



Case Reference: EA/2023/0424

Neutral Citation Number: [2024] UKFTT 504 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on: 20 February 2024
Further Consideration on 7 June 2024
Decision given on: 14 June 2024

Before

TRIBUNAL JUDGE HEALD
TRIBUNAL MEMBER PEPPERELL
TRIBUNAL MEMBER CHAFER

Between

ALBERT EDWARD POOLE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

The Appeal was decided without a hearing as agreed by the parties and allowed by the Tribunal by rule 32(1) of the Tribunal Procedure (First -Tier Tribunal) (General Regulatory Chamber) Rules 2009 (“2009 Rules”)

Decision: The appeal is Allowed.

Substituted Decision Notice: the Appellant’s request for environmental information of 22 June 2023 is not manifestly unreasonable. The Department for Education shall within 35 days of being sent this Decision respond to questions 1, 2 and 3 of the request without

reliance upon the exception at regulation 12(4)(b) Environmental Information Regulations 2004.

REASONS

1. This Appeal is brought by Mr Poole pursuant to section 57 Freedom of Information Act 2000 ("FOIA") and regulation 18 Environmental Information Regulations 2004 (EIR"). It relates to a Decision Notice ("the DN") issued by the Information Commissioner ("the IC") and it concerns a request for information ("the Request") made by Mr Poole to the Department for Education ("the DfE").
2. References to page numbers are to the Bundle provided for this Appeal.

Background

3. This Appeal relates to the sale of playing fields in Tenterden ("the Land"). The issues relating to the sale itself are not a matter for the Tribunal. For context only, we understand that an Academy Trust sought the consent of the Secretary of State ("SoS") for the DfE to sell the Land for development. Consent was given in 2023. Mr Poole is a founder member of the Limes Land Protection Group ("LLPG")(B44) which opposed the SoS' decision. (D56).

EIR

4. Reg 5(1) EIR provides that:-

"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."

5. This obligation is subject to exceptions including that provided for by reg 12(4)(b) EIR by which a public authority may refuse to provide environmental information to the extent that *"the request for information is manifestly unreasonable"*
6. The use of the exception is also, by reg 12(1)(b) EIR, subject to the Public Interest Balance Test ("PIBT") which is that *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*
7. Reg 12(2) EIR requires a public authority to apply a presumption in favour of disclosure.

Request (C44) to DN (A1)

8. On 22 June 2023 Mr Poole made the Request for information to the DfE which the DfE refused to answer in reliance on reg 12(4)(b) EIR. The Request originally contained 11 questions but was subsequently reduced to the 3 below (see page A21 para 25 and A12 in the Notice of Appeal and A31 in the GoA):-

"I am attaching a document to comment on the Submission in my own name, although I am a member of Limes Land Protection Group. In your submission document you state that you expect some negative reaction to the decision. Whilst my comments provide an alternative view to that taken by officials, they are constructive in that they highlight errors and omissions from your submission on which I have based a number of questions which are submitted under a Freedom of Information Act 2000.

I am including the questions in this email, but these should be in the context of the attached comparison document.

- 1. Who provided the Plan in Annex A? Why was this plan not made available earlier in the process and not revealed until the consent was published? This was despite FOI requests.*
 - 2. What professional mapping software and what plan was used to provide information on playing field area?*
 - 3. Why does the plan not break down the areas of Playing Field areas as called for in the Guidance?*
9. The DfE replied on 4 July 2023 and refused to provide the information requested in reliance on reg 12(4)(b) EIR. Mr Poole sought a review of this outcome and on 2 August 2023 the DfE notified Mr Poole that it maintained its position.
10. Mr Poole complained. The IC issued the DN on 1 September 2023 in which it concluded that the DfE had correctly relied on the exception cited.

Appeal (A7)

11. On 29 September 2023 Mr Poole appealed the DN which is supported by Grounds of Appeal ("GoA") from page E122. The outcome sought is:-

"please review response from [the IC] which supports regulation 12(4)(b) of EIR. In respect of [DfE] exception of manifestly unreasonable I request that [DfE] answer questions 1,2 and 3 in respect of [the Land] "

12. The IC provided a Response on 30 November 2023 and Mr Poole replied to it on 12 December 2023. The Appeal was listed to be heard on the papers. It was part heard then adjourned. Directions were given by which the IC was (if able) to provide Mr Poole and the Tribunal with information about the previous EIR and/or FOIA requests referred to by them and Mr Poole was allowed to respond. The Respondent provided an excel table on 5 March 2024. Mr Poole responded to it on 21 March 2024.

Role of the Tribunal

13. The Appeal is by reg 18 EIR and section 57(1) FOIA which provides that:-

"Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

14. The Tribunal exercises a full merits appellate jurisdiction (*IC v Malnick and ACOBA [2018] UKUT 72 (AAC)*). By section 58 FOIA the Tribunal's role is to consider whether the DN is not in accordance with the law or if the IC should have exercised a discretion differently.
15. What follows is a summary only of the submissions, evidence and our view of the law. It does not seek provide every step of our reasoning.

Legal Position

16. Reg 12(1) EIR provides as follows:-

*12. – (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.*

17. Reg 12(4)(b) EIR provides:-

“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”

18. The EIR do not provide a definition of “manifestly unreasonable” but it involves the same types of consideration as apply to the determination of whether a request is vexatious in FOIA. (see *Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC)* and *Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC), (28 January 2013)*)

Was the Request manifestly unreasonable?

19. We recognised the need for a holistic approach when considering this question by reference to the themes in *Dransfield*.

Burden of the Request itself

20. We agree with the IC which said (A22 para 28) said that it not consider that the Request was burdensome in itself.

Collective Burden

21. The DfE and IC say that the Request is connected to a series of 21 requests from Mr Poole and others in the LLPG with whom he was acting in concert. We reviewed the excel spreadsheet of requests submitted by the DfE and commented upon by Mr Poole and noted that there were 21 items listed between 15 April, 2022 and 21 August 2023 of which the Request is the 20th and the 21st item post dates the Request.

22. The IC's conclusion (A22 para 28) is that:-

“Given the context and history it is clear that there has been some collective burden imposed upon the DfE in responding to these prior requests. This would have some bearing on the overall holistic assessment”

23. We accept that there can be burden in dealing with numerous requests including where they are from different requesters from a group who are working in concert as is alleged in this Appeal (*Duke-v-The Information Commissionaire and The University of Salford EA/2011/0060*).
24. In *Duke* the Tribunal found that there had been incitement or encouragement of requests based on evidential features they found such as a surge of concurrent requests and the use of similar pseudonyms. The relevance of the finding for the Tribunal in *Duke* was that that it assisted with their assessment of burden, motive and true purpose of the request and whether they were a *“reasonable proportionate way of pursuing a legitimate request for information.”*
25. The ICO in its guidance suggests a number of factors that could indicate a group is acting in concert such as similarities, other requesters are copied into correspondence and an unusual pattern of requests. The ICO also says that in their view requests as part of campaigns are not automatically vexatious and large numbers of individuals may share public concern about the same matter at the same time.
26. The IC did not refer to this issue in the DN but (A22 para 28) in its Response to the Appeal says *“...the Appellant would therefore appear to be acting in concert with other members of Limes Land Protection Group in making requests to DfE regarding this subject matter.”* The IC appears to have based this conclusion on this evidence:-

(a) that Mr Poole says in the Complaint:-

“I along with Limes Land Protection Group have opposed the sale of the land and have made numerous requests under Freedom of Information to establish the facts supporting this application”

(b) that he says he is the founding member of LLPG.

(c) a large amount of material had already been released previously to Mr Poole and members of the LLPG.

27. We saw that Mr Poole himself said (D57):-

“As a group Limes Land Protection Group have made many representations regarding the Application by the Tenterden Schools Trust indicating where we felt the guidelines for disposal of School Playing fields were being breached”

28. However the IC did not seek to show a connection between Mr Poole and others for example by reference to the similar use of acronyms or language or type face or by showing correspondence being copied to others in the LLPG. Further until required to do so by Case Management Directions the IC/DfE did not present a list of the previous requests upon which they relied.

29. Mr Poole was entirely open about his role with the LLPG and the number of requests he made. On 26 March 2024 he said:-

“ I would want to make it clear that until the final submission stage in February 2023, that I alone was acting for LLPG and no other members of LLPG were corresponding with DfE. As described above, I agreed with [redacted] for him to submit LLPG response. Until that point, he had acted independently and we were not acting in concert as suggested by the Information Commissioner.”

30. Also having reviewed the excel spreadsheet produced by the IC/DfE he said that he was responsible for 7 items but that:-

“All of the other requests were made by [redacted] who was a third party acting on an individual basis who was not a member of Limes Land Protection Group. As previously stated [redacted] helped to produce a submission on behalf of Limes Land Protection Group, but I was not party to his previous requests for information.”

31. In the GoA he said(A33):-

“It became clear following the consultation in 2022 that other residents were acting on their own in making requests to the case officer and subsequently the DfE Legal Department which they were perfectly entitled to do. At this point they were not linked to LLPG in the actions they were taking.

The last communication I had from the case officer was in September 2022. Following this I continued my correspondence with the Team Leader, Legal and Transactions Team, which appeared to be very cordial.

I agreed with the DfE Team Leader on 17th February 2023 that another third party would represent LLPG due to his previous background. This was done to reduce multiple requests on the same topic.

On 27th March 2023, I advised the Team Leader that another third party was using my name in communications and that this should cease as they were not acting on my behalf or LLPG.

I think these multiple contacts with DfE were a consequence of an issue affecting many residents, but as I have explained here, are not a consequence of my actions. I have sought throughout to ensure that there was no excessive burden on DfE and this can be shown in email evidence. It is entirely inappropriate to suggest this has any bearing on the assessment of this case.”

32. In his letter of reply to the excel table on 6 March 2024 he said:-

“It also appears that DfE have assumed that all requesters listed are members of Limes Land Protection Group (LLPG). I will demonstrate that this is clearly not the case and that other requesters documented were acting independently. I was a founder member of LLPG in 2017 and was in contact with DfE officials from July 2020 with respect to the Disposal of School Land. I was acting as an individual as can be deduced from all of my emails to DfE officials. This was a very disputed sale and as a consequence many local residents were contacting DfE regarding the sale.

In February 2023 I agreed to allow another resident with the necessary skillset to produce a submission to go alongside the DfE Submission to the Secretary of State for Education. This was on behalf of Limes Land Protection Group. This was welcomed by DfE officials to reduce the workload. At this point the Submission to SoS was imminent and therefore any further FOI requests would have been fruitless."

33. On review of the summary provided by the IC we did not identify obvious indicators that the 21 requests were produced in concert. We preferred Mr Poole's evidence namely that 7 of the requests came from him but the others did not and that those requests all came from one individual (who he names) and who, he says, was not a member of the LLPG but who had helped the LLPG in making submissions. While there was a common concern amongst members of the LLPG we accept his evidence that the Request was not the result of concerted action of the type referred to in *Duke*.
34. Mr Poole did however say that he had sent in 7 requests. We have reviewed the excel table provided by the IC and his response from which we concluded that he was responsible for those listed below prior to the Request.

No	Date received by DFE
2	4 May 2022
5	29 June 2022
6	5 July 2022
11	7 February 2023
13	9 February 2023
17	27 March 2023
19	23 May 2023

35. While 7 requests in a period of about a year might well indicate burden we noted for example that there was a period between July 2022 and February 2023 with no request. Also his requests do not repetitively ask for the same thing but appear mostly to develop from answers given.

Motive of the Requester and value/serious purpose of the Request

36. The DfE in its Response to the Request (C47) said that in their view the Request was not a request for information but a way to challenge the decision relating to the sale of the Land. The DN at para 13 said (A4) *"It is evident that the complainant wishes to use this request as a means of challenging a process he believes to have been flawed."*
37. In the DN the IC referred to the submission of DfE that the requests made by Mr Poole were motivated by a desire to challenge the decision of the DfE for which a Judicial Review application was available and appropriate.
38. The Appellant referred to para 13 of the DN in the GoA and said (E127):-

"The set of questions to the DfE was in order to understand why concerns expressed by resident groups had not been included in the submission to the Secretary of State for Education at the point the decision was taken"

39. The IC in its Response referred to the Appellant's own description of his motivation (para 25 A21)

"...he asserts that the first three parts of the request question the accuracy of evidence in the process. He argues that where he has requested recorded information, even if the information held is minimal, it should be made available. He has said that understanding the elements of what led to the decision to dispose of the playing field is in the public interest. He has said that challenging the decision is not a realistic prospect"

but concluded (A22 para 27) that the Appellant was using the Request to challenge the decision to sell because a formal challenge was not a realistic course of action for the Appellant.

40. The Appellant in his Response (A27) to the IC says that his motives were clear and they were to *"get answers to the questions which were refused prior to the decision."* He accepts that *"At this point, there is no expectation of any change in the decision or that the EIR can prevent it"*(E128)

41. It is always possible that a requester may have more than one motive in making a request. Having considered the evidence our conclusion is that Mr Poole did think that the decision to sell the Land was wrong in a legal and broader sense and the process of decision making was flawed. His motives in our view were (1) to continue to challenge and be challenging about the DfE decision but also (2) to have more information about the sale of the Land and (3) to better understand (for himself and others) how and based on what material and thus why the SoS had reached the decision to allow the sale of the Land.

42. The IC in the DN (A4 para 14) recognised that the removal of open spaces from public use was a *"decision of consequence"* and the Request would have had a significant public value except for the existence of the quantity of material that was already available (para 15).

43. The Appellant in the GoA supported the view about the removal of open space land but as regard the existence of publicly available material said (E128):-

"The information requested regarding [the Land] was not in the public domain prior to the decision being taken and it is not clear how it was calculated from the plan presented."

44. The IC's in its Response (A23 para 29) said that it recognised that there was some value in the Request as regards the decision making process but that this was diminished because of the extent of such information that is already publicly available.

45. In his Reply to the Response (A27) the Appellant summarised his position as follows:-

“The value or serious purpose of the request is to gain answers to questions which were raised before the decision was made and were deemed not relevant”

46. We also noted that in the DN on the question of the PIBT, while the IC found the balance was against disclosure said (A5):-

“In this case the Commissioner recognises once again that the request relates to a decision of consequence. The effect of that decision may be concentrated in a relatively small geographical area, but that does not mean that those living in that area would not be significantly impacted. He therefore accepts that there is a reasonably strong public interest in disclosure. He also acknowledges the strength of feeling, from the complainant and others, that the decision of the secretary of State was flawed.”

47. We agree that the DfE had provided answers to many previous requests and information was already in the public domain however we concluded that there was value in the questions (1-3) of the Request.

Harassment/distress

48. There is no suggestion that this part of the *Dransfield* test was applicable.

Conclusion

49. As set out above we are satisfied that the Request itself (now 3 questions) was not itself burdensome and that no question of harassment or distress arises. In our view there was value in the purpose behind the Request. We concluded that Mr Poole was not acting in concert with members of the LLPG (or the other requester he identified). Making 7 previous requests was bordering on burdensome but in the overall context of the time frame and how the requests developed we did not conclude it was burdensome - on this occasion.

50. Accordingly, viewed holistically, in our view the Request was not manifestly unreasonable. The PIBT and “presumption” questions do not therefore arise.

Decision

51. We concluded that the Request (reduced to questions 1, 2 and 3) was not manifestly unreasonable. The DN was not in accordance with the law and the Appeal is allowed.

Signed Tribunal Judge Heald

Date: 13 June 2024

Promulgated on: 14 June 2024