



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

Appeal Reference: EA/2017/0038

**Heard at Birmingham
On 7th. August, 2017**

Before

Judge

David Farrer Q.C.

Tribunal Members

Jean Nelson

and

Henry Fitzhugh

Between

Terence Cartwright

Appellant

and

The Information Commissioner ("The ICO")

Respondent

Mr. Cartwright appeared in person

The ICO did not appear but made written submissions.

The Decision of the Tribunal

The Tribunal finds

- (i) that the requests numbered 4, and 5 at p.2 of the Decision Notice were manifestly unreasonable for the purpose of regulation 12(4)(b) of the Environmental Information Regulations, 2004.
- (ii) that request 6 was vexatious within FOIA s.14.
- (iii) that requests 2 and 3 were not manifestly unreasonable and East Hampshire District Council ("EHDC") is ordered to respond to them within 28 days of the publication of this decision.
- (iv) To the extent indicated in paragraph (iii) this appeal is allowed.

1. This appeal arises from the granting by EHDC of planning permission for two housing developments. Both aroused intense local concern.
2. The first, known as the Doone development, was granted by EHDC on 22nd. January, 2015. Its relevance to this appeal lies largely in the ill – feeling which the granting of permission caused, very shortly before the decision on the second application, within a large group of local residents, among whom Mr. Cartwright took a leading role. He had engaged in a great deal of correspondence with EHDC over these issues before either application was determined. He lives in Selborne, close to the Doone development.
3. The second application related to the South Alton Plan. Although Mr. Cartwright lives outside the relevant ward, this application had wider implications for neighbouring areas, including Selborne. The proposed

development was substantial and would probably generate a significant increase in local traffic. It attracted substantial opposition, both in respect of traffic and visual issues. A critical question was whether it would require the demolition of Butts Bridge, a valued local landmark, and its replacement by a wider bridge. The application proposed its replacement.

4. On 4th. February, 2015, the Planning Committee recommended that permission be granted.
5. The minutes of that meeting, which were helpfully set out, so far as material, in the ICO's Response to the Notice of Appeal, suggest some confusion or uncertainty among councillors as to a requirement by Hampshire County Council ("HCC"), the highway authority, for the replacement of Butts Bridge as a condition of any housing development. It is necessary to summarise the recorded strands of the argument in order to put requests 2 and 3 (see §14) in their proper context.
6. The District Valuer had submitted a Viability Report to EHDC in November, 2014. It was based on the understanding that, for the previous ten years or thereabouts, HCC had placed a moratorium on residential development in Alton until Butts Bridge had been widened, to improve traffic capacity and in the interests of safety. The application apparently proposed demolition and replacement of the bridge. Given the substantial increase in development costs, the District Valuer proposed a halving of the requirement for affordable housing within the development from 40% to 20%, a very significant modification of the "housing mix".
7. Councillor Maynard stated that the above assumption was wrong. The HCC transport manager had written in December, 2011 and again in December, 2014, denying that development of the relevant site was

conditional upon the replacement of Butts bridge. Its demolition could not be justified on that basis.

8. Councillor Branch referred to the Viability Report and argued that it was based on a false premise. The District Valuer, he said, was plainly unhappy with the conclusion that he had reached but could only act on what he was told.
9. The Development Manager and his colleagues states that access to Alton was a longstanding problem and that the bridge must be rebuilt if this site was to be developed.
10. Councillor Joy, whose ward includes Butts Bridge, referred to the great problems associated with the application, the doubts over the Viability Report, the visual impact of such a development, the reduction in the affordable housing requirement and the need for clarity over the assumptions underlying the Viability Report. He asked for a deferral of the decision until that and other uncertainties relating to the Neighbourhood Plan and a strategic transport infrastructure study had been resolved.
11. However, the recommendation for approval was carried by eight votes to two with three abstentions. That recommendation was approved by EHDC in July, 2015, following the Secretary of State's decision not to call in the application.
12. In the year following the Planning Committee meetings in January and February, 2015, there was an intensive email correspondence between Mr. Cartwright and various EHDC officers relating to the two decisions and how EHDC dealt with them. Mr. Cartwright's made emphatic complaints as to his treatment and the alleged shortcomings of EHDC. Those emails,

when copied in the agreed bundle, covered about 130 pages of A4. We deal with the content and character of these exchanges later in this decision.

13. Shortly before the requests which feature in this appeal, Mr. Cartwright was involved in an exchange of emails with Councillor Cowper, the leader of EHDC, on the subject of Butts Bridge, which resulted in a meeting on 7th. March, 2016. Mr. Cartwright asserted at the hearing, although, we find, his assertion was not directly supported by subsequent emails, that Councillor Cowper had admitted at that meeting that information as to the Butts Bridge issue, so far as it related to the South Alton decision, had been withheld by EHDC because of embarrassment at the way it had handled it. This was a significant factor, said Mr. Cartwright, in his decision to make some of the requests for information which we are required to assess

14. On 3rd. March, 11th. April, 28th.April and 10th. May, 2016, Mr. Cartwright made seven requests, which were, in summary form:

- (i) As to the Doone development, had there been a second application in relation to changes in the type of house? That question was answered in due course in the Refusal Notice on 28th. July, 1916.
- (ii) As to the South Alton application, he requested a copy of a posting on the EHDC website, which *"the (planning) committee might not have seen"* concerning the *"unease"* of the District Valuer, (*"who could only work on what he was told"*), over the *"methodology and conclusion"* of the report, which was referred to, in those italicized terms, by Councillor Branch at the planning meeting (see §8)

and

- (iii) copies of the District Valuer's report and of HCC's rebuttal of the statement that it had imposed conditions as to Butt's Bridge on any residential development. (These requests were repeated on 28th. April.)
- (iv) He requested the "yellow sheets" distributed to councillors before the planning meeting of 4th. February, 2015 and answers to the questions, whether to all councillors before the meeting and, if so, when and by what means. Yellow sheets provide updated information on material, such as agenda and reports, previously sent.
- (v) He asked for copies of two letters from HCC referred to at page 1 of the yellow sheets. This might imply that he had already seen the yellow sheets or their content.
- (vi) Following an indication by letter of 11th. April, 2016 that EHDC was treating his requests as vexatious, he requested a copy of its policy on vexatious requests. It seems that there was no written policy.
- (vii) He requested a copy of EHDC's written policy relating to FOIA. In its refusal notice EHDC directed him to a link on its website. That is a positive response to the request.

It is apparent that nothing really hinges on whether (vi) is vexatious. Nevertheless, that does not exclude it from assessment as to those characteristics nor, like (i) and (vii), from forming part of the overall picture of Mr. Cartwright's communications with EHDC.

15 As indicated, the Executive Director of EHDC responded on 11th. April, 2016, summarizing the correspondence of the previous twelve months,

stating that further requests would be treated as vexatious, advising Mr. Cartwright of his right to complain to the Local Government Ombudsman (which he did) and stating that EHDC had answered comprehensively every legitimate inquiry.

16. However, Mr. Cartwright continued his requests the same day, emphasising that requests (ii) and (iii) were made under FOIA. Thereafter he maintained a steady flow of complaints and criticisms until 29th. July, 2016, when the EHDC Governance and Information Manager wrote informing him that requests 2 – 6 were being treated as vexatious, answering (i) and providing a web link for (vii). She made clear that this decision took account of EHDC's dealings with Mr. Cartwright over a substantial period.
17. Mr. Cartwright complained to the ICO. EHDC had stated that no internal review was possible because so many of its officers had been involved in its confrontation with him.
18. The ICO's Decision Notice ("the DN") was issued on 16th. January, 2017. It upheld EHDC's decision in respect of all seven requests, even those which had been answered on 29th. July, 2016. It did not differentiate one from another to any significant degree but applied familiar tests in determining that (ii) – (v) were manifestly unreasonable (Environmental Information Regulations r. 12(4)(b)) and (vi) vexatious (FOIA s.14(1))
19. Mr. Cartwright appealed. His grounds of appeal are extensive and focus closely on the DN, which it criticizes paragraph by paragraph. Such an approach does not always identify clearly the central points in the case which the appellant advances and that is the case here. Those grounds were later supplemented by a detailed Reply to the ICO's Response, to which were attached a series of Appendices, which included correspondence with the EHDC leader and its solicitor. Further written submissions were

admitted at the hearing on a provisional basis; in the event, they contained nothing new of relevance which the ICO might wish to answer. Mr. Cartwright made further extensive oral submissions to the Tribunal, most, but not all of which repeated points made on paper. Besides that, the Tribunal had received an agreed bundle of documents, running to about 500 pages, which appeared to include every email that passed between Mr. Cartwright and EHDC over and beyond the relevant eighteen month period from January 2015 to August, 2016.

20. Mr. Cartwright 's case, in its material particulars was that:

- the issues that were raised by these requests were all of substantial public importance;
- the public interest would be served by the disclosure of every requested document ;
- no contrary interest outweighed that interest;
- the DN failed to apply the presumption in favour of disclosure, provided by regulation 12(2) of the EIR [2004];
- they had not been answered because of fundamental flaws in the governance of EHDC and the evasive inclinations of the members and officers with whom he dealt;
- his complaint had been determined on the basis of a (false) judgement that he was vexatious/ manifestly unreasonable , not his requests;
- past history and contacts had been wrongly taken into account, whereas the question was simply the character of the requests under consideration;
- the decision erroneously took account of an EHDC contention that he had made unfounded allegations of fraud against an EHDC officer.

21. It must be clear that the Tribunal is not concerned with the merits of the planning decisions or the alleged shortcomings in the ICO's investigation. Its task is simply to determine whether the ICO's decision was "in accordance

with the law", that is to say, produced the right result. It is not concerned with how she got there. It applies its own view of the law, which is rarely contentious, to the facts as it finds them, on evidence which may be different from that presented to the ICO.

- 22 The ICO's Response acknowledged an undue concentration in the DN on the Doone issues rather than South Alton. She provided a full written analysis of the case on requests (ii) – (v), applied to the evidence the principles derived from *Dransfield v Devon C.C. and ICO [2012] UKUT 440 (AAC) 16; [2015] EWCA 454* and concluded that the character, frequency and content of Mr. Cartwright's emails and the requests seen in the context of those emails was manifestly unreasonable.

23. The relevant law can be shortly summarized. The first question is whether requests (ii) – (vi) are subject to FOIA or the EIR [2004]. Information is "environmental information", hence subject to the EIR, if it falls within r. 2. R 2(b) includes information on "*. . . plans, programmes, . . .and activities affecting or likely to affect (the state of the land, soil, land, landscape and natural sites . . .)*". That plainly applies to requests (ii), (iii), (iv) and (v) (the material information on the yellow sheets relating to the second application and letters referred to therein). So, in relation to them, the question is whether, taken in overall context, they are manifestly unreasonable. Equally clearly, it does not cover request (vi). So the issue, under FOIA, is whether it is vexatious. Having said that, it is doubtful in this, as in many appeals, whether the result will depend on which jurisdiction applies.

24. Mr. Cartwright is, of course, entirely right in stating that, in the case of either test, it is applied to the request, not the requester. That is of considerable importance in this appeal.

- 25 A public authority must, as he states, apply a presumption in favour of disclosure (EIR r.12(2)). Even where it is manifestly unreasonable, it may

refuse to disclose it only if, additionally, it can show that *“in all the circumstances of the case, the public interest in (refusal) outweighs the public interest in disclosing the information”*. (r.12(1)(b))¹.

26 “Manifestly unreasonable” is not defined in the EIR but is closely akin to “vexatious”, given that disproportionality is a key feature of the latter term – see *Dransfield (CA)* at 453. Its characteristics include the volume and burden of requests in relation to the importance of the issue(s), the motive of the requester – for example, to cause delay or disruption, to increase workload for no good purpose, to irritate or frustrate. The frequent adoption of an aggressive manner designed to intimidate or cause distress and the creation of a sense that no answer will ever stem the flow or even cascade of demands are further common examples of the manifestly unreasonable request.

27 It follows from what appears above that, contrary to Mr. Cartwright’s submissions, requests should be viewed in the context of what occurred before and, sometimes, after they were made. Any other approach would have the absurd result that a public authority could never argue that an endless stream of requests was an unreasonable burden, providing that each, taken in isolation, could be answered without difficulty. Plainly, taken individually, none of the seven requests here required much effort to answer.

The reasons for our decision

28 We have no doubt that, viewed over the eighteen month period involved in this appeal, Mr. Cartwright’s correspondence with EHDC over the two planning applications was manifestly unreasonable and vexatious. More

¹ Bizarrely, though of no consequence here, the same provisions as to presumption of disclosure and public interest apply where, as, it seems, here in request (vi), the authority does not hold the information at all.

materially, we are sure that the same goes for the majority of FOIA requests (as he took them to be) that he made, including those not covered by this appeal, viewed against the background of offensive communications with which he bombarded EHDC. We have had the advantage of reading them, first in documents introduced by Mr. Cartwright, then, comprehensively, so far as we can see, in the two hundred and fifty pages of emails between Mr. Cartwright and EHDC submitted by EHDC and included in the agreed bundle.

29 The tone of Mr. Cartwright's correspondence is almost unwaveringly hostile, supercilious, hectoring or, still worse, intimidating. It must have consumed hundreds of hours of council time, including the time of senior staff and the council solicitor. Whether it included accusations of fraud or other defamatory material we do not propose to determine because the offensive style and the relentless pressure in respect of any minor point which he adjudged unanswered are more than sufficient to justify such an assessment. We have no doubt that any further appellate tribunal seised of this matter would can get to the nub of this appeal by simply reading the email evidence.

30 All the unanswered requests must be assessed by reference to the whole corpus of demands and criticisms.

31 As regards, (iv), (v) and (if unanswered) (vi), we consider them to be of very limited public interest. There is no evidence that the yellow sheets contained anything of significance to the issue of HCC's stance on South Alton or its presentation in the District Valuer's report. The same goes for the two letters referred to in those sheets. Their context suggests that these requests were made largely to keep up the pressure on EHDC, regardless of their intrinsic value. We should add that we have not seen either the sheets or the letters but conclude that Mr. Cartwright probably saw copies of the sheets at some

time, though the point is of little importance. As to the request for EHDC's written policy on the application of s.14 ((vi)), the same judgement applies, since any dispute as to whether the material request is vexatious will be determined by the ICO or, if appealed, the Tribunal. Had there been some evidence of a written s.14 code, created by EHDC, which appeared to flout the accepted interpretation of this provision, the position might be different. There is none, however.

32 There is a powerful public interest in protecting public authorities from wastage of time and resources on burdensome and fruitless inquiries. It firmly outweighs any such interest in disclosure of any of the requested documents. We have no hesitation in dismissing the appeal to the extent that it relates to (iv), (v) and, assuming that it was not answered, (vi).

33 However, we find that the position is different, when we confront requests (ii) and (iii). We bear well in mind the manner, described above, in which these requests were presented and pursued. Nonetheless, the intrinsic importance of the issues underlying these requests, whatever Mr. Cartwright's epistular style and motives, creates a public interest in their disclosure altogether more substantial than those so far considered.

34 It is clear that, as at February, 2015, HCC was not seeking to impose any embargo on development which failed to include the replacement, widening or other improvement of Butts Bridge. Yet the critical Viability Report from the District Valuer stated the converse, although, so it seems, with some reluctance or dismay. The affordable housing element in the development must be drastically reduced, in accordance with the report, on the premise that HCC's support required that Butts Bridge be demolished or radically altered. There was in existence, it seems, at the date of the meeting, a written contradiction of any such premise in the shape of a document from HCC but it was evidently not presented to the meeting. The minutes may convey

some sense of understandable confusion among councillors and there was reference to deferment for clarification. Yet the decision to recommend was taken. The motives of the majority who supported approval cannot be known. Whether they approved an application which included the replacement of Butts Bridge, only because they believed that HCC would not accept residential development on any other basis, is simply speculation. Yet this was a very sensitive and socially significant development. If the decision was taken on a materially false basis, that must be a matter of considerable public concern, even though, by the date of the request, the die was cast – permission had been granted and a s.106 agreement (for associated work to be paid for by the developer) had been signed.

35 We do not consider that the email correspondence between him and the council leader around March, 2016 provides substantial support for his claim that Councillor Cowper acknowledged that information was being suppressed to cover up EHDC embarrassment over the handling of the critical meeting. However, the first paragraph of his email to Councillor Cowper of 8th. March, 2016 (Agreed bundle p. 91), referring to the leader's "frankness" at the meeting the previous evening, is consistent with a concession of some kind as to the way that the application was handled. The most obvious point for concern was the possible (unintended) misleading of committee members on the issue of HCC's attitude to the development.

36 Taking account of all these matters, the Tribunal finds that, whilst disclosure of the three items of information requested might well fail to resolve entirely any doubts as to whether committee members voted under a misconception on a very important issue, they are all potentially relevant to an investigation of that issue, particularly the report itself.

37 We have already indicated (in §34) that this remains a matter of significant public interest. Despite the matters which point to the need to protect HCC

from an unending campaign of cross examination, we find that the public interest in disclosure of the information covered by requests (ii) and (iii) is not outweighed by such a need. To that extent this appeal is allowed. That means that EHDC must reply to these requests, stating whether it holds responsive information (which it clearly does) and providing it, subject to any appropriate EIR exceptions on which it can properly rely.

38 Lest it be thought by any party or interested person that this opens the door to a resumption of the kind of correspondence described in this decision, further EIR/FOIA requests on topics already covered in this lengthy saga or complaints to EHDC as to earlier requests, the Tribunal considers that EHDC would be entirely justified in invoking FOIA s.14 or EIR r. 12(4)(b), as the case may be, in respect of any further attempt to rake over any of these matters, even in terms more temperate and appropriate than those that featured all too frequently in the voluminous exchanges set before us.

39 For these reasons the Tribunal allows this appeal to the extent indicated

40 This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge,

6th. September, 2017