IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Appeal No. EA/2010/0169

BETWEEN:

ANTHONY LAVELLE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

STAFFORD BOROUGH COUNCIL

Second Respondent

DECISION OF THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Paper hearing by: Claire Taylor, Tribunal Judge
Anne Chafer, Tribunal Member
Paul Taylor, Tribunal Member

On: 25 March 2011 at Holborn Bars
Date of Decision: 30 November 2011

Subject Matter
Environmental Information Regulations 2004: Exception, request manifestly unreasonable

Cases
1) *Ahilathirunayagam v ICO and London Metropolitan University EA/2007/0024 ("Ahilathirunayagam")*
2) *CAAT v ICO and Ministry of Defence EA/2006/0040 ("CAAT")*
3) *Carpenter v Stevenage Borough Council EA/200/0046 ("Carpenter")*
4) *DBERR v ICO (EA/2008/0096) ("DBERR")*
5) *Easter v ICO & New Forest National Park Authority EA/209/092 ("Easter")*
6) *Martyres v ICO EA/2010/0105 ("Martyres")*
7) *Welsh v ICO EA/2007/0088 ("Welsh")*

Decision of the Tribunal
The Appeal is dismissed.

REASONS FOR DECISION

Introduction

1. The Appellant seeks from the Stafford Borough Council ('Second Respondent' or 'SBC') information under the Environmental Information Regulations 2004 ('EIR').
2. The main issue for the Tribunal concerns whether the request was manifestly unreasonable.

Background

3. The Appellant's requests for information relate to the use of land near his property. A planning agreement had originally provided that space at Wootton Drive would be gifted to SBC for use as public open space. However, the land was never transferred and the council was then legally advised that it could not enforce the agreement. The Appellant has been concerned for some time by the council's failure to secure ownership of the land.
4. This resulted in an investigation by the Local Government Ombudsman. In July 2009, she concluded that there had been maladministration in not securing the transfer of the land. However, she noted that SBC continued to maintain the land, with the landowner's agreement, such that it was made available for public use. Therefore, she stated that there was no current injustice to the Appellant.
5. In accordance with the Ombudsman's recommendations, the council paid the Appellant £250 compensation for 'frustration, time and trouble' and formally apologised on 17 July 2009 for its failure to secure the transfer.

The Request for Information

6. On 8 September 2009, the Appellant wrote to the Second Respondent making a fourteen-page request[1]. He asked for documents and information answering questions, including:
    1) Whether there were disciplinary proceedings, coaching or retraining for what the Appellant described as the council's *"somewhat maladroit attempts to conceal information…coupled with a lack of willingness and an inability to manage and retrieve records efficiently and effectively…"*
    2) Questions about what he referred to as the Statutory Development Plan 2001;
    3) SBC's intentions in respect of activities prior to May 2008;
    4) Eleven questions about the Local Planning Authority;
    5) "*The Head of Departments briefing paper … and the Leaders briefing paper … and additionally the minutes of the meeting/subsequent meeting to discuss the papers."*
    6) SBC's *"brief to its legal advisers and a copy of the advices received."*
    7) *"The file notes for meetings held between the Council and [Hallam Land Management] HLM to discuss the disputed ownership of the land and the*

[1] We note the Appellant's objection to the Commissioner having described his letter as fourteen pages. He asserted it was a five-page letter with nine attachments. However, the nine pages labelled as attachments contained most of the requests, so were clearly a material part of the letter, and the Appellant would have expected them to be read. Whilst many of those pages were only partially filled with text, the Appellant adopted a layout that was densely filled with words, as he did with most of his letters. Therefore describing the request as spanning fourteen pages is neither inaccurate nor misleading.

outstanding issues relating to the land, including a copy of the 'compromise solution'."

8) *"The formal request to HLM seeking the acquiescence; "A copy of the reply from HLM agreeing to the acquiescence; "A copy of the acquiescence."*

9) *"The "Risk Assessment" carried out in respect of the land and its facilities prior to the Council's commencement of the maintenance in 1992 and also a copy of the current "Risk Assessment" as part of the agreement of the acquiescence with Hallam Land Management, the landowner in May 2005."*

10) "*The file notes of the Pre-Application meetings held between the Council and HLM to discuss the proposed planning application."*

11) "*The amended open space layout BH 6240/2B received (by the Council) on 13th April 1983."*

12) *"The amendment to the "Permission for Development" – Application NO 14292, Date Registered 26 January 1983, Decision Date 27 April 1993 (in reference to the removal or amendment to point 14 which states "Within four months of the development hereby permitted being completed, the proposed landscape scheme and that agreed pursuant to condition 10, shall be implemented and thereafter satisfactorily maintained, including the replacement of any subsequent failures")."*

13) *"The information contained within the "additional file" relating to this matter which was found after you ceased correspondence with me in September 2008".* This request specified ten areas of interest to the Appellant.

7. On 29 September 2009, the council refused to provide the information on the basis that it was manifestly unreasonable such that regulation 12(4)(b) EIR was engaged. It warned that as the underlying complaint regarding the handling of the land had already been considered by an independent investigator, further pursuance of the complaint could amount to harassment of the council and its officers.

8. On 20 October 2009, the Appellant requested the decision be reviewed.

9. The council subsequently informed the Appellant that having conducted a review, its' position had not altered. It stated that the request was the latest in a long series of lengthy requests. Taking into account the time already spent in dealing with these, the public interest in managing resources effectively outweighed the interests of the Appellant's in exploring each avenue of questioning.

The Complaint to the Information Commissioner

10. On 7 December 2009, the Appellant applied to the Information Commissioner ('Commissioner') for a decision under s.50 Freedom of Information Act 2000 ('FOIA') as to whether it had complied with the EIR. He asserted that the information previously provided to him had not all been candid or accurate. He wished to understand how and why the "*injustice investigated by the Ombudsman occurred, as these elements are as significant as the failure itself*". He later suggested a number of things that the council ought to put things right, such as "*a clear and unqualified apology to each and every householder on the CMFS estate*" for its failure in management and subsequent failure to inform residents of such maladministration.

11. In his decision notice of 15 September 2010, the Commissioner concluded that the council dealt with the request for information in accordance with the EIR and required no steps to be taken.

The Appeal to the Tribunal

12. The Appellant appealed to the Tribunal by notice dated 12 September 2010. The Tribunal joined the Second Respondent as a party to the appeal.

13. The parties elected not to appear by way of an oral hearing and so the panel met on 25 March 2011 to consider all papers the parties had submitted. The panel then put further questions to the parties, and their responses were considered at a later point.

14. The Tribunal has had the benefit of bundles of documents and case law and a number of submissions. We have considered all of this material, even if not specifically referred to below.

15. The Second Respondent also submitted a confidential submission that included the requested legal advice. However, we have not found it necessary to comment on this, and no part of our decision is issued on a closed or confidential basis.[2]

The Appellant's Grounds of Appeal

16. The Appellant's grounds for disputing the Commissioner's decision are:

    1) The Commissioner erred in concluding that the Appellant's request was manifestly unreasonable and that therefore the exception under regulation 12(4)(b) EIR was engaged; and

    2) If not, the Commissioner erred in concluding that, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Evidence and Submissions

17. The Appellant's submissions were extremely long and required quite some effort to follow. They included the passages below. (We have inserted some of the headings to help to best understand his case).

Ground 1: Not manifestly unreasonable

1) Previous requests not solely about use of the land:

    i. *"…my correspondences were also concerned with … the planning process, following information obtained from the developer... my correspondence was unplanned and that its direction and intensity were dictated and driven by the responses provided by SBC… whilst I acknowledge that all of the correspondences relating to this matter, from whatever source, are in some way inextricably linked to the original planning agreements and thus to the*

[2] It is in the nature of the subject matter of this hearing that some Respondents will consider it necessary to submit part of its submissions on a confidential basis such that the Appellant and public may not view it. However, in this case, after directions from the Tribunal, the Second Respondent accepted very little of submission needed to be confidential, such that most were then disclosed to the Appellant (for his comment) and the Tribunal agreed that only part that was redacted was in fact confidential in nature. The parties were referred to the Practice Note on "Protection Of Confidential Information In Information Rights Appeals Before The First-Tier Tribunal In The General Regulatory Tribunal On Or After 18 January 2010" in relation to this.

land; I would submit that such links were/are in the circumstances unavoidable."

ii. *"… my request is not for minor, insignificant or unimportant information, but for key documentation and information relating to…The actual facts, circumstances and specific reasons for SBC's decision not to adopt the land; and what measures and actions they undertook prior to reaching their decision…Information relating to the background surrounding the proposal to develop the land, the pre-planning discussions and the compromise solution…The Council's brief to its legal advisors and the advices received. The acquiescence between SBC and the landowner. Whilst I accept that SBC did provide me with a brief summary of the information it had found in February 2009…); I would argue that that on its own, the information was/is of no value… I would further argue that the Council's decision not to adopt the land is irreconcilable with the facts… Additionally, I would also argue that my request seeks to obtain documentary information to establish the actual reasons why the land failed to meet the required standard; what actions SBC undertook to address the failure; and what enforcement action and/or measures were taken at that time to remedy this failure; and why ultimately, it was not possible to enforce the agreements at the appropriate time; in short, to establish the unadulterated facts."*

iii. *"…I would further argue, that some of the responses provided by SBC in the course of my original correspondence raised serious concerns in respect of the background to the planning proposal and the pre-application discussions; … I would submit that these concerns were/are:-*

1. *Why was it necessary for the Leader of the Council to be involved in a routine planning matter? ...*
2. *Why was it necessary to take the unusual step of recommending that the applicant undertake a public consultation prior to presenting a formal application…"*

2) <u>SBC's Information Inaccurate</u>

i. *"… Additionally, I note that in their submission to the [Commissioner] in [copied in paragraph 17(2)(ii) below] ... SCB appear to accept that their initial declarations were inaccurate, but … that this is of no consequence, because in their view, the information did not add anything further to my concerns. Whilst I am unclear as to what this statement actually means, it would appear that SBC are suggesting that even though they did provide inaccurate information, that it is acceptable for them to ignore the guiding principles of the FOI/EIR or alternatively, that they are not required to comply with the principles because in their view, they consider that it would ultimately make no difference and; that in the circumstances they (alone) should decide whether the provision of information is necessary… In the simplest terms, I would argue that it is unrealistic for SBC to seek to reply upon specific exceptions within the statute to prevent the disclosure of information, having previously by and through its own actions, sought to undermine its basic principles*."

ii. SBC wrote to the Commissioner during his investigation, and stated that:

"In your email, you mention that [the Appellant] claims "he is only asking to have access to recorded information which he was not previously aware of." During the Ombudsman investigation, a further file on this matter was found that officers hadn't been aware of when responding to Mr Lavelle previously. The Council made the Ombudsman and Mr Lavelle aware of

this file… and summarised its contents as being correspondence between the Council and the developer between 1992 and 2003. The Council confirmed that the contents did not add anything further to Mr Lavelle's concerns. Details of this file are not the only questions being asked by Mr Lavelle's in his request. (e.g. he asks for sight of a Barrister's advice which would likely be exempt from disclosure under regulation 12(5(b) [EIR]). However, to spend officer time researching through this file and the other Council information to find answers to Mr Lavelle's numerous questions would still take a significant amount of officer time…"

iii. *"I* would *further argue that SBC's responses to questions relating to their records management […* see sub-paragraph 17(2)(iv) below*]) singularly demonstrate that SBC were, less than helpful; and that their responses were indeed unclear, incomplete and contradictory and that SBC's denial of such facts in the face of overwhelming evidence is frivolous ... Additionally, I would argue that the final statement [see paragraph 17(2)(iv)3 below] makes clear, that SBC had no desire to be helpful and that they were unwilling to be open, transparent and accountable when it came to the question of their records management.*

I would also argue that the above illustrates why it was often necessary to rephrase/repeat, or ask similar questions in order to affect a response which was either credible or intelligible, and why my original correspondences were laboured and extended."

iv. The documents referred to by the Appellant in the sub-paragraph above include:

1. An email response to him where it is explained that (a) the council never adopted the land in question and that they do not hold records indicating why; and (b) they have investigated council records but these do not date back to 1983 as they are not obliged to keep records for that length of time, but they confirm that SBC have maintained the land and play area for a considerable time. (The Appellant also argues that this response provoked further requests.)

2. An email dated 14 January 2008 answering two of his emails containing 18 questions from the Appellant, including as to why SBC records include the original planning agreements but not the reason for not adopting the area. The response confirmed that the reason was not in the records but that the council continued to maintain the land for the benefit of the wider community.

3. An 8-page response dated 15 May 2008 replying to two of the Appellants emails explaining that the cost of complying would exceed the FOI regime but that nevertheless they would answer his questions as far as it were able; and stating that questions relating to the maintenance of records had been answered in previous correspondence but clarifications were provided within that letter and a statement that the Council retained records it considered necessary in accordance with the relevant guidance.

v. *"I would suggest that the records always existed and that is was a question of a lack of desire and application… Additionally, the fact that the records could not be located at the appropriate time, illustrates that SBC's records systems were not fit for purpose; clearly if the records system had been fit for purpose the records would have been located."*

vi. *"…Additionally, SBC appear to infer … that because my request was for information that I was previously not aware of and because their officers had found a file of which they were previously unaware, that this somehow justifies or makes their failure acceptable? I would argue that by the placement of the two statements in the same paragraph SBC sought to establish some sort of link between the two in order to influence the [Commissioner]; and I would submit that the inference is in its self illogical and its use ill-considered…"*

vii. *"…whilst it is accepted that if records had been available this would not have changed the status of the land, clearly the question of the missing records was highly significant... the absence of records meant that SBC were unable to provide any explanation for the failure of the planning process; that is, why the process failed to realise one of the key objectives of the planning agreements; to secure the transfer of part of the land into public ownership for use as public open space."*

viii. *"I would argue that I pursued my correspondence partly because SBC's actions were, in the light of their declarations, not only illogical (because they did not own the land) but also illegal and that these matters were relevant to my original requests."*

ix. *"Additionally, I would argue that my original correspondences were unnecessarily laboured and extended as a direct result of the Council's inability to provide any factual information relating to their administration and management of the original planning agreements… whilst at first sight my request might appear long and complicated; I would submit that both were produced, presented and delivered (via email) in such a manner as to facilitate ease of response… it was more a question of interpretation, application and desire; and that SBC did not indicate or display any desire to be helpful and that this was clearly illustrated in/by their responses to requests for information concerning their policies and practices for management of records…"*

Costs

x. *Self-inflicted: "I would submit to the Tribunal that whilst I acknowledge there will be a burden both in terms of distraction and cost and also that the burden should be considered in the context of the history of this matter, … the burden is one that has been self inflicted and made unnecessarily greater by SBC itself… the greater part of this "extensive work" particularly in respect of the distraction and cost, resulted from SBC's own failures and was not directly related to or linked to my requests… in view of these acknowledged failures and false declarations, their arguments relating to the burden cannot be justified."*

xi. Aggregation*: "…I would argue that the burden of fulfilling my current request should not be aggregated with my previous requests, as it primarily seeks that information which the Council had falsely declared did not exist; and that their false declaration clearly prevented me from submitting a request at the commencement of my correspondences; and whilst I accept that it is not possible without the benefit of hindsight to determine what course my correspondence may have followed, it is reasonable to conclude that my correspondences would have followed a different path had the false declarations not been made…"*

xii. EIR and costs*: "…I would also argue that there are no cost limits for responses to requests for environmental information and that SBC have*

provided no evidence that the costs of providing the information may be exceptional or unreasonable…"

xiii. *"…in light of their initial false declarations, their interpretation of my request as manifestly unreasonable is untenable; whilst I accept that the exception 12(4)(b) is designed to protect public authorities [see Easter][3]; I would argue that in this particular case the public authority has exposed itself to the (additional) burden as a result of its own negligence; clearly had the Council's administration and management of its records systems been effective they would have found the records at the appropriate time."*

xiv. The Appellant contested SBC's estimate of the costs of responding to his requests as an exaggeration. He noted that as SBS stated that they had already spent in excess of 14 days responding to previous requests, they would already be familiar with the material.

Ground 2: Public Interest

3) The Law

i. *"I would further argue that the question of public interest should be considered at the relevant time (see [CAAT] at paragraph 53) and I would argue that the relevant time was December 2007, given that was the time when I was prevented from making a request as a direct result of the false declarations made by the Council. I would further argue that this date is wholly relevant given that the Council were at that time in discussions regarding further development…"*

4) Transparency

i. *"… my purpose has always been to establish the facts surrounding the failure of the planning process and why crucial records did not exist; although, following the LGO's investigation, my purpose was extended to include establishing why SBC knowingly provide misleading information relating to the status of the land; and why they failed to be open and transparent about those matters which preceded the planning application. Ultimately my purpose has been to establish the truth…"*

5) To Establish why the land was not adopted

i. *"I would further suggest that it is logical to assume, that having spent in the region of £180,000 of taxpayers' money up until this date (2005) maintaining the land, that the Council would have wanted to establish the reasons why they did not adopt the land."*

ii. *"… I had purchased my home from plan (early 1984) and that one of the principal selling features of the development was that leisure and recreational facilities were to be provided and that these facilities would be handed over to the Council in perpetuity..."*

iii. *"…many of the responses provided by SBC in response to my original requests, were proven to be unreliable as a result of their admission that their initial declarations (relating to the existence of records) were wrong…"*

iv. *"there is strong public interest [to] … allow individuals to understand the decisions they made."*

[3] Case references are stated on page 1 of this decision.

v. *"280 dwellings were marketed and sold on the premise that the land would be gifted and adopted by the Council…An important leisure amenity remains uncertain… That the Council has incurred considerable costs as a direct result of its failures, cost[s] which are being borne by the taxpayer…the land is used daily by a significant number of people, and that it is important that …[they] are aware of both the period and the terms and conditions of the acquiescence…the residents and wider public have a reasonable right to know, why…have the Council now entered into an acquiescence with the land owner to continue to maintain the land…*"

18. The Commissioner's submissions included:

Ground 1: Not manifestly unreasonable

1) There is no single test for what sorts of requests may be considered to be manifestly unreasonable. In *Carpenter,* the Tribunal decided that the principles considered when looking at s.14 FOIA can also be applied to requests involving regulation 12(4)(b) EIR. Regulation 12(4)(b) will apply where it is demonstrated that a request is vexatious or that compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

2) In *Welsh,* the Tribunal stated
   i. "*... there is a danger that setting the standard of vexatious-ness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested..."* (*See Para.26).*

3) The Commissioner argued that the matters the Appellant had raised about the actions of SBC's conduct in relation to the land were not within the jurisdiction of the Tribunal to consider. As the Tribunal stated in the decision in *Easter*
   i. *"the Tribunal's jurisdiction does not extend to reviewing any decision made by a LPA or revisiting issues that have been examined by, for example, the Local Government Ombudsman." (See para. 25.)*

4) The Commissioner considered the list of criteria set out in its' Awareness Guidance No 22 '*Vexatious and repeated requests*' of 3 December 2008, to determine whether a request for information is manifestly unreasonable. *(The criteria are set out in the titles of sub-paragraph 6 (i) to (v) below.)*

5) When considering the list, the Commissioner argued that the wider context and history of the request could be considered. It was argued that at least one of the criteria needed to apply for a request to be vexatious (or in this case, manifestly unreasonable), and the more that did, the stronger the case.

6) Considering that list:
   i. Can the request fairly be seen as obsessive?

1. The Commissioner regarded obsessive requests to be a very strong indication of vexatious-ness. The current request was argued to be obsessive because:
    A. Of the high volume of correspondence from the Appellant over two years, on a consistent, often frequent basis – only ceasing whilst the LGO undertook its investigation.
    B. Although the Appellant argued that the volume and frequency were caused by SBC being "*less than helpful*", with many responses being "*unclear, incomplete and contradictory*" and its "*inability to locate records*", the Commissioner was satisfied that the council had sought to answer his questions. It had made clear that there were no records stating why the land was not formally adopted.
    C. All correspondence and information requests being centred on the one issue - the use of a particular piece of land as public open space. Whilst the Appellant asserted otherwise, the Commissioner found nothing he had identified successfully contradicted the fact that all previous requests raised sufficiently similar points.
    D. This issue had been investigated independently by the LGO. Despite the LGO finding in the Appellant's favour and resolving the matter as far as was realistic, he continued to pursue the matter via the EIR, submitting further lengthy correspondence. He was attempting to reopen matters already independently investigated. In *Ahilathirunayagam*, the Tribunal stated that where a request appeared to be "*intended simply to reopen issues which had been disputed several times before*" it could rightly be judged as vexatious.
    E. SBC spent a considerable amount of time and resources answering the numerous questions the complainant has raised over this period and dealing with the seven previous information requests. Every time it responded or sought to assist the complainant it has received further lengthy correspondence asking further questions and seeking further information.
    F. The Commissioner noted that the request that is the subject of this appeal comprised 14 pages discussing and requesting further information relating to the same topic.
    G. Also, to date each response from SBC generated further lengthy questions and requests for information, such that this behaviour would most likely continue, and would be viewed by any reasonable person to be obsessive.

ii. <u>Is the request harassing the authority or causing distress to the staff?</u>

1. Although the Commissioner considered the request to be obsessive, he did not consider it to be either harassing or

distressing. Whilst the request is the eighth in just over 12 months, each request has been politely written, and has not been directed at particular members of staff.

iii. Would complying with the request impose a significant burden in terms of expense and distraction?

1. In *DBERR,* the Tribunal found that:
   A. "*public authorities may be required to accept a greater burden in providing environmental information than other information*" (*See para. 39*).

2. Notwithstanding DBERR, the Commissioner considered the request to impose a significant burden because:
   A. It had already spent a significant amount of time responding to the complainant's seven previous requests and correspondence and locating and providing relevant information. Further time researching points and extracting information would impose a significant burden. As the central issue of the requests had been thoroughly investigated, the burden was unnecessary.
   B. To respond to the complainant's latest request and other issues raised outside of the EIR would place a significant burden upon the Council in terms of time and expense and disproportionately divert and distract the Council and its staff away from other business to a matter which has already been the subject of an independent investigation.
   C. The Appellant argued that the requests and further questions were caused by SBC's protocols for the management and administration of its records system not being fit for purpose. Further, that costs in respect of diversion and distraction could have been avoided if it were not for the management failures. The Commissioner found nothing to suggest that had SBC's systems been different, it would have been able to provide the Appellant with more recorded information or answered questions differently.
   D. Even though the Council were able to locate further records following the LGO's investigation, on the particular facts of this case, the pattern from previous request and correspondence strongly indicated that a response to the request that is the subject of this appeal, would more than likely lead to further requests, leading to more expense and distraction.

iv. Is the request designed to cause disruption or annoyance?

1. The Commissioner did not consider this was proved.

v. Does the request lack any serious purpose or value?

1. The Commissioner concluded that although the request had purpose and value to the complainant and affected his property, this did not justify the continual pursuit of this matter. This was because:
    A. The latest request was obsessive due to the central issue having been debated and independently considered by the LGO;
    B. The planning status of the land was now clear; and
    C. SBC had confirmed, following legal advice, that the complainant's desirable outcome could not be achieved. Further debate and information would not change this situation.

Ground 2: Public interest

7) The Commissioner cited authorities suggesting that the burden to show the public interest favoured disclosure is relatively high:

i. In *Easter*:
"*in relation to the exception in regulation 12(4)(b)EIR, there is an in-built public interest to ensure that applicants for information do not, as a result of their manifestly unreasonable requests, either jeopardise sound and effective administration within public authorities or unjustly harass those working for public authorities*." (*See para 76.)*

ii. In *Martyres:*
"it seems rather unlikely that the public interest could ever require a public authority to answer to a manifestly unreasonable request." (See para. 9.)

iii. The Commissioner decided the public interest in maintaining the exception outweighed the public interest in disclosing the requested information. He essentially argued that even if the burden had not been relatively high, the Appellant had not met it because he had provided no evidence to substantiate his assertion that there is "*considerable public interest*" in the information requested.

iv. In considering the test, the Commissioner accepted the arguments in favour of disclosure would be to promote transparency and accountability within the council and provide information relating to the use of the land in question as public open space. However, in assessing their weight, he found there to be little wider public interest in requiring the disclosure of the information. The Appellant's request and previous requests related to a piece of land used as public open space by him, his family and surrounding neighbours. In other words, the requested information and the issues this addresses affected a relatively small number of people.

v. The Commissioner decided that arguments in favour of maintaining the exception included that while public authorities were encouraged to be transparent and accountable, it was not considered the intention of the legislation to require them to tolerate obsessive behaviour by individuals seeking information. To do so would seriously undermine the purpose of this legislation.

vi. The Commissioner strongly considered public authorities ought to be able

to concentrate their resources on dealing with legitimate requests rather than being distracted by requests that continued to request information and debate underlying matters that had already been thoroughly investigated and where the wider public interest would not be served by the disclosure of information.

vii. Relevant factors were also that the matter has also been independently investigated by the LGO, a settlement was reached and the complainant was informed that his desired outcome is not possible.

viii. The Commissioner took into account the considerable amount of time and public resources already expended in dealing with the matter and that a further response would place a significant burden diverting a disproportionate amount of resources from its core business. The previous pattern of behaviour clearly demonstrated that any response would more than likely lead to further requests strengthening the public interest in maintaining this exception.

ix. The Commissioner considered these factors outweighed the interest in disclosure and in particular that there was a public interest in ensuring that the EIR was used responsibly.

19. To the extent the Second Respondent's submissions differed from those of the Commissioner, its submissions and the evidence included:

Can the request fairly be seen as obsessive?

Evidence

1) The Second Respondent produced a chronology of correspondence between SBC and the Appellant. SBC stated that on a number of occasions, the Appellant would send further requests before SBC had been able to provide a full response to the previous one. For instance, on 12th December 2007, SBC replied to a request and the Appellant sent a further request containing 8 questions within a few hours. He stated, "*I will need sometime to digest your response and consider its contents fully. However I would be grateful if you could provide the following information, where appropriate under [FOIA]…*" Shortly afterwards, he emailed again, amending the previous request. A further e-mail was received on the next day, with a series of further questions.

2) The evidence showed that the pattern of requests also included:

   i. On 17 March 2007, a 10-page letter to SBC's Chief Executive. A reply was sent on 16 April, where it was noted that some of his questions had already been answered in previous responses. On 22nd April 2008, the Appellant replied with a number of further questions.

   ii. On 13 June 2008, a 30-page request. In it, he asked that nine elected officers, including the chief executive, councillors and MP, all let him have their independent views on his correspondence to date.

   iii. On 11th July 2008, a 13-page request.

3) Following this, the Appellant made a complaint to the LGO, (of 15 pages), on 11 September 2008 and his requests ceased. The Ombudsman presented her findings on 18 June 2009. SBC then sent the Appellant an apology in line with her recommendations under the agreed arrangement to settle the matter locally.

Submissions

4) The Second Respondent argued that the Appellant's latest request was an attempt to reopen the issue already investigated by an independent investigator. The Ombudsman (who found the council was at fault for not originally securing the land as public open space) had not questioned the accuracy of the information the council had been providing to the Appellant.

Is the request harassing the authority or causing distress to staff?

5) SBC argued that the volume and frequency of correspondence could be considered to amount to harassment of the authority. This was because requests were followed up with further requests, even before officers had the chance to fully respond to the initial request. Also, responses to previous requests had only elicited further questioning and comment from the Appellant.

6) SBC noted that the Appellant was aware of the burden he was causing to the Council, and suggested he was deliberately doing so because he was unhappy with the answers he had received. It quoted the Appellant's statements that

   i. "*I accept that the volume and frequency of my requests increased*" but that "*the burden is one that has been self inflicted.*."

   ii. While his requests were "*speculative in nature*", he had said "*I would argue that the absence of any accurate and/or factual information necessitated this approach*".

Would complying with the request impose a significant burden in terms of expense and distraction?

7) SBC asserted that the request would have a serious impact on the delivery of daily council services with the removal of technical officers from their normal duties. It would take more officer time to:

   i. Examine and ascertain what information the Appellant was requesting. The Appellant's requests for information are interspersed with numerous stand-alone questions and comments and so are not immediately apparent when reading through each request. This means that officer time and concentration is required just to understand the information being sought within each request. The estimated time for this was two hours.

   ii. Review the information in the "pre-application" planning files.

   iii. Review the land in question that is held on three microfiche files (roughly 1200 pages), and four other paper files (roughly 800-1000 pages). It was estimated to take 14 working hours (two days) to consider whether any of the documents met the Appellant's description. The work would need to be done by an officer who understood planning and legal issues relating to the matter. (SBC argued that the information was contained in historical files created by officers no longer working at the Council. Therefore the answers could not be gained from memory for Council. Each question would require thorough research to be conducted by existing council officers. The research could not be conducted by officers at an administrative support level as it would need officers with an understanding of the issues referred to in order for them to identify any relevant documents within the files.)

   This estimate did not take into account the need to constantly review, and refer back to, the questions being asked to ensure none are missed when searching through each file. However, as an alternate to sub-paragraph (iii) above, SBC considered it could be possible to conduct a search for

information relating to each request for information in turn. There were nine "requests for information" underlined in the request (but more questions than that in the whole letter). A search for information on each question could be estimated to take two hours if the relevant file could be identified. However, at least three of the requests would need a comprehensive check of all seven files to see if the information existed. A rough estimate could therefore amount to between 18 and 24 hours of dedicated officer time.

iv. Consider whether that information was held by the Council and whether any parts of it were exempt from disclosure; and

v. Extract any relevant information; and

vi. Disclose it.

8) In light of the time already spent on these series of requests, and the fact that the issue has been investigated and determined by an independent body, it would not appear reasonable to place further burden on Council staff in this matter. A conservative estimate of the time already taken to deal with previous requests included 5 working days of an administrative support officer locating and retrieving relevant files (some of which were on microfiche); two or three days of a support officer in the Chief Executives department coordinating and drafting responses and five days of solicitor time in reading and interpreting requests and identifying whether the information exists.

9) SBC argued that the Appellant was aware that his requests were not straightforward because of his statements that:

i. "*my original correspondences were laboured and extended*" (*See sub-para.s17(2)(iii) and (ix) above*).

ii. "*my request might appear long and complicated*"; (*See sub-para.17(2)(ix) above*); and

iii. "*it may be argued that my request is for documentation relating to matters which had previously been the subject of questions in earlier correspondences*".

Is the request designed to cause disruption or annoyance?

10) SBC argued that whilst it was not aware of an express intention to cause disruption the effect of the repeated requests had resulted in this. The council found it difficult to understand what the Appellant's intention was in maintaining the level of correspondence he had, considering that the Ombudsman's investigation had taken place.

11) It referred to the Tribunal's statement in *Welsh* that:

> "*whatever [the requester's] intention, the effect of the request was to cause disruption and annoyance to the [recipient], and had the effect of harassing them." (See para.26).*

Does the request lack any serious purpose of value?

12) SBC argued that the request lacked serious purpose or value because (1) the issue has been thoroughly investigated by the Ombudsman; (2) the planning status, and ownership, of the land has been made clear; and (3) the issues were historical facts that could not be changed by further investigation into the issue.

Legal Advice

20. The Second Respondent brought to the Tribunal's attention an additional matter in relation to the legal advice that formed part of the request. It explained that the Appellant had already requested this and the council had withheld it claiming that the exception for legal privilege applied. The Appellant had not made a request for them to review that decision.

21. Whilst SBC claimed – as a factor in support of its argument of the request being manifestly unreasonable - that the burden of complying would be excessive, it seemed clear that this could not be said for the legal advice. However, SBC argued that due to the context of the latest request, the legal advice should not be looked at in isolation and that the Tribunal need look no further than the question of whether the request as a whole was manifestly unreasonable.

22. These arguments were initially put to us as confidential submissions. We questioned the validity of this and they were subsequently disclosed to the Appellant. He in turn made further submissions, but did not choose to directly address this point. He did state that he considered that the majority if not all the requested information was readily available to be disclosed and that SBC had purposely overstated the burden to them of collecting the information. Therefore, to deny the appeal solely on this basis would "*reward failure, not serve justice and render the legislation ineffectual*".

The Task of the Tribunal

23. The Tribunal's remit is governed by s.58 FOIA, as incorporated by Regulation 18 EIR. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

24. The questions before the Tribunal are:

    1) Ground 1: Is the Appellant's request 'manifestly unreasonable' under Reg.12(4)(b) EIR?

    2) Ground 2: Does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case?

    3) Whether the requested Legal Advice should be considered separately?

The Law

25. No party has disputed that this appeal be dealt with under the EIR. We accept this as the requests seem to be broadly centred on information relating to the state of land and administrative or other measures connected to this.[4]

26. Under regulation 12(1)EIR, a public authority may refuse to disclose requested environmental information if an exception applies and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. One such exception is where "… *the request for information is manifestly unreasonable*". (*See Reg.12(4)(b)).*

[4] See Regulations 2(1)(a) and (c) EIR.

27. Regulation 12(2) provides that "*public authority shall apply a presumption in favour of disclosure".*

Question 1: Is the Appellant's request 'manifestly unreasonable'?

28. It is our view that whether a request is caught by this exception should always be considered on the basis of the facts of the case. The facts of the case are likely to include the history of the matter and what lay behind the request and the existence of any previous request.

29. Given the meaning of the words, when an independent body is reviewing the matter, a conclusion that a request is 'manifestly unreasonable' ought most probably be a straightforward (albeit regrettable) one to reach. Having ascertained the relevant facts and context, the decision is likely to be blatant and jump out from the material before it. It is therefore important not to be obscured by a 'tick-box' exercise or otherwise overly structured approach. Having said that, in this particular appeal, we do accept that the criteria put to us by the Commissioner serve as useful indicators, which can help to explain why we have come to our decision.

30. It is absolutely clear to us from reading the request itself, in the context of the bundle containing previous requests and Ombudsman's investigation, that it is manifestly unreasonable. In reaching this decision, we have considered the overall tone of the request and approach of the Appellant in the round.

31. The factors that made this most clear to us are that the request:

    1) Most definitely seems obsessive. This is evident from the volume, style, length and detail of correspondence, as well as the unending pursuance of the matter despite the Ombudsman having resolved his complaint in his favour. We accept both the Second Respondent's evidence and submissions that are set out above on this point. We also accept the Commissioner's arguments in this regards.

    2) Lacks any serious purpose or value, particularly given the information requested will not alter the fact that nothing can be done to enforce the transfer of the land in question. We agree with both the Commissioner and the Second Respondent's arguments in this regard as set out above.

    3) Has a harassing effect on the authority, albeit at a low level because there are no allegations directed at individually named members of staff. We agree with the Second Respondent's arguments set out above on this point.

32. As for whether the request is aimed at causing disruption or annoyance, we did not find this clear cut. The Appellant's correspondence has generally come across as very polite. However, his approach is somewhat relentless and highly likely to cause annoyance. The Appellant states he found it often necessary "*to rephrase/repeat, or ask similar questions in order to affect a response which was either credible or intelligible"* and that his *"original correspondences were laboured and extended*". However the reasons he gives to justify this (set out in paragraph 17(2)iii and 17(2)iv above) are not convincing. We have not seen any evidence that the volume of correspondence was necessary due to the lack of transparency and helpfulness on the part of SBC. On the contrary, the council's responses appear to have been courteous and extremely helpful even up to the level of the Chief Executive.

33. A factor that did not feature in our decision was the burden or cost of compliance with the requests. Whilst it is conceivable that the costs are so excessive that the exception would be engaged, we were not satisfied that the Second Respondent had sufficiently proven this with the level of analysis that we would wish for it to rely on the point. We were also not

sufficiently persuaded by the assertion that in this case previous costs expended more than one year earlier should be taken into account for these purposes. However, we did find some weight in the argument that given the request lacked any serious purpose or value because the central issue had been explored, it was arguable that any further cost was probably unnecessary.

34. We do not find the Appellant's arguments compelling. He repeatedly makes unsubstantiated or exaggerated assertions about SBC's handling of the matter. In doing so, he appears to be referring to one incident where records SBC originally claim not to have had, they then discover. However, it appears these records were already taken into consideration by the Ombudsman, who in any event found in his favour. It is not clear what further public interest is served by what seem to by an unending flow of requests.

Question 2: Does the public interest in maintaining the exception outweigh the public interest in disclosure?

35. We consider the public interest in favour of disclosure would be that it would promote further transparency and accountability. However we do not place much weight on this within the context of this appeal.

36. We do not accept the Commissioner's argument that the issue of the piece of land only affected a small number of people. The Appellant and others may lose out in terms of the value of their property and enjoyment of the land as a result of it not having been transferred. However, this does not indicate a public interest in disclosing the requested information. This is because it will not alter this history. We accept the council's statement that the records do not show why the land was not transferred and accordingly disclosure will not enable an understanding about this. (We note the timing of the public interest to be considered cannot be that prior to the date of the request, as argued by the Appellant.)

37. We consider that the public interest in favour of maintaining the exception includes that further compliance after the Ombudsman has investigated the underlying concerns places a disproportionate and unreasonable burden on the council, who has to be accountable to all taxpayers for the way it uses its resources. There is a need to maintain the integrity of information rights legislation, and this includes ensuring it is not misused at the cost of others by responding to requests that are manifestly unreasonable. We place considerable weight on these interests and agree with the Commissioner's arguments set out above in sub-paragraphs 18(7)i-ii and 18(7)iv-18(7)ix above. We conclude that whilst taking into account the presumption in favour of disclosure required under regulation 12(2), in all the circumstances of the appeal, the public interests in maintaining the exemption strongly outweigh the public interest in disclosing the information.

Question 3: Whether the Legal Advice should be considered separately?

38. The Second Respondent made clear to us that part of the request concerning disclosure of legal advice would not be costly to the council to provide. Nevertheless, it believed that the exemption applied and that the council was not required to disclose this. SBC explained that this was a repeat request originally refused on the basis of a different exemption.

39. Our finding that the request is manifestly unreasonable is based on looking at it and the events in the round. It is not based on the cost of compliance, so we do not need to consider whether it is appropriate to dissect the request to see which parts would not be too costly to disclose. The repeated request for legal advice therefore does not need to be disclosed.

Conclusion

40. Essentially at its core, all parts of the Appellant's request revolve around the Appellant being unhappy that the land was not transferred to SBC. He refuses to accept the council's response to him that they cannot provide information as to why this was, since this was not recorded. He seems to seek to uncover something that will reveal a fault by the council in its on-going handling of his matter. However, it is unclear to us that this further request subsequent to the Ombudsman's findings serves any useful purpose.

41. Our decision is unanimous.

Other matters

42. We cannot over-state the importance of a public authority limiting its confidential submissions to those that are truly confidential. It is a basic principle of justice that the Appellant know what the other party's arguments are that he or she must grapple with. It is only by necessity that this principle may be compromised – where disclosing the arguments in open submission would undermine the purpose of an exception or exemption within the legislation. Wrongly stating matters as confidential will cause delay and costs to the public purse and sometimes to the other parties, when the Tribunal issues further directions to put the matter right.

43. The judge apologises for the delay in producing this decision. As the parties will know, this was due to unforeseen lengthy illness and she thanks all the parties for having kindly been so patient.

Claire Taylor **30 November 2011**

Tribunal Judge