Neutral citation number: [2024] UKFTT 00978 (GRC)

Case Reference: FT/EA/2024/0201

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 14th October 2024
Promulgated on: 04 November 2024

Before

DISTRICT JUDGE L MOAN
TRIBUNAL MEMBER K PEPPERELL
TRIBUNAL MEMBER A CHAFER

Between

PAUL CAWTHORNE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Claudia Hyde, counsel.
For the Respondent: Did not attend

Decision: The appeal is allowed.

Substituted decision -

1. **The decision of the Respondent dated 18th April 2024 is set aside and substituted with the following decision -**

   (i) Telford and Wrekin Council are not entitled to withhold information under regulation 12(4)(b) of the Environmental Information Regulations 2004.

(ii) Telford and Wrekin Council shall respond to the Appellant's request for information (questions 1, 3 and 4) dated 14th July 2023 within 35 days of receipt of this decision without relying on regulation 12(4)(b) of the EIR 2004.

2. The Tribunal will send a copy of this decision to Telford and Wrekin Council.

REASONS

Decision under appeal and background

1. The Appellant appeals against the Commissioner's decision notice IC-278479-D5J8 dated 18th April 2024 which decided that Telford and Wrekin Council were entitled to withhold the requested information under regulation 12(4)(b) (manifestly unreasonable) of the Environmental Information Regulations 2004 ('EIR'). The information in this case relates to Stoneyhill landfill site, and the Appellant's concerns regarding chemicals and contaminants within the landfill. The Council were not required to take any steps as a result of the Commissioner's decision.

2. On 14th July 2023 the complainant wrote to the Council and requested information in the following terms:

   "1. Please release all Stoneyhill chemical test results for the last year, referred to by [name redacted] at https://www.youtube.com/watch?v=2npny1honew

   2. Please confirm whether the testing done after the recent noxious outbreak was "routine", as claimed, or responsive.

   3. Please release list of all contaminants tested for at minimum detection levels and full results.

   4. Please confirm whether it is true that the site only received chemicals under waste permit or whether the site also received waste, potentially including "hazardous" chemicals, before the permitting regime."

3. On 10th August 2023 the Council wrote to the Appellant and outlined the requests that he had submitted to the Council, namely, 7 requests in 9 working days. The Council informed the Appellant that it did not intend to respond to his requests and

applied regulation 12(4)(b) (manifestly unreasonable) of the EIR to the request; this mirrored an earlier indication in a letter dated 9th October 2020 to the Appellant from the Council that any further requests for information would not be responded to.. However, the Council provided him with some additional information as it considered it may help address his questions. It also directed the Appellant to the Environmental Agency, and provided a link to its website; should he have further environmental concerns, he can lodge these with them.

4. On 11th August 2023 the Appellant wrote to the Council stating that he wished "*to complain formally about the incompleteness of this response…*"

5. On 14th August 2023 the Council asked the Appellant for clarification on whether he wished to make a complaint about how his request had been handled, or to make an appeal that not all the requested information had been received. The Council referred him to the Information Commissioner's Office if his complaint was concerned the Council's handling of his request. On the same day, the Appellant confirmed that he required responses to specific points relating to Stoneyhill, and set out each of his points.

6. On 7th September 2023 the Council responded and maintained its original position. It said the exception still applied in relation to a number of further recent requests which the Appellant submitted on the subject of Stoneyhill.

7. Further to his complaint to the Commissioner, the Appellant confirmed that he was seeking information to his request to the Council dated 14th July 2023. However, the Appellant stated to "knock out point 2" of the request as he had the information about this, but would like information to points 1, 3 and 4 of the request.

The initial refusal to disclose information to the Appellant dated 10th August 2023

8. The Council stated that it had responded to the Appellant on 9th October 2020 in response to a number of information requests and indicated that it would not be

responding to any further information requests on the site. In that letter the Council had set out 14 previous requests for information about the site from the Appellant. The Council stated that it had responded to all requests made and taken time to process his requests and subsequent correspondence. In its response dated 10th August 2023 to this information request, the Council had set out each of the individual requests made by the Appellant between 4th July 2023 and 14th July 2023. The Council did confirm the following information to assist the Appellant –

- *The Council can confirm that the site currently being developed by Jessup Brothers Ltd is not, and has never been, in the ownership of Telford & Wrekin Council. Ownership details of the site can be found through the HM Land Registry - https://www.gov.uk/government/organisations/land-registry*
- *The site is within 250 metres of the former Stoneyhill Landfill.*
- *Find attached cabinet report with exempt items included.*
- *The Council does not hold any recorded information in relation to which housing associations or other organisations or companies are planned to be involved with the housing on that site.*
- *The Council does not hold recorded information in relation to who owns and who is developing the two sites including The Croppings (Phase 2) and The Woodlands. Again, information in relation to this question can be found at HM Land Registry.*

9. The Council confirmed in a letter dated 6th September 2023 that an internal review had been carried out. The review confirmed that a total of 22 requests had been received from the Appellant and that the Council had supplied 17 responses. Some of the requests were repeat requests for information already supplied. The Appellant had been offered the opportunity to meet with the Council to discuss the site but had not taken up that opportunity nor the offer of a joint expert to undertake testing at the site. The Appellant had been on notice that the Council intended not to reply to further requests but had a received a number of further requests, some of which repeated requests made in earlier requests. The Appellant had then sent a large quantity of correspondence to officers and councillors asking for information. The

time taken to consider his correspondence was unreasonable and placed an undue burden on the Council's limited resources.

The decision of the Commissioner

10. The Appellant complained to the Commissioner via the online service on 27th November 2023 complaining at the lack of response and accusing the Council of not disclosing data that might show problems at the site. The Commissioner wrote to the Council on 27th March 2024 to request further information about the complaint and in particular the impact of complying with the requests and details of the public interest test considerations that they had applied.

11. The Council responded to the Commissioner in a letter dated 11th April 2024. The Council maintained that to comply with the requests would cause a disproportionate and unjustified level of disruption to the Council. The Council said that it had received approximately 2750 emails from the Appellate between 1st January 2022 and 14th September 2023 on the same subject matter. The Appellant copied a number of separate officers and teams into the emails sent. The officers and teams had reduced capacity to undertake other critical work as a result. The Council included a table of the considerations that had been taken into account (pages 144-7 of the bundle). Of particular note were the Appelant's aggressive tone, numerous follow-up requests/emails after each information request, repeat requests, that the concerns were only raised by the Appellant and not others, correspondence to numerous teams and officers, the Appellant's ability to raise his concerns with the Environment Agency, and there is no value for the Council or wider public to continue to expend resources on further replies noting the finite and precious resources of the Council.

12. The Commissioner in his decision notice dated 18th April 2024 considered the competing arguments but considered that regulation 12(4)(b) was engaged. The Commissioner concluded that on balance the public interest in maintaining the exception outweighed the public interest in disclosing the withheld information. The Commissioner decided that the Council had correctly applied the regulation.

Appellant's grounds of appeal dated 13th May 2024

13. No appeal grounds were stated in the appeal application form. The form referred to an email dated 18th April 2024 which confirmed the grounds to be that -
    (a) There was wide public and specialist interest in the accuracy of the Council's information and pollution containment.
    (b) There is inherent implausibility to the Council's website claim that there are not toxic chemicals at the site.
    (c) If there were no toxic chemicals at the site, why were the Council spending £ 50K a year removing elevated leachate from the site.
    (d) He did not recognise that he had sent 2750 emails.
    (e) The request was not disproportionate in the light of extensive national interest.

Respondent's response to the appeal dated 2nd July 2024

14. The Commissioner opposed the appeal.

15. The Commissioner submitted that in all the circumstances of this case the request was manifestly unreasonable further to the case law set out by the Court of Appeal in **Dransfield v Information Commissioner & Devon County Council and Craven v Information Commissioner and DECC [2015] EWCA Civ 454**. The Upper Tribunal held that for all intents and purposes the term 'manifestly unreasonable' under regulation 12(4)(b) has the same meaning as 'vexatious' under section 14(1) FOIA.

16. The Commissioner considered the public interest in disclosure of the requested information in paragraphs 32-35 of the decision notice. Having done so, he concluded that the public interest in the maintenance of the exception provided by regulation 12(4)(b) outweighs the public interest in disclosure of the withheld information.

17. The Commissioner reminded himself that regulation 12(2) of the EIR required a public authority to apply a presumption in favour of disclosure when relying on any

of the regulation 12 exceptions. As stated in the Upper Tribunal decision **Vesco v Information Commissioner (SGIA/44/2019)**:

"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…" and "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" (at paragraph 19).

18. The Commissioner's view was that the balance of the public interest favoured the maintenance of the exception, rather than being equally balanced. This meant that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly. Therefore, the Council was not required to disclose the requested information.

Appellant's reply dated 8th August 2024 to the Respondent's response

19. Burden - The Appellant denied sending 2750 emails between January 2022 and September 2023. The Appellant had not refused to meet with the Council but had not received a response from the Council. The Council rescinded their offer to instruct a joint expert. The Council had not provided evidence of their claims nor evidence of the time spent on those requests, why they were burdensome, the time required to answer those requests and the extent to which resources would be depleted in meeting those requests for information. Twenty-two requests could not be considered excessive over many years; those requests were justifiably for further information. The blanket position of the Council that they will not respond to the Appellant's requests about the site was not in accordance with the Regulations. The requests raised discrete issues with little overlap. The Appellant was seeking updated information.
20. Motive – the Appellant was a committed environmental campaigner. There was little evidence that his motivation was anything other than to obtain information. There was little evidence of the Appellant naming individuals or pursuing a grudge.

21. Value – There were widespread concerns amongst the local community concerning chemical wastes and pollution from the site. The Council has refused to publish the chemical testing. The Council have never responded to the Appellant's request for publication of the chemical test results for 2022-23. There was clear and objective value in the information.
22. Harassment – the Appellant accepted that he had criticised the Council but such expression was considerably short of harassment.
23. Public interest – There was a compelling public interest in the disclosure of the information requested. The information was to provide reassurance about the hazards of the site, there are concerns of the impact on Ironbridge (a UNESCO heritage site), the site was not accessible and there was routine testing by the Council, there were community concerns about the site and significant media interest in the site.
24. The only counter-balancing argument that the Council put forward was the burden on their resources. There was scant evidence of that burden and this was overwhelmingly outweighed by the public interest in disclosure of the information.

Procedural matters relating to the determination of the appeal

25. The Tribunal considered the open bundle produced by the Respondent which was 152 pages and the Appellant's bundle of 180 pages. The Appellant also provided an authorities bundle and a supplemental reply of 3 pages dated 11th September 2024. The Council had not submitted evidence for the Tribunal to consider. The evidence provided to the Commissioner by the Council has been provided as part of the Respondent's bundle.

26. The hearing was attended by the Appellant, his witness Mr McCarthy and counsel instructed on his behalf. The Respondent did not attend and relied on the written submissions within the bundle. The Council had been invited to consider whether they wished to be joined as party but confirmed by email on 7th June 2024 that they did not want to participate in the appeal. The hearing took place remotely via video

platform (CVP). There were no objections to this as a suitable method of hearing and there were no technical or other difficulties during the hearing.

27. At the hearing we heard brief evidence from the Appellant and his witness who adopted their respective statements and answered some questions from the Panel. We heard submissions from Ms Hyde. The hearing was recorded. The decision of the Panel was reserved and is delivered by the handing down of this document.

The Legal Framework

28. There was no dispute that the request related to environmental information as defined by Regulation 2 of the 2004 Regulations.

29. Regulation 5(1) provides that *"…a public authority that holds environmental information shall make it available on request"*. This is described as the duty to make environment information available. This duty is subject to exceptions in Reg 12.

30. 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.
Under regulation 12(2) a public authority shall apply a presumption in favour of disclosure.

31. Under Regulation 12(4) … *"a public authority may refuse to disclose information to the extent that –*
(b) the request for information is manifestly unreasonable".
There is no definition of manifestly unreasonable in the Regulations.

32. At para 10 of the decision in **Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC)** (the **Dransfield** decision) Judge Wikeley said that the purpose of this provision *"must be to protect the resources (in the broadest sense*

of that word) of the public authority from being squandered on disproportionate use of [the Regulations]"

33. The exceptions are to be interpreted restrictively - **Highways England Company Ltd v Information Commissioner [2019] AACR 17.** The threshold to justify non-disclosure is a high one and the authority relying on an exception must provide enough evidence to support the exception claimed.

34. The Court of Appeal in **Dransfield** confirmed the approach of the Upper Tribunal as regards manifestly unreasonable indicators. There are several key messages from that judgment –

(i) The Upper Tribunal held that vexatiousness connotes "*manifestly unjustified, inappropriate or improper use of a formal procedure*".

(ii) The Upper Tribunal had highlighted key themes to consider when determining whether a request was vexatious were –
(a) The burden (on the public authority and its staff);
(b) The motive (of the requestor);
(c) The value or serious purpose (of the request) and
(d) Any harassment or distress (of and to staff).
These themes were not exhaustive and were not disapproved of by the Court of Appeal.

(iii) Regarding the burden of a request, said that the "*number, breadth, pattern and duration of previous requests may be a telling factor*".

(iv) As far as motive is concerned, "*what may seem an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority*" , and held that "*section 14 serves the legitimate public interest in public authorities not being exposed to*

irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources. In that context it must be relevant to consider the underlying motive for the request".

(v) Regarding value or serious purpose, the following question should be asked, "*Does the request have a value or serious purpose in terms of the objective public interest in the information sought*".

(vi) The Court of Appeal were specifically asked to consider whether past requests should influence future requests, even requests made properly. The Court of Appeal said at paragraph 68 – *".. the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available.*

In **CP v the Information Commissioner [2016] UKUT 0427 (AAC)**, which was decided by the Upper Tribunal after the Dransfield case that "*the context and history of the particular request, in terms of the previous course of dealings between the individual request and the public authority…must be considered in assessing whether the request is properly to be described as vexatious*".

(vii) Vexatious under the Freedom of Information of Act 2000 was the same as manifestly unreasonable under the 2004 Regulations.

35. Guidance on the public interest test can be found in the case of **Vesco v Information Commissioner [2019] UKUT 247 (AAC)** as follows at para 18:

(a) 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;

(b) 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.

(c) 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. Which factors are relevant to determining what is in the public interest in any given case are usually wide and various. 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.

(d) 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.

(e) If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

36. And at para 19 of that case UTJ Poole QC said –

"If [the above] 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" … 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."

37. The date at which the public interest balance must be decided is the date of the primary decision refusing the request – **R (Evans) v Attorney-General [2015] UKSC AC 1787** at para 73 " … a refusal by a public authority must be determined as at the date of the original refusal …" although "facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the Tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal."

38. The presumption in favour of disclosure informs both the application of the exception and the public interest balancing test as highlighted in **Vesco.**

39. Regulation 18 of the 2004 Regulations confirms that the appeal provisions of section 57 of the Freedom of Information Act 2000 apply to a decision under these Regulations.

40. The powers of the Tribunal were considered by the Upper Tribunal in **Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)** who confirmed that the Tribunal conducts a full merits review of the Commissioner's decision albeit the starting point was the Commissioner's decision. The Tribunal will give such weight as it considers fit to the Commissioner's views and findings; and will determine whether the Commissioner's decision was in accordance with the law. The appeal process is not adversarial, it is inquisitorial by nature.

41. Also, in **Vesco v Information Commissioner [2019] UKUT 247 (AAC)** the Upper Tribunal confirmed that the First-Tier Tribunal was entitled to give such weight to the Information Commissioner's views as the Tribunal considers appropriate but was not bound by those findings and had to reach its own conclusions.

Evidence and submissions at the hearing

42. The Appellant made a witness statement dated 8th August 2024 which he adopted as his evidence. He was an environmental campaigner who was concerned about the dumping of toxic chemicals on this site and others around the country. He considered that issue to be one of national importance. He had concerns about the site since 2000 having smelt a sickly-sweet smell and having perused documents from the Environment Agency and the Council about the waste on the site. He identified leachate leaving the site in 2023 and requested a meeting with the Council. He had undertaken research and could see leachate running into a ditch and onto the road. He was concerned about Phenols in the leachate. He accepted that his emails and correspondence with the council carried a sense of urgency following his discovery of the leachate and that it was still continuing some three weeks later.

43. He did not consider that 7 requests in 9 working days was excessive. The requests were made at the time of the leachate outbreak and he requested some urgent information noting the leakage.

44. He did not consider that 22 requests over 15 years to be excessive. He said that whilst the Council had signposted him to data, the scientific testing data had not been made publicly available.

45. He described that the attempts to convene a meeting with the Director of Neighbourhood Services had broken down due to availability and the Appellant's view that the meeting was urgent due to the ongoing leachate discharge; and that the conversations about a joint report resulted in the Council ultimately declining the offer despite being initially agreed. He stated that the FAQ section of the Council's website was created on 25th August 2023 but did not disclose the raw data from testing at the site. There was reference to testing for PCBs but no other potential contaminants. It was implicit from the exhibited emails that some testing data had been supplied but there was a question about what contaminates had been tested. It was clear from council minutes and the Council's FAQs on their website that regular

testing took place. Testing for Phenols took place annually as well as weekly testing of leachate.

46. He did not have time to send 2750 emails; there was no evidence to support this and he believed that the Council had counted every recipient of the emails. He said he did not know who to contact and that he had received responses from a number of different individuals. He had not used abusive or aggressive language. He said that he had been provided with inaccurate and misleading information and it was appropriate that these untruths were pointed out. He disputed that the purpose of his requests were to cause annoyance or disturbance; he was simply a concerned individual looking for answers. He was aware of at least three other individuals who had sought information about the site from the Council, references to the site from a local councillor and media interest in the site.

47. He disagreed with the Commissioner that the Council had responded in full to all of the Appellant's requests. In fact, the most important element of his request remained outstanding, the leachate test data.

48. The Council's website FAQs about the site was published after his request and does not include the test data.

49. He alluded to the significant local and national interest about the contamination of controlled waters and the interest in this site. He described this as widespread media and public concern relating to the site.

50. The Tribunal also had a witness statement from Patrick McCarthy dated 8th August 2024. He was the co-ordinator of the Telford and Wrekin Green Party. He became aware of concerns about the site in 2023. He was aware of articles about the site and attended a public meeting about the site in November 2023. He had made an information request dated 24th September 2023 where he asked for a copy of the testing reports but had not been supplied with that data. He was referred to the

FAQs on the Council's website which did not contain the raw data. Mr McCarthy was aware of the Appellant's and others requests for information and that he believed there was a great deal of public interest in the information sought.

51. The Tribunal considered that both witnesses were credible and reliable witnesses. There was little to contradict their evidence.

52. Ms Hyde made submissions as regards the legal principles that relate to the manifestly unreasonable exception and the public interest, and she reminded us of the guidance in **Dransfield** and other case law as to the principles that we needed to consider. The Tribunal reminded that first instance decisions of the Tribunal were not binding.

Conclusions of the Tribunal

53. The Tribunal directed itself as to the nature of the appeal; the appeal was a full merits review and not an analysis of whether there were reasons to dislodge the decision of the Respondent for an error of law. The Tribunal was entitled to exercise its discretion differently to that of the Commissioner.

54. The 2004 Regulations included a presumption in favour of disclosure. The purpose of the Regulations was to allow public debate and scrutiny of information of environmental matters. The type of information sought in this request was squarely within the information that the Aarhus Convention was designed to make available to the public. The regime under the 2004 Regulations was more favourably disposed towards disclosure and a restrictive interpretation of any exceptions than the Freedom of Information Act disclosure regime. That is the background against which the Tribunal must assess the exception claimed and apply the public interest considerations, if appropriate.

55. The position of the Council was that the Appellant had sent a large number of emails and copied in a number of recipients to those emails, for example, members of the

FOI Team, officers in the Engineering and Projects, the Customer Relationship Team and Chief Executive. This scattergun approach was causing disturbance, as well as his lengthy telephone calls which were considered to be a deliberate intention to cause annoyance. The Council submitted that the Appellant was seeking pre-determined answers and would continue to request information until he got the information that he wanted rather than that held by the Council. The Council conceded to the Commissioner that the number of requests were not significantly excessive but they were repetitive and involved follow up correspondence. The Council said that they had responded in full to his previous requests for information.

56. Page 56 of the Respondent's bundle was a photograph of a meeting that had a number of attendees who clearly wanted more information about the site. The objective information confirmed that the issues had also been the subject to national media interest about the dumping of chemicals by a now defunct US Chemical company. It was clearly not correct to suggest that the concerns were just those of the Appellant. The concerns appear to coincide with concerns raised about other sites where the same US Chemical company had been dumping chemical waste, and circumstances where toxic chemicals had been found nearby those sites and discharged into the waterways. The Appellant was undoubtedly the main campaigner as regards this site but was not the only individual who was concerned about leachate at the site.

57. The Tribunal did not have information before it as regards the information provided in 2020 save for a letter from the Council dated 9th October 2020 which confirmed that they would not be responding to any further information requests about the site and that the Council had responded to all requests and follow-up emails. That letter confirmed that he had made 5 information requests in 2020, 4 in 2019, 2 in 2010, 2 in 2009 and 1 in 2008.

58. The letter dated 10th August 2023 from the Council to the Appellant did include some information about land ownership and enclosing a redacted cabinet report (which

was not supplied to the Tribunal). All the questions asked about contaminants at the site, testing leachate remained outstanding. The correspondence referred to repeat requests but this was not substantiated by exhibiting those repeat requests. In September 2023, the Council referred the Appellant to their FAQs on their website. The Appellant said in his witness statement that the FAQ page did not answer his information request as it did not provide the raw data of the test results.

59. The Council prepared and submitted a business case as to why the Appellant should be deemed to be manifestly unreasonable and why the public interest in maintaining the exception outweighed that in disclosing the withheld information. In the business case, the Council submitted that:

(i) Abusive or aggressive behaviour – the Appellant's tone was described as inflammatory and three examples of words used by the Appellant's criticisms of the Council. There was no doubt that the words used "*risible, meaning, ongoing denial strategy and disgracefully misleading*" were critical but objectively they were neither abusive, aggressive or indeed harassing. The Appellant did not deny using those words. The Tribunal considered that the words used indicated his frustration but were an exercise of his right of freedom of expression and could not be objectively described as language likely to cause harassment or distress.

(ii) Repetition - The Appellant included follow up emails to his requests, the Council described 11 items of correspondence from one request alone and four long telephone calls. The requests were described as repetitive or similar. The Council submitted that time taken to deal with the Appellant's requests and emails diverted resources from other projects. The Council said that there was no wider interest in relation to the site; the site was solely his concern.

The Tribunal were not aware of the information provided to the Appellant in 2020 and before. In that regard, it was not possible to opine whether the 2023 questions replicated those in 2020. The majority of the questions in 2023 related to the testing on the site. Those questions were not answered by the Council in 2023 and the Appellant's evidence was that they had not previously been answered either. The Council had not exhibited evidence that they had answered those

requests. Noting that the testing occurs on the site regularly, it was foreseeable and not unreasonable that there may be further questions raised about subsequent test results.

Noting the objective evidence produced by the Appellant in both of the Appellant's and Respondent's bundles, and the evidence of the Appellant and Mr McCarthy, the Tribunal were satisfied that the concerns were not solely that of the Appellant. There was local and national interest in the issues around that and similar sites.

(iii) Personal grudges - The Council submitted that the Appellant's action in lodging a complaint against a council officer, seeking correspondence about him from the council and naming a council official is indicative of a grudge. This was denied by the Appellant. That correspondence was not exhibited and on face value, the Tribunal considered that it was not evidence of a personal grudge against named individuals.

(iv) Unreasonable persistence - the Council submitted that the Appellant had made a number of similar requests. As already indicated, the previous requests were not exhibited. The Appellant agreed that he had persistently asked for information about testing. The Appellant said this had not been supplied and there was little to suggest from the Council that the results had been disclosed. He had been directed to other teams and individuals by the Council. It was the testing data that was at the heart of his request and it was understandable why he maintained his request for information not supplied when no exception had been claimed in relation to that class of data. The Appellant said himself that if the Council published the data regularly, he would not need to continually ask for it.

(v) Unfounded accusations – the Council provided the same three examples as they did for aggressive behaviour. The Appellant had additionally asked about a Council employee's past relationship with a contractor implying potential wrongdoing. The Tribunal noted that the Council objected to the tone of the correspondence and refuted any implication, however, the conduct of the Appellant fell some way short of harassment and distress. The Council had not

provided the raw data requested, and noting the concerns, there was bound to be some suspicion as to why the data had not been provided.

(vi) Deliberate intention to cause annoyance – the Council said that they had responded on a number of occasions to the Appellant and that he would not cease his repetitive requests. The Tribunal were not satisfied that the Council had replied to his requests, especially as far as testing information was concerned.

(vii) Scattergun approach – the Appellant had copied in various people to his emails to cause disturbance. The Appellant did not deny that he had copied in various individuals to his correspondence and indeed he suggested this was how the 2750 emails might be accounted for. The Tribunal did not doubt that it was unhelpful for emails with requests to be sent to multiple council individuals as this might be disruptive and cause duplication; any requests for information should be sent to the FOIA department. However, the Tribunal accepted the Appellant's account of why he sent emails to a number of departments and individuals. The Tribunal accepted that some disturbance might result but not that the Appellant's intention was to cause disturbance.

(viii) No intent to obtain information – The council referred to previous similar requests albeit those requests and importantly the answers to those requests, had not been provided to the Tribunal. The Tribunal concluded that the Appellant was absolutely focused on getting information about waste and residual contaminants on the site.

(ix) Futile requests – the Council submitted that the Appellant was the only person asking for information. At the time, this may have been the case, but that does not equate to a lack of interest in the information. A lack of requests does not equate to a lack of interest. Many people will have an apathetic response to obtaining information for themselves or rely on someone else to do so. The Tribunal were satisfied that there was wider interest in the information.

(x) Purpose and value in the request – the Council said there was no purpose and value in further responding. In the light of clear evidence that the Council had indeed responded to his requests, this was not an argument that was accepted by the Tribunal.

It is noted that there is some information on the FAQs on the Council's website regarding testing. The Council had not relied on the exception that the information was available elsewhere and the Appellant submitted that the FAQs were uploaded at the end of August 2023. The information appears to be a summary report rather than raw data.

60. The Tribunal concluded that many of the concerns outlined in the business case had not been substantiated objectively or by the provision of evidence. The Council had not joined in the appeal or presented any primary evidence to assist the Tribunal. The Council had the burden of proving that the exception claimed applied and the Tribunal were duty bound to restrictively interpret the exception claimed. The Tribunal had some concern that the intent of the Council was to close the door of any further request of the Appellant about this site at all. That was a wide-ranging prohibition which did not recognise that his requests for information had not been satisfied and that there may be a need for further information as other information became apparent in the future including further testing results.

61. The Tribunal considered the **Dransfield** factors as follows -

62. <u>The burden (on the public authority and its staff)</u>

Paragraphs 29-33 of **Dransfield** provide the following guidance –

29. First, the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.

30. As to the number, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request

may properly be found to be vexatious. Volume, alone, however, may not be decisive. Furthermore, if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against such a finding that the new request is vexatious.

31. As to their breadth, a single well-focussed request for information is, all other things being equal, less likely to run the risk of being found to be vexatious. However, this does not mean that a single but very wide-ranging request is necessarily more likely to be found to be vexatious – it may well be more appropriate for the public authority, faced with such a request, to provide advice or guidance on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.

32. As regards the pattern, a requester who consistently submits multiple FOIA requests or associated correspondence within days of each other, or relentlessly bombards the public authority with e-mail traffic, is more likely to be found to have made a vexatious request.

33. Likewise, as to duration, the period of time over which requests are made may be significant in at least two ways. First, a long history of requests e.g. over several years may make what would otherwise be, taken in isolation, an entirely reasonable request, wholly unreasonable in the light of the anticipated present and future burden on the public authority. Second, given the problems of storage, public authorities necessarily have document retention and destruction policies in place, and it may be unreasonable to expect them to e.g. identify whether particular documents are still held which may or may not have been in force at some perhaps now relatively distant date in the past.

63. It was not disputed that the Appellant had made 14 previous information requests between 2008 and 2020 (5 information requests in 2020, 4 in 2019, 2 in 2010, 2 in 2009 and 1 in 2008) prior to his requests in July 2023. He had then made a further 7 requests over a 9 day period. The Tribunal were not satisfied from either the number or frequency of the previous requests that these requests constituted a voluminous number of requests in themselves. The Tribunal had not been given information about the content of the earlier requests or the time expended in dealing with them.

Equally it could not be said that the 7 requests in July 2023 were a voluminous number of requests, especially as the information sought was squarely focussed on the landfill site, the surrounding developments and testing. The information requested was neither wide-ranging nor lacking in focus. There was a three-year gap between his previous requests and the July 2023 requests.

64. There was no doubt that the requests were repetitious and persistent in requesting testing data but equally the information had not been provided. There was no doubt that providing partial answers (or even complete answers) may have led to further questions as the Appellant wanted a complete overview of the testing regime, the nature of those tests (i.e. what was being tested) and the results of the tests, as well as other information. It is foreseeable that the Appellant may wish to see the annual testing data.

65. The Council had submitted that the Appellant had bombarded them with email traffic. The number of emails sent were disputed by the Appellant and the Tribunal did not have a summary or any other primary evidence upon which to make a finding about the number of emails sent by the Appellant, or the pattern of those emails. It was contended that those emails were sent between January 2022 and September 2023. It was candidly agreed by the Appellant that he had copied in a number of recipients to his emails. The Tribunal accepted that this could utilise additional resources as many individuals would be looking at the same correspondence. However, taking the requests as a whole, the information requested could not be said to be excessive.

66. <u>The motive (of the requestor)</u> – "*the motive of the requester may well be a relevant and indeed significant factor in assessing whether the request itself is vexatious*" and that "*vexatiousness may be found where an original and entirely reasonable request leads on to a series of further requests on allied topics, where such subsequent requests become increasingly distant from the requester's starting point*" (paragraph 34 **Dransfield**).

67. There was little evidence for the Tribunal to conclude that the Appellant was on a personal grudge campaign or that his requests for information were not for a genuine reason. Individual pieces of correspondence that the Council replied upon had not been exhibited. There was little for the Tribunal to conclude that the Appellant had an improper motive in seeking the information. Rather, the objective information confirmed he was a long-standing environment campaigner with long-standing concerns about this site. The nature of the requests were consistently about the landfill site.

68. The Appellant had concerns not just around this site but enhanced by evidence emerging about other sites and other Councils being less than forthright about contamination issues. He was very clear that the trigger for the requests for information were that he observed a discharge from the site. That was credible and not disputed by the Council.

69. There was no doubt that the information existed somewhere as highlighted by the FAQs on the website and so the ongoing reluctance to provide it was bound to cause additional concerns about what was being concealed. That was human nature. If there are genuinely no concerns about the site, a pertinent question was why the information had not been released. We do not have the Council's answer to that question.

70. The value or serious purpose (of the request) – "*Does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (paragraph 38 of **Dransfield**).

71. The Tribunal were satisfied that the requests had reasonable foundation; the concerns were contamination of the surrounds and waterways and the impact on health. The Tribunal were also satisfied that the wider local community were also interested in the information. There was a national media interest in the issues. Others had made information requests around the same site. The nature of the concerns about the site

were the hazards presented to the local community from the landfill site and in discharges into the River Severn. The Tribunal were clear that such information would be of great interest to a number of groups and individuals, not least from nearby residents. The consequences could impact on a large number of people and groups.

72. The actions of the Council in dedicating a FAQ page on their website about the site in our view acknowledged that there was public concern about the landfill site and contradicted their position that it was only the Appellant who was concerned about the site.

73. Any harassment or distress (of and to staff) – "*Vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive (e.g. the use of racist language)*" albeit it is not a pre-requisite (paragraph 39 **Dransfield**)

74. The Tribunal were not satisfied that there had been any abusive or aggressive emails from the Appellant. At times, he had expressed frustration as to why the information was not being published and a suspicion that something was being hidden as a result. No doubt at times, staff had become exasperated with the emails, even if this was just fatigue at being relentlessly copied into emails. At most, the Appellant had caused some irritation. However, there was no direct witness evidence about the impact of his communications on Council staff or others.

75. Taken all of the **Dransfield** factors into account, the Council had not established on the balance of probabilities that the request was manifestly unreasonable. The Tribunal disagreed with the Commissioner on that issue and find his decision on that point not in accordance with the law. The Council were not entitled to rely on regulation 12(4)(b) to withhold information.

76. Having found that the Appellant was not manifestly unreasonable, the Tribunal need not go on to consider the public interest test as there is no public interest in refusing disclosure within the scope of the exception. In the event that the Tribunal were wrong on the issue of regulation 12(4)(b) the Tribunal considered that there was very little in favour of the public interest in maintaining the exception save to stifle genuine requests for information about the site. On the other hand, there was significant public interest in disclosure noting the potential impact of health and safety problems caused by the site which would undoubtedly outweigh the exception claimed, albeit the Tribunal did not find that the exception was validly claimed.

77. The appeal is allowed and a substituted decision is made by the Tribunal which appears at the top of this decision.

District Judge Moan sitting as a Judge of the First-Tier Tribunal

23rd October 2024