



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Appeal No. EA/2017/0004

BETWEEN:

STEVE CLARK

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

-and-

HAMPSHIRE COUNTY COUNCIL

Second Respondent

Before

**Brian Kennedy QC
Jean Nelson
Narendra Makanji**

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) and Regulation 18 of the Environmental Information Regulations (“EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 5 December 2016 (reference FER0637356), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on Friday 4 May 2018. 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Clark’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Hampshire County Council (“the Council”) was correct to characterise Mr Clark’s request as “manifestly unreasonable”.

Chronology:

10 April 2015	First request for correspondence and memos re the Trail since January 2015 between various departments
27 April 2015	Second request for copy legal advice regarding work on the Trail and all relevant emails
13 May 2015	Council refusals and advice to narrow requests
19 May 2015	Third request for details of consultation into Trail
29 May 2015	Council denies holding any information re the second request
3 June 2015	Appellant challenges this denial, citing correspondence from the Council, which confirms that legal advice was received
4 June 2015	Council withholds information on basis of legal professional privilege
5 June 2015	Fourth request for copies of all ‘emails of support’ allegedly received
22 June 2015	Appellant complains to Commissioner that no response to third request Present (fifth)request for all emails between the Council’s press department, Countryside department and a named Councillor concerning the Trail
4 July 2015	Appellant requests internal review of handling of second request
6 July 2015	Sixth and seventh requests for details, costs and correspondence concerning a report commissioned by the Council into promoting the Trail
15 July 2015	Council provides a summary of ‘informal consultations’ and public engagement activities re Meon Valley Trail, advises Mr Clark about refining the third request and refused other requests

23 July 2015	Appellant resubmitted his fifth request
24 July 2015	Council refuses the three further requests that are the subject of this appeal, citing reg.12(4)(b)
27 July 2015	Appellant requests an internal review
30 July 2015	Council review of second request upholds refusal
11 Aug 2015	Council review upholds refusal of fifth request
12 Aug 2015	Appellant complains to commissioner
18 Aug 2015	Council refuses third request but changes basis of refusal from 12(4)(c) to stating that it held no more information over and above that which it has already provided
27 Jan 2016	DN FS50586790 upholds Council's contention that it did not hold further information for third request
16 March 2016	DN FER0593198 finds that first request was wrongly refused
10 May 2016	Appellant requests that the Council reconsider this and the three other refusals
23 June 2016	Council again refuses requests
11 July 2016	Complaint to the Commissioner
5 Dec 2016	Decision Notice upholding Council's refusal Appeal to the Tribunal
7 June 2017	Judge Kennedy QC issued directions joining the Council as a party, and directing the parties to "attempt to resolve all outstanding matters in an attempt to reach agreement"
29 June 2017	Appellant confirms he is prepared to limit his interest to fifth, sixth and seventh requests. Council discloses all information with redactions for personal data.

Relevant Legislation:

Environmental Information Regulations 2004

Regulation 5 - Duty to make available environmental information on request

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Commissioner's Decision Notice:

[4] The requested information is evidently environmental, as it concerns the development of a recreational trail that affects the land. The Commissioner considered that there was no material difference between a request considered vexatious under s14 FOIA and a request considered manifestly unreasonable by reason of vexatiousness under reg.12 (4)(b) EIR. She referred to published guidance on this issue, noting especially that it is the request itself to be considered rather than the requester, and whether this particular request would be likely to cause a disproportionate or unjustified disruption, irritation or distress to the authority. The context of a request and the history of engagement with the requester can only be taken into consideration where relevant to the question of the disruption likely to be occasioned.

[5] The Commissioner did note that, unlike s14, where an authority is considering the vexatiousness of a request it must apply the public interest test before determining whether to maintain the exception, and that there is a presumption in favour of disclosure.

[6] The complainant believes that the changes to the Trail were undertaken without proper consultation or planning permission. The Council's position is that no planning permission was required, and that some public consultation was still undertaken despite there being no Statutory obligation to do this. There is also a related complaint to the Local Government Ombudsman currently in progress.

[7] The Council considers that the timing of the present requests contributed to a disproportionate burden, as there were numerous other requests made around this time from Mr Clark and the wider campaign group associated with him. The complainant's request of 22 June 2015 would require the Council to collate emails from a number of different officers in two different departments, in addition to the named Councillor. The following two requests seek a wide variety of related information, and were submitted within the statutory time for response of the previous request. The Council saw this as a fishing exercise rather than targeted requests serving a clear public interest. Mr Clark explained that he and others were concerned about the legality of the Council's actions regarding the

Trail. The Commissioner confirmed that she was aware that their concerns were widely held in the local area.

[8] The Commissioner emphasised that the guiding principle in the consideration of vexatiousness is one of proportionality. She noted that while Mr Clark's previous request was targeted at specific information known to exist, these requests are much wider and without any identifiable benefit in advancing public knowledge or discussion, or formally resolving the concerns of the group or wider public. Conversely, the requests would cause a disproportionate diversion of resources, especially as it is foreseeable that the correspondence would have to be redacted to remove personal information.

[9] Whilst the Council did not clearly define how it has undertaken the public interest test, the Commissioner was satisfied that "it is clear that it has considered public interest factors as part of its decision". There were evident, genuine and understandable concerns held by Mr Clark and the wider public about the Council's plans, but the Commissioner found "no clear evidence" to suggest that the Council has acted inappropriately, and there are mechanisms by which the Council's actions can be appealed. The requests would not immediately resolve any public concerns and compliance with the requests would consume finite public resources. Consequently, the Commissioner upheld the Council's reliance on the exception.

Grounds of Appeal:

[10] Mr Clark stated that the Commissioner wrongly characterised his request as a 'blanket request' when it was tightly drawn regarding timescale. He was the person in the campaign group nominated to deal with FOIA requests, a move that had been prompted by a request from the Council itself. He explained the motivation behind the requests as being to find out:

- a) whether Council employees were accurately briefing the newly elected named Councillor in charge of the Trail project;
- b) whether Council employees were attempting to 'spin' or brief against campaigners; and
- c) following a public statement from the named Councillor that there was wide support for the project, how many messages of support had actually been received.

As for the timings of the requests, Mr Clark explained that the Council was slow to respond to the requests, and the Council made many of the requests in response to public statements. Some degree of overlap was therefore to be expected.

Public Interest:

[11] The public interest in this case lies in ensuring that large sums of public money (c.£450,000 to date) was being spent appropriately, and that the Council was not using its resources to mislead the public or an elected representative, or suppress genuine public concerns. Mr Clark chastised the Commissioner for accepting so readily an assertion that the Council had in fact conducted a public interest exercise in the absence of any evidence; nor was it for the Commissioner to conclude that the information would not have resolved the group's concerns.

Burden:

[12] Identifying and extracting the requested emails should not be difficult on modern IT systems. As the Commissioner stated in her previous decision notice FER0593198, large public authorities such as county councils must have a higher threshold of burden than smaller authorities, and where there is no malevolent intention to disrupt activities there should be a meaningful consideration of disclosure. Mr Clark did not consider the request overly burdensome.

Response of the Commissioner:

[13] The Commissioner cited Craven v ICO and DECC (GIA/786/2012), stating that it is not 'easier' to get a request accepted under EIR than FOIA. ICO v Devon CC & Dransfield (GIA/3037/2011) held that when determining whether a request is vexatious requires an authority to consider four broad issues:

- i) burden on the authority (taking into account history of request and dealings with the requester)
- ii) motive of the requester
- iii) value or serious purpose of requester
- iv) any harassment of, or distress caused to, staff of the authority.

The first limb was clarified by Arden LJ in the Court of Appeal, who emphasised that the foundation of vexatiousness is a request “which has no reasonable foundation” and clearly has no value to the requester or the public.

Public Interest:

[14] Mr Clark expressed concerns about the legality of the Council’s actions. The proper method of challenging this would be by way of judicial review or “court action”, and this seems not to have been done. The Commissioner accepts that there is “some serious purpose” behind the request but that is reduced by the circumstances and the previous requests.

Burden:

[15] The present request is so wide and encompasses so many individuals that it would involve searching multiple departments and email accounts. It must also be considered in the context and history spent on responding to not only the Appellant’s four previous requests but also any time spent dealing with communications from any other individual in connection to the Trail. The Council had spent several hours in meetings “attempting to address the public’s concerns”. The burden of compliance, in the view of the Commissioner, still outweighed the benefits in disclosure.

Tribunal Directions:

[16] The Tribunal issued directions joining the Council as a party, and directed the parties to “attempt to resolve all outstanding matters in an attempt to reach agreement”. All information requested under the fifth, sixth and seventh requests was disclosed, with redactions for personal information. The Appellant took issue with two email chains and the redactions therein. He stated in regards to two heavily redacted emails, he was certain that he knew the identity of an individual to which the emails referred, and asserted that that individual should be contacted to obtain their consent to have the information released. The Council stated that the emails discussed potential criminal activity, and should therefore not be released to the general public.

[17] It seems to the Tribunal that the purpose of the request has now been satisfied. There is no evidence before the Tribunal of consent from the said individual to have the remaining withheld information released to the world at large, or at all. In the circumstances we refuse to allow the appeal relating to the remaining withheld information and accept and adopt the Commissioner's reasoning relating thereto.

Brian Kennedy QC

Date: 15 MAY 2018