NCN: [2024] UKFTT 00380 (GRC)
Case Reference: EA- 2022/0134

First-tier Tribunal
General Regulatory Chamber

Before

TRIBUNAL JUDGE CARTER
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER EMMA YATES

Between

GRAEME BICKERDIKE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

NATIONAL HIGHWAYS

Second Respondent

1. This is an appeal brought by Mr Graeme Bickerdike ("the Appellant") against the Decision Notice ("DN") dated 7 February 2023 of the Information Commissioner ("the Commissioner"). The Commissioner found that the public body National Highways ("NH")

was right to consider the Appellant's requests for information to be "manifestly unreasonable" under reg.12(4)(b) Environmental Information Regulations 2014 ("EIR"). The Appellant appeals under section 57 of the Freedom of Information Act 2000 ("FOIA"), as modified by reg.18 EIR.

2. The Tribunal dismisses the appeal.

Background

3. The requests under the EIR were for information about two disused railway bridges. The bridges are part of the Historical Railways Estate ("HRE"), which is managed by NH.

4. On 9 May 2022 the Appellant requested the following information:

"In relation to Great Musgrave bridge (EDE/25) – a structure forming part of the Historical Railways Estate – please provide me with –
• the visual inspection/detailed examination reports produced in 2011, 2012, 2013, 2018 and 2019
• the Strengthening and Options Report, produced by Capita Symonds for Cumbria County Council in 2009
• detailed design drawings for the 2011 infill scheme."

5. On 23 May 2022 the Appellant requested the following information:

"In relation to structure CFH1/12 Rudgate [Road] bridge, part of the Historical Railways Estate, please provide me with:
• the most recent detailed examination report
• visual inspection reports for 2017-2021
• the most recent structural assessment
• completion reports for any repairs carried out since 2010
• detailed design drawing for the 2021 infill scheme."

6. NH refused both requests on 7 June 2022 relying on regulation 12(4)(b) EIR, and again following an internal review on 5 July 2022. The Appellant complained to the Commissioner on 6 July 2022. This is an appeal against the Commissioner's decision to uphold NH's refusal. Other than providing an initial response, the Commissioner did not take part in this appeal.

7. The Appellant is a member of The Historical Railways Estate Group ("THREG"), a body of individuals who seek to persuade NH, central government and local authorities to protect the HRE. The Appellant's first witness statement explains that people value the railway structures in their local areas as community features, sites of heritage interest and locations of high environmental value and recreational utility. It was said further by the Appellant that "*THREG receives expressions of concern and requests from members of the public about local railway structures. It then coordinates actions to protect the bridges and seeks to find out NH's intentions about them. This sometimes involves making EIR requests to NH to find out its intentions for particular bridges, their condition, details of any past repairs and any justifications for the use of emergency permitted development rights (if that is intended).*"

8. The Appellant is described as passionate about protecting the parts of the HRE that may have heritage, cultural, ecological or future transport value. He explains in his second witness statement that his concern is not to prevent NH doing any work on the HRE but simply to protect those parts with particular value to society and ensure decision-making is both proportionate and holistic. NH for its part argues that the Appellant is at least by the date of the refusal of the requests, motivated by an animosity against NH.

9. As noted above, the appeal concerns two requests made to NH in May 2022. They were for information regarding two bridges: Great Musgrave Bridge, which NH had infilled approximately a year previously (May/June 2021) and for which it had been forced to make a retrospective planning application to the Local Planning Authority ("LPA"), the determination date for which was just over a month away at that time, and Rudgate Bridge, the infilling of which had, at the time of the request, just become unauthorised (on the Appellant's understanding of the planning laws) due to the effective expiration of the emergency permitted development rights used by NH (see below for an explanation of those rights).

Legal framework

10. EIR implements Council Directive 2003/4/EC on public access to environmental information ("the Directive"). The Directive itself was made to implement the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Tribunal "in applying national law… [when] called upon to

interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter" (Marleasing SA v La Comercial Internacional de Alimentacion SA [1992] 1 CMLR 305, §8). The Directive is, also, "a powerful aid to the interpretation of domestic legislation passed into law to give effect to it" (Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin), §20.

11. It was agreed between the parties that the requested information was "Environmental information" as defined in reg.2(1) EIR.

12. The duty to provide environmental information on request is contained in regulation 5 and the exceptions to the duty to disclose environmental information are in regulation 12, which relevantly 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.

(2) A public authority shall apply a presumption in favour of disclosure.…

(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;

13. The strength of the presumption in favour of disclosure in regulation 12 is informed by the following provisions of the Directive and the Aarhus Convention:

Recital 9 of the Directive states that it is "necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible".

Article 4.2 of the Directive states "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure."

The Aarhus Convention provides at Article 4.4 that the "aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure …".

14. The Upper Tribunal in Vesco v IC [2019] UKUT 247 (AAC); [2020] PTSR 179 made clear that exceptions under the EIR must be interpreted and applied restrictively, that there is a high hurdle to satisfy in determining that a request is manifestly unreasonable, and that the presumption in favour of disclosure distinguished EIR from FOIA and is an additional consideration. It outlined the three-stage test to the manifestly unreasonable exception:

" 17. The first stage. The decision maker must first decide if the request is manifestly unreasonable. Authorities on "vexatiousness" under Section 14 of FOIA and FOISA may be of assistance at this stage, because the tests for vexatiousness and manifest unreasonableness are similar (Craven v Information Commissioner and Department for Energy and Climate Change [2012] UKUT 442 , and Craven / Dransfield v Information Commissioner [2015] 1 WLR 5316 at paragraph 78).

The starting point is whether the request has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public, judged objectively (Dransfield v Information Commissioner [2015] 1 WLR 5316 at paragraph 68, Beggs v Information Commissioner 2019 SLT 173 paragraphs 26-29). The hurdle of satisfying the test is a high one. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in Dransfield v Information Commissioner and Devon County Council [2012] UKUT 440 at paragraph 28. These are:

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

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

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

(4) the harassment or distress of staff.

This is not an exhaustive checklist …

18. The second stage. If it has been established that a request falling under the EIRs is manifestly unreasonable within Regulation 12(4)(b), that of itself is not a basis for refusing the request. The public authority must then go on to the second stage, and apply the public interest test in Regulation 12(1)(b). Application of this test may result in an obligation to disclose, even if a request is manifestly unreasonable. The public interest test requires the

decision maker to analyse the public interest, which is a fact specific test turning on the particular circumstances of a case. The starting point is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are "the values, policies and so on that give the public interests their significance" (O'Hanlon v Information Commissioner [2019] UKUT 34 at paragraph 15). "Which factors are relevant to determining what is in the public interest in any given case are usually wide and various", and will be informed by the statutory context (Willow v Information Commissioner and the Ministry of Justice [2018] AACR 7 paragraph 48). Clearly the statutory context in this case includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If relevant factors are ignored, or irrelevant ones are wrongly taken into account, then the decision about where the balance lies may be open to challenge (HM Treasury v Information Commissioner [2010] QB 563). If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

19. The third stage. If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was "common ground" in the case of Export Credits Guarantee Department v Friends of the Earth [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations."

15. The Upper Tribunal in Vesco also made clear that the burden of proof in establishing the exception is on NH (it is not for the Appellant to disprove it). If the Tribunal has doubt about whether NH has met its burden, the presumption in favour of disclosure prevails (regulation12(2) EIR).

Grounds of appeal

16. The Appellant put forward 5 grounds of appeal.

Ground 1

17. The volume of requests over a three year period submitted by the Appellant is not excessive. The Commissioner has overlooked the coordinating role played by THREG and the Appellant within it. It is argued that this is not a case of an individual with 'an axe to grind' against a public body; on the contrary, THREG is a coordination point for requests that originate from several sources. It is wrong to overlook this when assessing whether these requests are manifestly unreasonable. The Commissioner has also overlooked the fact that the requests over that time have been for different, specific pieces of information. There have been multiple requests because the threat of infilling or demolition relates to many parts of the HRE. The fact that a separate request has previously been made in relation to a completely different structure within the HRE is irrelevant.

Ground 2

18. The Commissioner was wrong to have accepted NH criticisms of the Appellant. The Appellant has not taken information obtained from NH through EIR requests and presented it out of context, nor has he abused his position on the Stakeholder Advisory Forum ("SAF"). The Commissioner has overlooked and underplayed the reality that the requests have been necessitated by NH's attempts to avoid transparency and procedural scrutiny by relying upon emergency permitted development rights to manage the HRE, instead of obtaining planning permission in the usual way.

Ground 3

19. The Commissioner accepted NH's assertion that its staff had suffered distress. However, there is no explanation for how distress could reasonably have been suffered here, and the Commissioner has overlooked the fact that any distress was not caused deliberately (which is relevant to the analysis: Rod Cooke v IC EA/2018/0028). There is no suggestion that the requests have been in any way rude or inappropriately made.

20. The only conceivable distress could have been a sense of frustration at having to respond to the requests. That is not in any objective sense capable of being described as "distress". In any event, any distress or frustration felt here would not have been at a high level; it does not come close to establishing the high threshold needed to engage this exemption.

Ground 4

21. The Commissioner has undervalued the public interest in this information. In particular, the Commissioner overlooked (i) the widespread concern amongst members of the public about how NH manage bridges and other parts of the HRE in their local areas, and (ii) the

serious questions about the legitimacy of NH's use of emergency permitted development rights when managing the HRE.

Ground 5

22. The Commissioner failed to apply a presumption in favour of disclosure. On a proper application, and without prejudice to the foregoing, it is argued that even if stages 1 or 2 of the three stage test in Vesco pointed towards the maintenance of the exception, at the third stage the only lawful conclusion in these circumstances is that the information should be disclosed.

NH submissions

23. The NH advanced two key themes:

    (1) It was argued that there was little value in, or purpose to, the Appellant's requests. This was based on his motives for making the requests, his history in dealing with NH, a lack of regard he has had to the information received and misuse of that information previously supplied to him by NH.

    (2) The requests should, it was argued, be considered in the context of the Appellant's other multiple requests. Together they have placed a disproportionate burden on NH's staff and, as accompanied by derogatory comments and other inaccurate or unpleasant information he has published about NH's staff, this has caused some of those staff members significant distress.

24. It was submitted that the Tribunal should find that the requests in issue were of very limited value to the Appellant or to the public more generally. The Appellant or Matthew Skidmore, who gave evidence on behalf of the Appellant and a member of THREG, had contacted members of local groups proactively and were not solely responding to concerns raised by members of the public.

25. This is consistent, it was said, with THREG being a non-transparent organisation. The identity of its membership is essentially secret, and the members mostly do not even know each other. There is no constitution and therefore nothing to verify its aims and objectives.

26. Essentially it was argued the information obtained was used as a tool to denigrate NH. The extent of the value/serious purpose of the Appellant's requests has to be considered

against other relevant factors. Most significantly, it was said, that includes the Appellant's motives for making his information requests. Thus, the Appellant was said to have a great deal of animosity towards NH. In particular, NH refers to the evidence about "Mrs McIrwin" (see paragraph 75 below). This implied professional misconduct on the part of Mr Irwin.

27. It was argued that the Appellant made accusations of NH first, but then only later sought information on the very matter he has made accusations on.

28. The Appellant has, NH submitted, repeatedly misrepresented the information he has received in response to information requests made of NH, and he has repeatedly and consistently failed/refused to verify information about, or from, NH, before circulating press releases to the media. For instance, the Tribunal's attention was drawn to:
    a. the amendment of the table of structures supplied to him by NH re planned works, with no recognition that he had chosen to amend the table by removing a column;
    b. the unwillingness to state in any of THREG's press releases that Class Q powers could be used to prevent an emergency, rather than only when an emergency has occurred;
    c. published a "tweet" stating that Horspath Bridge was to be demolished, when NH was not intending to demolish it, nor were the works being carried out to that effect, instead being works confined to the parapets of that structure. The Tribunal was also invited to consider the Appellant stating that Horse-Batch Bridge was now off "the list" when NH had made clear that it was never on the list; also, publishing a photo of Great Musgrave Bridge implying that this was the "end product" when the Appellant would have known this was not the case (i.e. it needed to be sloped, top soiled and grass seeded); and
    d. misrepresenting what had been said by NH about Barcome bridge works and the ecological impact of infilling.

29. It was pointed out that both in her written and oral evidence Senior Engineer Fiona Smith had explained that NH had been co-operative with the Appellant right from the very outset and answered most of his information requests. The requests which are the subject of this appeal were refused because NH considered they had no serious value or purpose and instead were a manifestation of an unjustified campaign by the Appellant against NH.

30. A great burden has been imposed on NH and the Appellant's dealing with NH has, it was argued, caused genuine distress amongst its staff members: (a) NH has had to deal with his frequent information requests, which should be considered in aggregate. When looked

at this way, they have been burdensome; and (b) NH's HRE Team has been forced to respond to work due to the Appellant's misuse of the information he has received from NH, including a large volume of press and media enquiries, MP questions, and an investigation into its work. This should, it was said, be coupled with the language the Appellant has used in the surrounding context of making the requests.

31. NH argued that the Appellant's campaign against NH has been to repeatedly insinuate guilt, wrongdoing, and personal failures by NH's staff members. Public resources must be protected to ensure that a public authority, such as NH, is capable of carrying out its functions efficiently and effectively. The Tribunal was invited to agree with the Commissioner's conclusion that "*It is evident that regardless of the information provided and the position on the stakeholder forum that this situation will continue and…..that the point has now been reached whereby information requests of this nature can be deemed manifestly unreasonable. It is not in the wider interests of the public to allow this to continue*" (at §34 of the Decision Notice).

Appellant's submissions

32. The two bridges that are the subject of this appeal, have important heritage, cultural and ecological features, are notable and valued physical landmarks and have the potential to play a future role in the context of sustainable transport provision. NH infilled them using statutory powers that provide for no public scrutiny (as opposed to seeking planning permission in an ordinary way).
    a. The requests were made at a crucial times in the process. Had the information been disclosed, some degree of public scrutiny of the decisions would have been possible within a reasonably short timeframe. There was clearly a reasonable foundation for thinking that the information would be of value to the public. Even if it were the case that the Appellant's wider conduct in his communications made these requests manifestly unreasonable, there is still a reasonable foundation for thinking that the information sought would be of value to the public. Further, the public interest test and the presumption in favour of disclosure both point in favour of granting the appeal.
    b. The requests were made against a backdrop of public concerns about NH's management of the HRA. The Government intervened to pause NH's HRE infilling and demolition programme in July 2021 as a result of, it was said, widely-held concerns about its negative social impacts and conflicts with sustainable transport

policy, pending the establishment of a "*formalised framework and engagement process for these structures to understand, in each case, whether there is a realistic prospect of it being used for active travel or other transport purposes in future; and to ensure that the views of local stakeholders, including active travel groups and the local authority, are fully taken into account*".

33. The pause lasted for ten months during which time changes were made including:
    - the establishment of SAF which the Appellant was invited to join, whose purpose was to review proposals and provide feedback;
    - the requirement for all future infill/demolition schemes to have Ministerial approval; and
    - the requirement that planning permission is sought for all infill schemes by default.

34. The Appellant argued if seen as part of a "*pattern*", the number or volume of requests was not manifestly unreasonable. They were spread over a number of years, each individually had a reasonable foundation, and many were submitted on behalf or with the support of wider community groups for whom the Appellant and THREG provided support.

35. There is no dispute from NH that the requests are narrow on their face and could be easily dealt with.

36. There is strong evidence that the Appellant had a legitimate motive for making these requests. He explained in his first statement the reason for the requests: "*At the time THREG [(The HRE Group)] was established, we only knew of one bridge that was threatened with infilling. No information was publicly available about the broader extent of the threat and so we initially used EIR/FoI requests to become better informed about the structures being considered for infilling or demolition, the evidence relied upon by NH and the decision-making process. However, the majority of our later requests have focused on individual structures, seeking specific collections of documents, often after individuals/community groups/stakeholders have contacted us with their concerns*".

37. The timing of the requests is important. As noted, the requests were made after both bridges had been infilled by NH without obtaining planning permission, using "Permitted Development" rights. At the time of the requests in May 2022, Eden District Council was shortly to determine a retrospective planning application in relation to Great Musgrave bridge whilst Selby District Council was considering enforcement action in relation to Rudgate bridge where the infill scheme had become unauthorised.

38. The Appellant submits that there was very high public interest in the information (especially at the time the requests were refused). Disclosure would advance transparency; not only would it reveal the condition of the bridges, which is valuable in its own right, that would also provide transparency about the legality of NH's decision to infill them in the first place and the statements it made at the time about the bridges' condition. Disclosure would increase public knowledge of the condition of the bridges and to assess whether there were viable alternatives to infilling i.e.: whether alternative plans (such as the proposed heritage railway under Great Musgrave Bridge) are viable.

39. It was submitted that the Appellant does not need to be neutral in order for his motive in seeking information to be bona fide or for his requests to have public value.

40. Many of the complaints NH make have nothing to do with EIR information (such as the complaint about the photograph Appellant took of Great Musgrave Bridge).

41. The characterisation of NH's unpublished intentions to infill a large number of structures as "secret plans" is not a misrepresentation of EIR information.

42. It is an attention-grabbing description but it is fundamentally accurate; they were not disclosed to the public and NH was advancing them through a process that allowed for virtually no scrutiny.

43. As to the allegation that the Appellant used "very offensive language" in relation to NH, it was argued that this characterisation is a significant exaggeration. The public are entitled to express views about public bodies in a forthright and eye-catching way. Robust criticism of a public body by members of the public is not a basis on which to find that the requests are manifestly unreasonable, given the clear public value in the information.

Analysis

44. There are three legal questions for the Tribunal, per *Vesco v IC* [2019] UKUT 247 (AAC); [2020] PTSR 179:
    a. Are both requests "*manifestly unreasonable*" (reg.12(4)(b))?
    b. If yes, does the public interest in maintaining the exception outweigh the public interest in disclosure (reg.12(1)(b))?

c. If yes, does the presumption in favour of disclosure nonetheless require that the information be disclosed (reg.12(2))?

45. In order to address whether either request was "manifestly unreasonable", the Tribunal noted that there must be no adequate or proper justification for the request or "*no reasonable foundation for thinking that the information would be of value to the public*": per Arden LJ in *Dransfield v IC* [2015] 1 WLR 5316; [2015] EWCA Civ 454, §68:

> "*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.*"

46. Per Dransfield, the Tribunal addressed the following issues in turn, whilst noting that this was not an exclusive checklist:

> (1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being wasted;
> (2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious;
> (3) the value or serious purpose of the request; and
> (4) the harassment or distress of staff.

47. Before addressing these factors, the Tribunal set out aspects of its approach to this decision.

48. Evidence on both sides, both documentary and oral, was extensive. The Tribunal, acting proportionately and in accordance with the overriding objective, whilst considering all the evidence, gives an account here of a limited number of incidences and bridges in relation to which evidence was given.

a) <u>Class Q Permitted Development Rights</u>

49. A significant part of the hearing was devoted to a disagreement between NH and the Appellant as to the appropriate interpretation of the legal tests for reliance on Class Q Permitted Development rights. This arises from the legislation to be found in the Town and

Country Planning (General Permitted Development) (England) Order 2015. This created Permitted Development rights on which NH relied for infilling and demolition. Thus, the contentious Permitted Development rights are in Class Q of Part 19 of Sch.2 to the 2015 Order.

50. The Appellant submitted that a particular concern had been NH's misuse of this power that allows for temporary measures to prevent an emergency arising ("permitted development right"). NH considers this allows them to infill bridges (essentially, blocking them from below with aggregate and concrete). However, it is argued by the Appellant that, despite the temporary purpose of the emergency permitted development rights, the means used (infilling) is typically a permanent step. It was submitted that if NH were to do this without exercising emergency permitted development rights, it would usually be required to obtain planning permission, which would allow for public scrutiny and engagement. The Appellant is concerned that NH has used the rights even when the urgency and degree of threat would not justify it.

51. NH argued that the focus should be on the fact that Class Q permitted development rights could be used in order to prevent an emergency, which in its view included preventing an emergency from arising. It was not necessary that an emergency had already arisen.

52. The Tribunal concluded that on the face of the legislation both interpretations were broadly reasonable and, whilst not the role of the Tribunal to determine which was the preferable interpretation it did form the view that neither was clearly right or wrong – only a court could determine that. As such, the Tribunal placed little weight on this aspect of the case and in particular on the Appellant holding and putting forward a view, with which NH disagreed.

b) <u>The removed column</u>

53. The Tribunal also placed little weight on the Appellant's repeated reference to the numbers extrapolated from a version of the list, from which he had removed the column that indicated whether bridges were either a "potential" for development or "in development" and listed for infilling or demolition. THREG and thereby the Appellant had become aware of 29 letters sent out to authorities indicating that infilling or demolition was expressly planned for the structures that were on the potential list. The Tribunal accepted that there was considerable doubt over the question of how many and which bridges were indeed firmly scheduled for the works. The confusion around this was also confirmed by matters put by NH into the public, for instance, a quote from an NH engineer in a media

article, dated 6 January 2021 and a response to a Parliamentary question issued by Transport Minister Baroness Vere of Norbiton on 8 February 2021 both of which referred to 115 bridges scheduled for infilling or demolition.

c) The Pause

54. The date on which NH changed its policy in relation to infilling proved important to the Tribunal's overall approach. The Tribunal took the view that prior to the pause THREG, for whom the Appellant was the lead and public facing campaigner, was engaged in a campaign based on a matter of considerable public interest, one which the Tribunal accepted had a serious purpose. That there had been this significant change in policy by NH was an indication of the weighty value of the campaign before that date. As a group acting in the public interest, the Tribunal concluded that it was entitled to considerable latitude in the way in which it conducted its campaign, including the use of information received further to EIR or FOIA (although very little of the evidence in this respect related to information so obtained). The Tribunal's analysis therefore took the view that there should be an effective cut off in the way in which the Commissioner approached the question of whether the requests were manifestly unreasonable (and then the public interest test – see below), by reference to the date of the pause.

55. After July 2021, the Tribunal concluded that THREG had successfully addressed the issues which were at the heart of its campaign. Its actions, and thereby the actions of the Appellant thereafter were based on a changed and a greatly decreased and limited public interest.

56. The Appellant stated however that:

"Notwithstanding these changes, there is still an ongoing role for THREG. For example, where NH proposes infilling or demolishing a structure, THREG can make representations to the SAF on the local community's behalf, review evidence relied upon by NH in its decision-making and, where appropriate, propose alternative asset management solutions allowing at-risk structures to be retained."

57. The Appellant further stated that:

"Beyond the general purpose of THREG's campaign as set out in para 8 of this witness statement, three specific objectives were set:

1) To secure a reprieve for the approximately 150 structures that had been under threat of infilling or demolition prior to the government pausing NH's programme whilst a review of their value was undertaken
2) To ensure that decision-making about major works to HRE structures took account of a broad range of issues, e.g. historical, ecological and community value, environmental impacts, future repurposing potential etc
3) To ensure that planning permission was sought for all infill schemes.

"51. A fourth objective, to secure the removal of the infill from Great Musgrave bridge, was added in response to the controversy around that particular scheme.
52. It could be argued that, in principle, all these objectives have now been met, but there remains a lack of clarity around the practical implementation of some commitments made by National Highways in relation to its new HRE management and decision-making process.

53. It is the view of THREG that the 'campaigning' phase of our work is largely over. This is reflected in our social media output and how we engage with interested parties and the media. Our current efforts are specifically focused on seeking progress regarding a number of outstanding issues, such as National Highways' unauthorised retention of infill works at five HRE structures where emergency permitted development rights were exploited, and NH's unknown long-term intentions with respect to the approximately 150 structures previously identified for infilling or demolition.

54. THREG hopes to evolve into a group fulfilling an oversight and support role, rather than active campaigning."

58. The Tribunal accepted that THREG saw itself in this ongoing role, in particular "*seeking progress…..[on] National Highway's unauthorised retention of infill works at five HRE structures where emergency permitted development rights were exploited"* but it was of the view that this was a significantly less important, weighty and publicly useful role than THREG had played than before the pause. Moreover, the Appellant appeared to be able to carry out part of THREG's former role through his presence on SAF.

d) <u>Acting on behalf of the public</u>

59. It was argued that the public interest in the actions of THREG and the Appellant were reduced on account of their not always being in response to the public's contact. In that

regard, the Tribunal took account of the Appellant's own evidence that he had proactively contacted local persons or groups over the structures at Wellinditch, Congham and Wiggenhall.

60. It formed the view however that the actions of THREG and the Appellant were often in response to contacts from members of the public and local communities. It was legitimate moreover for a campaign to progress its aims and objectives by reaching out to local communities where it perceived issues of concern to be arising. As such, it did not consider this argument put forward by NH as carrying any weight.

Serious purpose and value

61. Moving on to a consideration of whether the requests were manifestly unreasonable and the Dransfield criteria, the Tribunal considered first whether they had a serious purpose and value.

62. The Appellant explained the background to the two requests that form the basis of this appeal as follows:

"The refused request relating to Great Musgrave bridge was submitted when THREG was preparing to make further submissions regarding the retrospective planning application for retention of the infill, which was also carried out under emergency permitted development rights. The bridge had been infilled despite the known aspiration of two heritage railways to relay the track under it. The infill scheme gained national attention and notoriety due to its negative impacts, NH's failure to consult stakeholders and the lack of engineering justification.

57. The refused Rudgate bridge request was submitted in an effort to understand the condition of the structure immediately prior to its infilling under emergency permitted development rights. This insight would have helped to inform THREG's objection to the expected retrospective planning application for retention of the infill. Through an information request submitted by another member of the public, THREG has learned that NH had not inspected the bridge since October 2018 (it was infilled in March/April 2021) and therefore had no recent insight into its condition. The examiner's only recommendation in 2018 was to repair a fence."

63. Contrary to the assertion of NH, the Tribunal accepted that the requests had some limited purpose and value as described above.

64. However, in respect of Great Musgrave (albeit recognising that this bridge had commanded wider and general public interest as demonstrated via a petition) prior to making his information request, the Tribunal accepted it was the case that the Appellant had already sought and received information with regard to the condition of this structure from NH. Further, when NH applied for retrospective planning permission for Great Musgrave, it provided information, which the public was able to scrutinise and comment on, to support that application. Thus the utility of the information requested was materially reduced.

65. There was little evidence showing community concern, or significant public interest, concerning Rudgate Bridge even though it was the case that, the local planning authority (LPA) (Selby DC/North Yorkshire Council) had indeed required NH to submit a retrospective planning application to justify its infilling. While the Appellant claims that his request was submitted "in an effort to understand the condition of the structure immediately prior to its emergency permitted development rights", the Tribunal noted that the bridge had in fact been partially infilled before NH had started any works at the structure.

66. Thus, whilst there was purpose and value behind both requests, this was at the lower end of scale. Moreover this sat in the context of the reduced public interest in terms of what had been THREG's original campaign aims, and the fact that NH had introduced both the pause and the review of its use of infilling.

Burden

67. The Tribunal analysed the table of EIR and FOIA requests. This dated back to January 2021. There were 22 made since mid-July 2021, the date of the pause – which as set above, the Tribunal had explained was, in its view, the relevant period for the purposes of this exercise. The Tribunal took the view that 22 would not be considered an onerous number of requests. Further the Tribunal accepted the Appellant's submission that:

    1. *"The requests were for information within, for example, inspection or examination reports and structural assessments.[1] These are documents that NH can reasonably be expected to have had to hand at the time, given that it was actively working on processes related to them.*

[1]

2. *There could be no sensible suggestion that the requests were themselves difficult or complicated to respond to, or that they were inappropriately or disrespectfully worded."*

Distress

68. The distress felt by NH staff was predicated on a number of matters and not just the prospect of responding to these two requests – these had to be seen in the wider context of the workload created by responding to the Appellant's activities. Again the Tribunal approached this issue on the basis of events post pause.

69. Thus, Fiona Smith, Senior Civil Engineer, gave evidence relating to the EIR/FOIA requests since the pause and the wider burden created, she said by the media response to the THREG's actions/publicity of matters. Some of her evidence was carefully rebutted by evidence put forward by the Appellant (e.g. with regard to the number of hours needed to comply with previous requests, with regard to filming and recording and also with regard to an issue around his authority to act). Nevertheless, it was clear that dealing with the Appellant and his campaign activities post-pause had created real stress. Members of the public had told her, she said, that the Appellant had told them that NH were liars and dealing with members of the public correcting his misrepresentations had involved a level of unpleasantness. She said she lost "*countless hours of sleep over the course of [the Appellant's] campaigns"*. The Tribunal saw no reason not to accept her evidence in this regard.

70. Helene Rossiter Head of Historical Railways Estate for National Highways who joined NH post-pause, told the Tribunal that:

"As well as emails sent directly to me, and FOI requests, I have dealt with ministerial and Transport Select Committee enquiries, and a vast amount of communication/media related work. It has resulted in a significant workload for the organisation and caused large resource
requirements within NH as we have strived to conduct our safety and engineering role whilst
also managing reactive and proactive communications and media and ensuring information from our source material is shared with government and the public. NH have, since August 2021 created both the role I deliver, as well as a dedicated Communications Manager role to
specifically deal with HRE non-engineering activity. My time has been wholly dedicated to

developing new systems and processes in response to feedback, in improving our website and ensuring as much information as possible is available to the public in a timely manner, in responding to the frequent and detailed requests for information, statements, letters, and interviews from the press, media and MPs and in working to develop relationships with all relevant stakeholders to ensure that our revised processes are delivered with their input and
support."

71. She further stated:

"35. The impact of the campaign-generated media interest is significant and I frequently receive media enquiries that give me only hours to respond. Between June 2021 and June 2023 there have been 97 such enquiries recorded in NH's media monitoring system [HR1/pp. 241-242]. These requests, often from publications/organisations such as The Guardian, BBC and New Civil Engineer, usually come as the results of press releases issued by THREG. I know this as often, but not always, the publications approach us with the THREG press release and ask us for comments before then writing and publishing their stories."

72. Mr Irwin, an engineer at NH, stated in his witness statement that he felt he had *"spent the last 2.5 years being publicly shamed by Mr Bickerdike.*" When asked why Mr Irwin felt "shamed" by his experiences in relation to the Appellant, he explained that*: "The media and social media has been very hard to deal with, [I have] worked hard to get into this job. the Appellant was showing no interest in hearing the other side of the story, getting personal attacks albeit on the team. It is a very small team and [it is] difficult not to take it personally. [It has] been difficult to deal with, early on deciding whether to continue in the role*."

73. Mr Irwin also referred to the fact that the Appellant's campaign (in particular the use of the Great Musgrave photograph – see below) as repeatedly published in the New Civil Engineer magazine (the Journal of the Institution of Civil Engineers) had resulted in NH Engineers receiving negative comments from members of their own Institution, saying that NH Engineers did not know what they were doing and that the NH Engineers' membership of the Institute of Civil Engineers should be revoked. This was embarrassing and shaming he said.

74. He drew attention to a particular post of the Appellant on 5 May 2023 that *"perhaps the Great Musgrave works are being delayed because the contractor is "still busy with Mrs McIrwin's kitchen extension".* The Appellant argued that he had been referring to a popular comedy skit and not intended, as received by Mr Irwin, that he was in anyway personally benefiting from the situation. The Tribunal noted that whatever the Appellant's intentions, this was misguided and would reasonably have caused considerable distress.

75. The Tribunal took into account the hashtags used by the Appellant to refer to NH staff on social media and the inevitable distress this would have caused to professionals held to high standards of competency:-
    - #QuestionableCompetence
    - #NeedBetterEngineers
    - #EngineeringHysteria.

76. In her evidence Ms Rossiter explained: "*The subject matter is interesting, the burden that has resulted as a result of the campaigning and the way it has occurred has led to a great deal more of the negativity. Matthew Irwin's evidence of the language used, outlining hidden plans and secret lists, a body that is incompetent, creates readable pieces for any publication, clickable content and that is what has driven the overwhelming publicity we've seen, the burden has ensued on what is a very small team, who have taken a great deal of battering as a result of THREG campaigning."*

77. Ms Rossiter also gave evidence, which the Tribunal accepted, that the tone used by Mr Bickerdike had been derogatory and bullying. She told the Tribunal that she had personally experienced significant levels of stress in supporting the team, providing leadership of the SAF, responding to urgent and frequent media and ministerial enquiries derived from the Appellant's activities and in managing stakeholder relationships across a large number of schemes where THREG have become involved. She told the Tribunal further that this had caused staff stress including the need for one officer to take almost a month off and to receive counselling.

78. She had been the subject of FOIA requests that had been received as a result of the THREG campaign: *"One of these asked for my salary information and stated that I had only got the Head of HRE role as I was a "high profile active travel person" (I compete at a high level in triathlon). The latter information would have been gleaned from a search about me online and/or on social media, which caused me to lock down all my social media accounts. As a result of the anxiety this caused me, I have had heightened awareness as I felt*

increasingly at risk knowing that with online sources it would be fairly easy for someone who felt disgruntled as a result of the THREG campaign to find out where I lived."

79. The Tribunal accepted some limited force in the Appellant's argument that any distress caused by THREG was to be expected on account of its campaigning around alleged inappropriate or even unlawful actions by NH. It took the view however that the legitimacy of this argument essentially related to the pre-pause period, when THREG's campaign had been serving an obviously useful purpose. The Tribunal also accepted that insofar as NH was a large organisation, stress caused by a lack of resources should not be placed at the Appellant's door. It took into account however that, Ms Rossiter had been added to the team in part to support their response to the Appellant's requests and wider impact such that additional resources had already been provided. In these circumstances, the Tribunal did not give much force to the Appellant's argument.

80. Whilst the tone of the requests themselves were polite, there were examples in the evidence of a hectoring and undermining tone used by the Appellant in emails and wider communications, which taken alongside the challenges to competence of staff and engineers of NH (including the hashtags), the Tribunal concluded would reasonably lead to the distress felt by NH personnel. It did not accept that the reactions of the relevant staff were no more than frustration.

81. Finally, under this heading, the Tribunal sought to apportion the evidence of distress caused by the Appellant's actions to those post-pause. Clearly there was a build up of feeling from the Appellant's actions pre-pause which would have coloured all interactions after July 2021. The Tribunal took account of this in the weight it gave to the evidence.

82. It concluded nevertheless that the levels of stress experienced by the staff arising from the requests taken in context post-pause had reached a significant and unacceptable level.

Misrepresentation and a failure to fact check/correct inaccuracies

83. NH had argued that a component of all of the factors leading to a conclusion that the requests were manifestly unreasonable, was the Appellant's misrepresentation, misuse of information (derived both from previous EIR and FOIA requests and otherwise), a failure to fact check before going to publication or correct inaccuracies when discovered. The Tribunal considered the evidence for this post-pause and details here just a selection of the matters on which it received evidence:

THREG photos of the 'completed' Great Musgrave infill

84. THREG began to circulate a photograph which they claimed showed the 'completed' infilling at Great Musgrave bridge. It was said to have generated a huge public backlash against NH. The Tribunal accepted that the photo did not show the completed works, rather it showed the unfinished works, prior to topsoil and grass seeding – which had a major impact on the visual impact of the works. The Tribunal was of the view that had Mr Bickerdike attempted to verify his understanding he would have been informed by NH of this. Mr Bickerdike has himself acknowledged just how impactful the photograph has been on his campaign in recent Facebook/Twitter posts where he presented the image along with the statement "*Two years ago yesterday, taking this photo pushed our campaign to another level".* The Appellant told the Tribunal that he had never described it as showing the final appearance of the infill scheme; and that the photo "*captures the hidden nature of infilling*". He denied that it was knowingly used to misrepresent the situation.

85. The Tribunal took the view that given the obviously inflammatory nature of this photo and regardless of how he had described it himself, the Appellant should have taken steps to clarify in releasing it to the media, or at least upon seeing how it was depicted, that it did not represent the completed works on infilling. His failure to do so represented an acceptance of an ongoing misrepresentation albeit by other outlets.

Press releases

86. The Appellant stated in evidence that it was not the role of a campaign group to promote the views of those whose actions it opposes, that the responsibility for balance lies with the media outlets that make editorial choices and commission articles, over which THREG has no influence. He said that:

"If a decision is made to run a story based on a THREG press release, National Highways is approached for comment and has the opportunity to present its position.
106.The issues around individual structures are often complex and difficult to convey effectively in a typical press release of 600 words. When writing, decisions have to be made about what to highlight and what to omit. It is rarely possible to go into much detail and we have learned that the mainstream media is generally not engaged by overly-technical stories. Making these choices is an inevitable part of the writing process and does not constitute an attempt to mislead."

87. Whilst accepting the way in which the Appellant described the roles and responsibility of campaigners and the media covering a campaign, the Tribunal took the view that it was not unreasonable for a campaigning body to fact-check to some degree and again to some limited extent to put right inaccuracies in the coverage of its activities. In the context of EIR requests, a failure to do so may legitimately lead to a conclusion that the attendant stress caused to staff could render even unrelated requests manifestly unreasonable. The Appellant was free, within legal limits, to publish as he wished, but in the context of EIR the impact on stress on NH personnel from his wider activities became relevant to the exercise of his information rights.

88. In this context, the Tribunal noted the example of THREG issuing a press release relating to Stoke Road bridge on 9 August 2021 entitled "*Highways England acting like "cowboys and bullies" over bridge scheme*" . Ms Rossiter explained circumstances which the Tribunal accepted illustrated a failure on the part of the Appellant to put right a misunderstanding:

"In this release Mr Bickerdike stated, "The Chief Executive of the South Downs National Park Authority says his Authority will "resist this vandalism" after Highways England confirmed plans to infill an old railway bridge needed for a proposed active travel route", and went on to state "In a tweet, Trevor Beattie, the SDNPA's Chief Executive, said: "The National Park does not support the infilling and has not given consent, indeed we have argued without success that permission is needed, but [Highways England] has used their PD rights. We will resist this vandalism".

57. It should be noted that Mr Beattie subsequently apologised in a phone call with me for his statements after I explained to him that SDNPA had handed the discussion over to Winchester City Council planning department, who had agreed the use of PD (it is important to note that SDNPA planning duties are performed in a delegated manner, with local authorities being paid to deliver the statutory responsibility for planning, using National Park policies applied by SDNPA). Mr Beattie explained that he had not having verified the information and had worked off media articles circulated about this bridge.".

Use of Social media

89. The Tribunal noted tweets from the Appellant with regard to Horspath Bridge by way of an illustration of misrepresentation, quoting from Mr Irwin's statement:

THREG social media posts (Horspath Bridge) 10 December 2021

"155. Mr Bickerdike posted on social media that:
"We have now been provided with numerous reports and email exchanges. In them, an Oxfordshire County Council officer asks a pertinent question about the structure's emergency partial demolition".
156. Mr Bickerdike posted a statement from an email exchange between NH and the Oxfordshire County Council Engineer in which the Engineer asks "Please can you explain how this has become an emergency, since defects with the bridge have been apparent for many years, which appear to have been able to be rectifiable, with relatively minor repairs."

157. However, Mr Bickerdike misrepresents the facts here in that the statement made by the OCC Engineer was in relation to his belief that the full bridge was being demolished (as stated in the same email), and Mr Bickerdike then omits my response email where the OCC Engineer is informed that;
"It's only the parapets being taken down. We had a major refurb ready to go about 6 months ago but OCC were unhappy with the 6 week road closure so asked us to consider demolition"

158. Mr Bickerdike misrepresents the situation notably here and then used this to create the hashtag "#NeedBetterEngineers

The email exchanges to which Mr Bickerdike refers also included numerous other exchanges between myself and OCC that clearly state that NH's intention had always been to refurbish the bridge, and that it was OCC that had prevented this and were pressuring NH to consider demolition by withholding road closures Again, Mr Bickerdike appeared to have made no reference to this information publicly, despite having been provided with that information.

THREG petition update page, on change.org site, 15th January 2022 "wildlife corridor blocked at Horspath Bridge"

166. Mr Bickerdike stated that "National Highways has promoted its work to restore the historic railway bridge at Horspath near Oxford - which was previously earmarked for demolition - as an example of collaborative working with the community". However, he had

been made aware (by the FOI response) that NH had always intended to refurbish the bridge, having been issued with all correspondence for the structure in December 2021 in response to his FOI request, including emails from OCC directors and councillors confirming just that".

90. Whilst the email from Mr Irwin at the paragraph 157 quotation from his witness statement, did go on to say "*so we are placed the refurb on hold and are preparing a submission for full demolition and sloping back",* this does not materially alter the situation in which it was the Council pushing for demolition and not NH and yet this was not made clear by Mr Bickerdike, creating the impression that NH was the body primarily seeking demolition. The Tribunal accepted Mr Irwin's analysis of the above social media posts and the misrepresentation by the Appellant.

Letter to Transport Select Committee

91. In November 2021 Mr Bickerdike wrote to the Transport Select Committee to update them on "*the prevailing issues around National Highways' (NH) infilling and demolition of legacy railway structures, and formally introduce the matter to the Built Environment Committee".* Ms Rossiter explained as follows:

"a. [The letter asserted that] "Substantive works were put on hold by Government following the infilling of Great Musgrave bridge, Cumbria, in May/June, but preparatory works (tree-felling, bat exclusion activities etc) have continued in anticipation of the programme resuming."

All preparatory works that were delivered such as vegetation clearance would need to have been conducted regardless of the engineering solution required at any structure. Bat exclusion and vegetation clearance work did not indicate a plan to demolish or infill.

b. A long section of the letter related to Great Musgrave Bridge in Cumbria. Mr Bickerdike had been party to significant details about the scheme at this bridge during SAF meetings and from other correspondence from NH. In the letter Mr Bickerdike refers to the fact that "the Minister has been misled" over statements NH made that they had discussed the former branch line with both Eden Valley Railway and Stainmore Railway before works commenced. This assertion of the Minister being misled is incorrect. NH spoke with Stainmore Railway Company in October 2019 and they said that they had no plans for that

section of the line. Additionally, Mr Pemberton of RPL Ltd spoke to both heritage rail companies at the beginning of 2020 and when he offered them the land that RPL Ltd own in the area they declined as they said they had no plans for that part of the line."

92. Again, the Tribunal accepted Ms Rossiter's analysis and that this showed misrepresentation of the true position by the Appellant.

Conclusion on whether requests were manifestly unreasonable

93. As noted and acting proportionately the Tribunal took the approach that it was not appropriate or necessary to reference and analyse in this decision, every bridge and incidence which had been the subject of evidence before the Tribunal. Nevertheless it was all considered and the points made in the above Analysis section underpin the conclusions drawn from the evidence adduced and in the light of the extensive submissions from the two parties.

94. It was important to note that as a result of the careful and detailed rebuttal put forward by the Appellant, the Tribunal accepted that NH had overstated or exaggerated the position in relation to a number of the assertions/allegations against the Appelalant considered in this hearing (e.g.: in relation to Barcombe bridge). Nevertheless even with this, the Tribunal was persuaded on the basis of the above findings and per below, that the requests were manifestly unreasonable.

95. The Tribunal's starting point for this conclusion was a consideration of the requests themselves and its view set out above that there was only a limited public interest in the subject matter of the requests themselves.

96. The Tribunal took the view that the misrepresentation arose from a variety of causes: lack of attention to ensuring detail in the media remained correct, a failure to verify facts before going to print or put right inaccuracies. Whatever the cause, the Tribunal took the view that the extent of the misrepresentation indicated that the Appellant was in part motivated by a wish to cast NH in a poor light and at best a disregard as to whether this would be the result. Similarly the Tribunal concluded that either the Appellant wished to create what was a significant level of distress for NH staff, or was reckless as to this happening.

97. Thus, the Tribunal concluded that the public interest in the disclosure of the information which is the subject of the requests is significantly outweighed by the lack of value and serious purpose behind the requests, when considered through the lens of the Appellant's motives and in the context of his overall dealings with NH in the period post-pause.

98. On this basis, the Tribunal concluded that there was no reasonable foundation for thinking that the information would be of value to the public and that the requests were manifestly unreasonable.

Public Interest Test

99. The second stage as set out by the Upper Tier Tribunal in Vesco is to consider whether, even though a request is manifestly unreasonable as found here, the public interest should result in the information being disclosed in response to the request.

100. The Tribunal reviewed the Commissioner's DN in this regard and supported his analysis of the interests in disclosure at play in the second stage:

"In terms of the public interest, the Commissioner recognises the significant public interest in HRE works and ensuring that the most beneficial and cost effective solution is found for each structure. It is understandable that if members of the public are concerned that NH is not following due process and going ahead with works without potentially following it, that they will want to see information relating to that and potentially challenge it."

101. The Tribunal gave weight to the public interest in the ability of civil society organisations active in the environmental field, such as THREG, having access to information via the EIR. That was tempered here however by THREG's campaign aims being much reduced in terms of public importance given that it had, in effect, achieved its campaigning objectives by the time of the pause. The lack of transparency around THREG's membership and constitution also served to reduce the public interest at play in its campaigning as it was rendered difficult to ascertain who was arguing what, to verify campaign aims and whether there were any conflicts of interest present.

102. The public interest in the particular information requested was of a limited nature as set out in above. The public interest that certainly existed pre-pause did not clearly subsist to anything like the same level after that date.

103. Against the public interests in disclosure were set the public interests in maintaining the exception, that is in particular the need to protect the resources of public authorities carrying out important public functions. As the Commissioner in the DN explained:

33. ……..Public resources must be protected to ensure that a public authority is capable of carrying out its statutory functions efficiently and effectively. "

104. Carrying out a balancing exercise and in light of the significant distress caused by the Appellant in the context of his wider activities and in particular the level of misrepresentation, it was the Tribunal's view that the public interest in maintaining the exception outweighed the public interest in disclosure.

105. Finally, the Tribunal considered the third stage as described in Vesco and as is set out above. In these circumstances, the default position did not apply as the decision at the second stage was that the public interests in disclosure outweighed the public interest in maintain the exception. However the Tribunal ensured also that it had applied throughout the presumption where there were issues of evidential uncertainty or doubt about how the public interest balance applies, and that where this arose they should determine in favour of disclosure. The Tribunal concluded that even applying the presumption in this way, the public interests in maintaining the exception outweighed the interests in disclosure.

106. The Tribunal concluded that the Commissioner had been correct in upholding NH's refusal of the requests and dismissed the appeal. It thanked both parties for their careful and detailed submissions in these proceedings.

Judge Carter
22 April 2024

Amended under Slip Rule 13 May 2024