



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

Appeal Reference: EA/2018/045

**Heard at East London Tribunal
On 14 September 2018**

Promulgation date 28/11/2018

**Before
KAREN BOOTH
JUDGE**

**MARION SAUNDERS and ROGER CREEDON
TRIBUNAL MEMBERS**

Between

TONY MASON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

LONDON BOROUGH OF BARNET

Second Respondent

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 19 February 2018 (Reference: FERO724242) is in accordance with the law and the appeal is dismissed.

REASONS

(NB: References below to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

Background to the appeal

2. The Appellant is one of six residents whose gardens back onto a piece of land owned by the London Borough of Barnet (“the Council”) and leased to Middlesex University. The Appellant has taken the lead on behalf of the residents in negotiating with the Council regarding their interest in buying portions of that land to incorporate into their gardens.
3. In June 2016 (following a valuation of the land by the Council’s surveyors), each resident was offered a portion of the land at a specified price of between £30,000 to £35,000. The residents were unhappy with the valuation. The Council therefore agreed to refer the matter to the District Valuation Service (“DVS”) (the specialist property arm of the Valuation Office Agency (“VOA”)) for an independent valuation. In October 2016 the land was valued by the DVS, which used the same valuation method as the Council but applied a 50% reduction in value “to reflect a willing buyer/purchaser”.
4. The Council accepted the DVS advice and made final offers to the residents based on the DVS valuation in December 2016. The residents were still unhappy with the figures. The Council had previously indicated that all plots needed to be sold in order for any of the sales to proceed. As five out of the six residents decided not to proceed, the Council terminated the offers on 16/1/17.
5. The Appellant has been pursuing his concerns about the lawfulness of the Council’s land sales processes (in particular, their valuation methods) with the Council since then. He has also pursued this matter with other authorities by other means, which include the following.
 - He has complained to the Local Government Ombudsman (“LGO”). In a decision dated 25/4/17 (page 111) the LGO did not find any fault on the part of the Council with regard to the way in which it dealt with the Appellant’s attempt to buy the land at the rear of his property.
 - He applied to the Department for Communities and Local Government (“DCLG”) for a direction to be made under section 98(1) (disposal of land at direction of Secretary of State) of the Local Government, Planning and Land Act 1980. In January 2017 DCLG informed the Council and the Appellant (page 110) that they were not persuaded that

a direction to dispose would be appropriate in the wider public interest and they refused the application.

- He complained to the VOA about the DVS's valuation. In March 2018 he was advised that as the DVS had provided their valuation under contractual arrangements with the Council, the Appellant would need to take up any concerns regarding the valuation with the Council (page 261).
- He has complained to the Royal Institute of Chartered Surveyors ("RICS") about two individual Council Surveyors who were involved in the case (and others). We understand that this complaint has not yet been decided.

The request for information and the response

6. On 26/6/17, the Appellant emailed a request for information (page 140) in the following terms to the Council.

"I request that LB Barnet provides all non-exempt information related to [Redacted] from 01 Jan 2014 until the present time.

I am specifically seeking information that provides evidence of:

- a. The LB Barnet land valuation process for this asset from 01 Jan 2015, both as input to: the land sales discussion to local residents and also lease/rental valuation to any interested party.
- b. The decision by the authorised Council Officer not to proceed with the sale of the land to local residents, including the evaluation of alternative options.
- c. A copies of contractual documentation that:
 - i. Confirms that Land Asset 9697 has now been leased to Middlesex University (as stated in the attached email from [Redacted]) or any other lease arrangements.
 - ii. Identifies any obligations to maintain the land and not allow the land to become a nuisance to neighbouring properties (as has been the case for the last 15 years)
 - iii. Identifies the financial consideration paid by the leaseholder to Barnet Council, for the benefit of having access to this currently unused land."

In the same email he made a related subject access request ("request 2"), which is not the subject of this appeal.

7. He added six notes to the email. In note 1, the Appellant expressed the view that the request should not exceed the cost limit, but that if it did then he would be happy to discuss alternative wording. Note 2 refers to the relevant land sale negotiations having been concluded and asserts that any FOIA exemption

could no longer, therefore, be applicable as there were no ongoing negotiations that could be prejudiced. Notes 3 and 4 relate to request 2. Note 5 refers to officers he had copied in and his concerns about what he sees as a lack of openness and transparency on the part of the Council. Note 6 refers to the Council's response to the request referred to in the next paragraph and the comment that "The council is likely to refuse a further request about this subject as vexatious". He ended the email by offering to discuss alternative options for obtaining the information if necessary.

8. The Appellant made a related request for information on 2/1/17, which is the subject of a linked, but separate, appeal (appeal ref: EA/2018/044 and ICO ref. FS50690196) and which we also decided on 14/9/18.
9. The Council's response to the request dated 26/6/17 is at page 142. The Council treated the request as a request for environmental information under the Environmental Information Regulations 2004 ("the EIRs"). They refused the request in reliance on regulation 12 (4)(b) (exemption where a request for information is "manifestly unreasonable") on the basis that it was a vexatious request. Their reasoning, including the public interest factors they considered, is set out on pages 143-144.
10. The Council reviewed its decision but did not change it (page 149).

The complaint to the Information Commissioner

11. On 10/7/17, the Appellant complained to the Respondent about the Council's responses to his requests for information dated 2/1/17 and 26/6/17 (page 157).
12. Following an investigation of the complaints, the Respondent issued her decisions in relation to both requests on 19/2/18. In relation to the request dated 26/6/17 she decided that the request was manifestly unreasonable under regulation 12(4)(b) of the EIRs by reason of being a vexatious request and that the public interest favoured maintaining that exemption. No steps were required to be taken by the Council.

The appeal to this Tribunal

Appeal grounds

13. The Appellant appealed to this Tribunal. His grounds of appeal are set out at pages 14-15 and can be summarised as follows (although he refers to pink and yellow highlighting to denote his most/lesser relevant arguments, we had not been provided with colour copies of the documents and could not, therefore, see that highlighting – we drew this to his attention at the hearing and he said that he was happy to proceed despite this).
 - The Appellant has experience in dispute resolution. In this appeal neither the Council nor the Respondent have presented sufficiently strong arguments to demonstrate why, in the context of information law, they are right and he is wrong.
 - Having read what he believes to be the most recent case law on "vexatious"/ "manifestly unreasonable requests" and the Respondent

guidance (dealing with vexatious requests) he considers that he has strong grounds for appealing the decision.

- There has been a failure of due process and cognitive bias on the part of the Council and the Respondent in their handling of the request/complaint respectively. This follows the earlier threat made in the response to the linked request that further requests would be classified as vexatious. The relevant Council officer had sought out evidence to support their position rather than undertaking a review of the facts. The Respondent had accepted the Council's submission without challenge.
- Written clarification questions during a formal negotiation between parties should not be classed as historic FOI requests. Information generated during a negotiation is being used to justify classifying a later FOI request as being manifestly unreasonable.
- He refers to the factors considered to be relevant by the courts to the issue of whether a request is vexatious.
 - As regards motive and serious value/purpose, the request includes legitimate questions designed to promote transparency and accountability of decision making delegated by Councillors to Council officers under the Council's constitution. He refers to his correspondence with the LGO in this respect and his various methods of challenging the transparency of the Council's decision making. Transparency should be encouraged and a lack of transparency should be challenged in line with other relevant legislation.
 - As regards disproportionate burden (past and present) he is of the opinion that by classifying one or both of the linked requests as vexatious the problem of a future FOIA request associated with the failed land sale procedure would go away. But the Council has overlooked his entitlement to submit a subject access request under the Data Protection Act and his entitlement to request information under the Openness of Local Government Regulations 2014. It is difficult to believe that a FOIA request can be "manifestly unreasonable" when the Council is obliged to provide it under other legislation.
 - As regards harassment of/distress to staff, this was never his intent. In the course of his engagement with Council staff he has, however, had reason to challenge the quality of their work. Historic challenges during the land sale negotiations were justifiable and yielded corrective action.

14. On page 16, the Appellant states his desired outcome (on the assumption that the Tribunal decides that the request was not vexatious), which is:

- He would like a comprehensive analysis of what went wrong in this case and a set of "lessons learnt" to avoid a repeat of the error.

- His information requests are still valid and the information should be provided.
- If the land sale decision has not been properly documented the Tribunal may wish to refer this to the LGO

Respondent's response to appeal

15. The Respondent's Response to the appeal is at pages 31-52. Paragraph 11 explains that the tests under regulation 12(4)(b) of the EIRs (a request which is manifestly unreasonable) and section 14 of FOIA (a request which is vexatious) are the same. Paragraphs 12 to 23 summarise the relevant case law on the issue of vexatiousness. Paragraphs 24 to 52 address and reject the grounds of appeal, applying the case law to the facts of this case. Paragraphs 53-54 address the public interest test, referring to the relevant parts (paragraphs 31-33) of the decision notice.

The Council's response to the appeal

16. On 4 May 2018 the Tribunal made the Council a party to the appeal (page 27-36, paragraph 4). The Council's Response to the Appeal is at pages 53-63. It includes a detailed section on the background to the failed land sales and the disputed valuation approaches. It reveals that the Council made a final offer to the Appellant to sell the land at the rear of his property to him for £12,600 and that the Appellant made a counter offer for a significantly lesser sum which the Council rejected. The Council accepted that the request fell to be considered under the EIRs. The Council's key reasons for considering the request to be manifestly unreasonable/vexatious were as follows.

- Burden on the Council – The Council referred to extensive correspondence generated by the Appellant over a six-month period, with over 40 emails being sent, which were habitually lengthy with multiple attachments and copyees (up to 40 copyees each time). The Council also referred to considerable correspondence on the same topic over many years between the Council and the Appellant as well as correspondence involving the DCLG, the DVS and the LGO. They claimed that the amount of officer time and Council resources was “completely disproportionate to the nature of the case, and the equivalent cost to the tax payer unjustifiable.”
- Distress to staff – They provided examples of what they considered to be obsessive conduct that harassed/distressed staff and the inclusion of intemperate language in his communications. They referred to the Council's decision to classify the Appellant as vexatious under their Unreasonably Persistent Complaints Policy. They concluded with a reference to the formal complaint which the Appellant had made to the RICS against the Council's Surveyor (and others) and they included an extract from a statement she made about the impact his actions and this complaint had had on her both personally and professionally.
- Serious purpose or value – The Council had demonstrated their willingness to engage with the Appellant regarding the issues about the land valuation, but his requests had become obsessive and

disproportionate. They referred to the complaint to the VOA, the application to the DCLG for a direction, the complaint to the LGO and the complaint to the RICS. They consider the Appellant's repeated attempts to reject the outcome of the negotiation as attempts to reopen issues that have been determined and pursued by various means.

17. Their reasons for concluding that the public interest in maintaining the regulation 12(4)(b) exemption outweighs the public interest in disclosure are set out in paragraphs 45-47.

Appellant's Skeleton Argument

18. We noted the contents of the Appellant's email of 3/8/18 (page 120) and the case management directions made on 8/8/18 (page 136). On 27/8/18 the Appellant provided an amended and final (detailed) skeleton argument with an Appendix headed "Legal Framework" (pages 117a-r). Somewhat confusingly, the skeleton covered this appeal and the linked appeal. The points that the Appellant flagged up as being relevant to this appeal are as follows:

- Paragraphs 4 and 5
Context to the request.
- Paragraphs 12-15
The request was not manifestly unreasonable, but (at the time it was made and now) is "... fully justified, entirely reasonable and proportional in context.
- Paragraph 16-22
Motive and value.
- Paragraph 23-28
Burden on Council and harassment/distress to staff
- Paragraph 29-34
For reasons that are not clear, the Appellant appears to be suggesting that the issues of whether relevant information is held and the duty to provide advice and assistance are relevant to this request. That is not the case. The only issues that is relevant to this appeal is whether the request was manifestly unreasonable.
- Paragraphs 35-39
Other points of potential relevance to the "manifestly unreasonable balancing exercise".

Our task and the issues we had to decide

19. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (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.

20. The Appellant requested an oral hearing, which he attended on 14/9/18. He was not represented. The Respondent and the Council elected not to attend the hearing. The evidence consisted of: the evidence in the open hearing bundle (373 pages); the additional open documents, so far as they were relevant to this appeal; the authorities bundle provided by the Appellant; a paper produced by the Appellant at the hearing (about “Goals”) and the Appellant’s oral evidence. At the hearing, the Appellant took us through the relevant parts of his skeleton argument and provided some helpful context and background information.

21. The issues we had to decide were as follows.

- Issue (a) - Was the request for information manifestly unreasonable by reason of being vexatious?
- Issue (b) - If it was manifestly unreasonable - in all the circumstances of the case, did the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

22. Even if we thought it appropriate to do so, we did not have the power to refer the matter to the LGO or to require anyone to produce an analysis/list of “lessons learnt”.

23. The other legislation referred to in the Appellant’s legal framework document is not relevant to the issues we had to decide.

24. The Council had treated the request as a request for “environmental information” within the meaning of regulation 2(1) of the EIRs. The Respondent had accepted this without comment. It was not clear to us that the information requested was “environmental information” as so defined (except perhaps in relation to part c ii). However, there is no distinction between the tests for determining whether a request is manifestly unreasonable under the EIRs or vexatious under FOIA. The EIR regime is the stricter regime in that the public authority must apply a presumption of disclosure (regulation 12(2)) and the application of the EIR exemptions is subject to a public interest test (regulation 12(1)(b)) and so the decision to apply the EIRs was advantageous to the Appellant. Therefore, this was not an issue that we needed to determine.

What we decided and why

Issue (a)

25. After considering all of the evidence before us and taking into account the jurisprudence on the question of what may constitute a vexatious request (in particular, the decisions of the Upper Tribunal and the Court of Appeal in

Dransfield ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454), we concluded that the request for information was vexatious. Our starting point was that, in making an information request, the Appellant was exercising an important statutory right and that the hurdle of satisfying regulation 12(4)(b) is, rightly, a high one. We had little difficulty, however, in concluding that this request was vexatious.

Motive and value/serious purpose

26. On the face of it, the request was not obviously vexatious. Looked at in isolation, it was politely worded and reasonable. The Appellant's motive is clear. He strongly believes that the Council adopted an unlawful method of valuation in relation to the land at the rear of his property, which resulted in the land being overvalued and the land sales falling through. He is seeking information to support his case that the Council acted unlawfully. It is clear that the Appellant has a significant personal interest in this matter. If his assertions are correct and the Council accepts this and decides to re-open the negotiations, he stands to gain a valuable land asset at a lower price.
27. The Appellant asserts that the issue is of wider interest to the general public. He considers his questions to be legitimate and designed to promote transparency and accountability of decision making. We did not accept that assertion. We understood why this issue is of such importance to the Appellant personally, but we considered the issue to be of little wider interest. The Appellant is convinced that the valuation method adopted by the Council was unlawful. However, this is based solely on his own, unsubstantiated, interpretation of the law.
28. The Council reacted to his initial concerns by funding an independent valuation by the DVS. According to paragraph 12 of the LGO's decision (page 113): "The Council sent the terms of its instruction to the DVS having first sent them to [the Appellant]. It made provision for [the Appellant] to speak to the district valuer directly to ensure his views were made clear to the district valuer." The Appellant's complaints to the LGO specifically included an assertion about a lack of transparency on the part of the Council. The LGO did not uphold that complaint (or any of his other grounds for complaint). The request was, in our judgement, another attempt to reopen an issue that had been considered and determined firstly by the Council and then by an independent professional body and thirdly (from a potential maladministration/service point of view) by the LGO.
29. We considered it unlikely in any event that the information requested could further the Appellant's interest in strengthening his view about the illegality of the valuation *method*. Part (c) of his request (and the *rental* valuation aspect of part (a)) is not of obvious relevance to the issue. As regards the remainder of part (a), the Appellant himself has led on the most recent land sales discussions for the residents and had the opportunity to provide his views to the district valuer. As regards part (b), the Council accepted the (50% lower) independent valuation by the DBS and based its offers to the residents on that valuation. When the Council was unable to secure a sale of all plots by the offer deadline it withdrew the offers (as forewarned in its letter of 13/12/16 on page 68).

Burden

30. We accepted (to a point) the Appellant's assertion that correspondence generated as part of a land sales process should not be taken into account when considering whether his request was vexatious, as one would expect such negotiations to generate a certain level of correspondence. We noted, however, that the communications included a detailed questionnaire which the Appellant sent (in August 2016) to the Council (and other local authorities) about their purchase and disposal procedures and valuation policies and methods (page 64-66 of the bundle of evidence produced for the linked appeal), to which the Council responded in September 2016.
31. We also noted, from the list of correspondence (starting at page 373) produced in connection with the Appellant's subject access request referred to in paragraph 6 above ("..any information you hold about me personally as it relates to Land Asset 9697"), the vast amount of correspondence generated just in the period following the Council's final offer on 13/12/16 (page 68) up to the date when the Appellant submitted the request for information that is the subject of this appeal. That part of the list includes over 40 communications sent by the Appellant alone.
32. We noted the Council's comments about the Appellant's tendency to send lengthy communications with multiple attachments and copyees. There are many examples of this in the bundle of evidence (see, for example, his email at page 154). The Appellant does not deny these assertions and he sought to justify his methods in his email at page 148 in which he defended his practice of copying multiple officers into his communications "...because each named person is in some way involved in the outcome, including the CEO and leadership team who has responsibility and accountability for decisions made by Barnet staff".
33. The evidence before us indicated that the Appellant's communications with the Council over this matter have placed an enormous and unreasonable burden on its staff and other resources. We considered it unlikely that *any* response to his request would satisfy him (other than in the unlikely scenario of the Council accepting his assertions regarding the lawfulness of the valuation process and the reopening of negotiations with him on a different basis) and would merely encourage him to further pursue this issue with the Council. As the Appellant said in his email dated 2/7/16 (page 75) to one of the Councillors: "I will not let this matter drop and it is my intention to close this issue [value enhanced pricing] once and for all."

Harassment of/distress to staff

34. The Appellant may not have intended to harass or cause distress to Council staff, but we were satisfied that his actions did so and that (at best) he was oblivious to the impact of his approach.
35. We accepted the Appellant's point about the "knocking heads together" comment being a harmless turn of phrase. We also disregarded the references to the Appellant having been classified as "vexatious" under the Council's Unreasonably Persistent Complaints Policy (which he in any event disputes).

That is not equivalent the issue we had to determine. Under the EIRs the issue is whether the request for information (and not the requestor) is vexatious.

However, the paper evidence includes numerous examples of unreasonable demands and inappropriate tone and language in his communications with Council officers. The email dated 28/7/16 at page 75 is an example of this, as is the email dated 6/7/17 at page 147 (sent at midnight and demanding confirmation by close on the following day that the vexatiousness issue be withdrawn, failing which he would escalate the matter to the Respondent by the weekend).

36. We found the email dated 21/11/16 from the Director of Estates (page 83) and the statement by the Council's Surveyor at page 107 to be particularly compelling in this respect. In our judgement, the Appellant's decision to complain to her professional body (the RICS) about her and others indicated a lack of perspective on his part.

General

37. Considered objectively and holistically, we considered that the request satisfied the high hurdle of being a vexatious request. In our decision relating to the linked appeal, we noted that the Council had inappropriately declined to provide advice and assistance in that case on the basis that they would be likely to refuse a further request on that matter as vexatious. In spite of that, we considered that the Council had correctly refused this request on that basis. Although the request undoubtedly has a serious underlying purpose and value for the Appellant *personally* it is, in our judgement, of little (if any) wider public interest. The Appellant is persisting in pursuing a matter that appears to have been handled appropriately and in good faith by the Council and subjected to independent scrutiny by the DVS and the LGO. This has had an unreasonable and disproportionate impact on the Council's resources and its officers over a considerable period of time. It seemed unlikely to us that disclosure of the information he is seeking would secure the answers he is looking for. If the Appellant considers that the Council has acted unlawfully it is open to him to seek legal advice as to whether this is a matter that he can and should pursue through the courts.

Issue (b)

38. We accepted that there are strong public interest arguments in favour of maximising openness, transparency and accountability. We reminded ourselves that there is a presumption in favour of disclosure. Notwithstanding this, we were satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosure in this case due to the unjustified burden and disproportionate diversion of resources that the Appellant's pursuit of this matter has had on the Council's resources (which, in all probability, would continue unabated for some considerable time if the exemption was not maintained).

Conclusion

39. For the above-mentioned reasons, we concluded that the Respondent's decision notice was in accordance with the law and we therefore dismissed the appeal.

Signed: Karen Booth

Judge of the First-tier Tribunal

Date: 25 November 2018