IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2018/0125/7**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice Nos: FER0704201 and 0711608
Dated: 1 June 2018

Appellant:	**Conor O'Luby**
Respondent:	**The Information Commissioner**

Heard at:	**Southampton Magistrates Court**
Date of Hearing:	**28 November 2018**

Before

HH Judge Shanks

and

Suzanne Cosgrave and Nigel Watson

Representation:

Appellant:	**In person**
Respondent:	**Did not appear**

Date of decision:	**8 January 2019**

Subject matter:

Environmental Information Regulations 2004 (EIR)

Regulation 9: advice and assistance

Regulation 12(4)(b): manifestly unreasonable request

Regulation 12(4)(c): request too general and compliance with regulation 9

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substituted decision notice.

SUBSTITUTED DECISION NOTICE

Public authority: **Bournemouth Borough Council**

Name of Complainant: **Conor O'Luby**

The Substituted Decision

The Public Authority did not deal with Mr O'Luby's requests for information made on 16 July 2017 and 14 August 2017 respectively in accordance with Parts 2 and 3 of EIR in that the requests were not "manifestly unreasonable" and the Public Authority was not therefore entitled to rely on regulation 12(4)(b) to refuse to disclose the information requested and, in relation to the request dated 16 July 2017, they also failed to comply with their obligation under regulation 9(1) to provide reasonable advice and assistance.

Steps to be taken

(1) In relation to the request dated 16 July 2017 no action is required.

(2) In relation to the request dated 14 August 2017, the Public Authority must disclose the information requested by 5 February 2019.

HH Judge Shanks

8 January 2019

REASONS FOR DECISION

Introduction

1. This appeal concerns two requests for information under EIR relating to a proposed development by Bournemouth Borough Council involving the construction of a new "grade separated" junction and link road from the A338 to Wessex Fields Business Park. The project is part of an investment programme designed to help improve the highways along the A338 corridor. The proposed development cuts across green belt and conservation area land and has environmental implications including (in its original form) the demolition of an ancient barn. It is clearly a controversial project: there is fear that it will destroy widely used public green space and increase traffic congestion and noise and air pollution.

2. The Appellant, Mr O'Luby, is the leader of a group called Friends of Riverside, which also includes other members of his family. The group has been in existence for some 30 years. It is strongly opposed to the project. Mr O'Luby is open in declaring that it is his intention to fight to delay and ultimately prevent the project to the best of his ability within the bounds of the law. He and other members of the group have made various requests for information over the period 17 March 2017 to 6 February 2018 which are set out in a document produced by the Council at pp159-162 of our bundle and which we describe below.

Background facts

3. The plans were first announced in September 2016. It seems that the Council Cabinet approved funding for preparation of a planning application for the project at a meeting on 9 November 2016 and that it was anticipated at that stage that the application would be made in the summer of 2017. The application would inevitably be made by the Council to itself as the planning authority; this is a significant feature of the case since it is well established that, for obvious reasons,

there is a special duty of openness and transparency on the part of a Council in relation to such planning applications.

4. There was a public meeting on 16 March 2017 at which the Leader of the Council, John Beesley, answered questions about the project. Following the meeting Mr O'Luby's mother made a request for information concerning land purchased by the Council in connection with the project. The request was answered on 13 April 2017. It was followed by a request made on 18 April 2017 for the documents relating to the purchase which was also met on 20 April 2017. On 22 May 2017 she asked for the documents prepared for the planning application for the project; the Council refused this request on 22 May 2017 on the basis that the information was still in the course of completion under regulation 12(4)(d) of EIR.

5. On 6 June 2017 Mr O'Luby requested correspondence between the Royal Bournemouth and Christchurch Hospital and the Council relating to the project. This request was met in part with part being refused under regulation 12(5)(e) of EIR on the grounds of commercial confidentiality.

6. On 13 June 2017 Mr O'Luby asked for clarification of the structure and remit of the Development Services Directorate. This request was answered on 11 July 2017. We agree with him that this request was not really in the nature of a request under EIR or the Freedom of Information Act. On 15 June 2017 there was a request for information made by Wendy Sharp who is chairman of a local parish council; although relied on by the Council earlier in the proceedings they now accept that this request is not connected to the Friends of Riverside group.

7. On 16 July 2017 Mr O'Luby made the first of the requests for information which is in contention in this appeal. We set out its precise terms below; in summary Mr O'Luby wanted sight of any internal correspondence from Council officers raising concerns about the project. On 9 August 2017 this request was refused on the basis that it was "manifestly unreasonable" under regulation 12(4)(b). On 1 August 2017 another member of the Friends of Riverside made a similar request;

Mr O'Luby accepted that he had asked his colleague to make this request; on 24 August 2017 it was also refused under regulation 12(4)(b).

8. On 14 August 2017 Mr O'Luby made the second of the requests in contention; it was for correspondence relating to the project passing between Cllrs Beesley and Mike Greene (the Cabinet Member with responsibility for environment, transport and waste and the A338-Wessex Fields project) on the one hand and Council officers in the Planning Department and members of the Planning Board on the other. That request was also refused on the basis that it was manifestly unreasonable and vexatious under regulation 12(4)(b) on 6 September 2017.

9. On 2 October 2017 Mr O'Luby made a request for notes of discussions which had taken place between the Council and DEFRA about roadside nitrogen dioxide concentrations. The Council's document at p162 records that this request was met; we accept Mr O'Luby's evidence that in fact the Council informed him that there was no note of the meeting available and that he subsequently sought and obtained a note of the meeting from DEFRA.

10. The original planning application was submitted on 15 December 2017.

11. On 6 February 2018 Mr O'Luby requested email correspondence passing between Council officers in the project team and those in the Planning Department within the preceding two months. Notwithstanding their stance in relation to the requests of 16 July and 14 August 2017 this request was met by the Council on 4 April 2018.

12. In March 2018 Sophie Edwards, a Senior Planning Officer who was case officer for the project wrote to the Programme Manager stating objections to the scheme. Mr O'Luby says that this letter was effectively "hidden" in the appendices to the impact assessment and only came to light some months later. He told us Ms Edwards resigned in the summer of 2018 and was replaced by an outside consultant called David Innes.

13. The planning application was withdrawn on 20 October 2018 and a similar revised application put forward the same day.

The requests for information and the Council's responses

14. The first request was made on 16 July 2017. Mr O'Luby asked for:

> **…any correspondence written by Council officers during the last 36 months which raise concerns in relation to the A338-Wessex Fields proposals. I am aware that a number of council officers raised serious concerns previously about the Wessex Fields road building projects. Please also provide me with any replies to any concerns raised.**

15. On 3 August 2017 the Council refused the request on the basis of regulation 12(4)(b) EIR because of the burden on the Council and because the unstructured and unindexed nature of the data in email accounts meant that the Council could not ensure that all the information would be captured by any search. It was said that that the request was vague and potentially covered 2,838 officers and that, even if the search was restricted to the seven officers most likely to have corresponded on the issue, to review all their emails over the period of three years would cost £543.75 per officer (a total of £3,806).

16. Mr O'Luby sought a review of this decision raising three points: (a) the search could be narrowed using "A338-Wessex Fields" as an identifier; (b) the fact that the Council was both applicant and decision-maker in relation to planning meant that the process should be fully open and transparent; and (c) the argument about unstructured data was tantamount to saying that any request for internal emails could be refused. The Council upheld the decision on 30 October 2017; the decision letter raised a new expense: it was said that email data more than three months old was stored off-site and that it would cost £2,775 to restore it.

17. The second request was made on 14 August 2017. It sought:

> **… all A338-Wessex Fields Link-related correspondence between Cllrs Mike Greene and John Beesley and (a) officers in the Planning Department and (b) members of the current Planning Board, for the period starting January 1st 2016 to the current date.**

18. The Council also refused this request on the basis of regulation 12(4)(b). It stated that it had taken account the history of Mr O'Luby's correspondence and similar requests by him and other members of the Friends of Riverside group relating to the A338-Wessex Fields proposal. It pointed out that the planning process was open and transparent and gave an opportunity to residents to comment. And it stated that the request would require a search of numerous email accounts which would involve an excessive diversion of resources involving a search of unstructured data.

19. Mr O'Luby requested an internal review of this refusal on 11 September 2017. It was not until 18 May 2018 (some months after the Commissioner had become involved) that the Council wrote to him upholding its position. It stated that the request was a blanket request which was fishing for information and that it would place a disproportionate burden on the Council and was designed to cause annoyance and was part of a campaign by the Friends of Riverside to disrupt the Council.

Commissioner's decisions and the appeals

20. Mr O'Luby complained to the Commissioner in relation to the first request on 4 October 2017 and in relation to the second request on 16 November 2017. The Council's Information Governance Officer, Leah Dover, provided a very substantial response to the complaints on 13 April 2018 (pp 132-203 in our bundle). The Commissioner's decisions were issued on 1 June 2018.

21. In relation to the first request she found that the Council had correctly applied regulation 12(4)(b) on the basis that the request was manifestly unreasonable due

to the significant burden imposed on the Council in terms of cost (para 46). In relation to the public interest balance she considered that the request was "insufficiently targeted to serve a defined public interest" (para 60) and that, taking account of the availability of information associated with the planning application in the normal course, the significant impact of complying with the request outweighed the public interest in compliance with the request. The Commissioner also decided that the Council had complied with regulation 9 of EIR (which requires it to provide reasonable advice and assistance to applicants) on the basis (it seems: the Commissioner did not expressly make this finding) that Mr O'Luby would have been able to refine the request himself to name specific officers but had chosen not to do so in order "to cause disruption to the Council" (see: paras 39-41 and 63).

22. In relation to the second request, she found that Mr O'Luby and other members of the campaign were "exhibiting a degree of tenaciousness and persistence in making their request, in an apparent attempt to find fault in decision making processes which the Council has taken" (para 38), that the second request may have involved an expansion of the first (para 41) and that compliance would place a disproportionate burden on the Council and its officers (para 44) and that it was "vexatious and manifestly unreasonable" (para 46). In relation to the public interest balance she found in effect that the burden of complying with the request outweighed the public interest in disclosure (see: paras 47-52). She found that the Council had breached regulation 11(4) in not providing its internal review until 18 May 2018.

23. Mr O'Luby appealed against both decisions. The Registrar directed that the two appeals should be dealt with together on 24 July 2018 and a hearing was later set for 28 November 2018. The Council did not seek to be joined to the appeal although Ms Dover's substantial response to the Commissioner was before us in the papers. The Commissioner elected not to attend the hearing. As a consequence we heard oral representations only from Mr O'Luby. He struck us as an honest witness and, notwithstanding the evident strength of his feelings

about the project, as someone who was approaching matters in a reasonable and measured way. We accept his evidence that, although his firm intention was to prevent the project going ahead if he could, he would use only lawful and proper means to do so.

24. On the appeal it is for the Tribunal to review the position in the light of all the material now before us and to decide whether the Council was entitled in 2017 to rely on regulation 12(4)(b) to refuse to disclose the information requested and whether it provided reasonable advice and assistance in relation to the first request as required by regulation 9. If the Council was not entitled to rely on regulation 12(4)(b) we must also consider what steps they should now take.

The relevant law

25. There is no issue that the information which Mr O'Luby was requesting was "environmental information" and that the relevant regime was therefore the EIR. The relevant provisions are as follows

> **5(1) Subject to … Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.**
>
> **…**
>
> **9(1) A public authority shall provide assistance, so far as it would be reasonable to expect the authority to do so, to applicants …**
>
> **(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall-**
>
> > **(a) ask the applicant as soon as possible … to provide more particulars in relation to the request; and**
> >
> > **(b) assist the applicant in providing those particulars.**
>
> **…**
>
> **12(1) Subject to paragraph (2) … a public authority may refuse to disclose environmental information requested if-**
>
> **(a) an exception to disclosure applies under paragraph (4) … and**

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

…

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

…

(b) the request for the information is manifestly unreasonable

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9 …

26. Thus, for a public authority to rely on regulation 12(4)(b) to refuse a request for information under EIR, the request must be "manifestly unreasonable" and the public interest in maintaining the exception must outweigh that in the disclosure of the information; and there is a presumption in favour of disclosure.

27. The scope of the exception provided by regulation 12(4)(b) was considered by the Court of Appeal in appeals from the Upper Tribunal in the familiar cases of *Dransfield v IC and Craven v IC* [2015] EWCA Civ 454. The Court was also considering the scope of the exemption under section 14 of the Freedom of Information Act 2000 relating to "vexatious" requests. In summary the law can be stated as follows:

    (1) Although the expressions "vexatious" and "manifestly unreasonable" differ, it is difficult to see how the result in any case where regulation 12(4)(b) was relied on would differ in practice from a case decided under section 14 unless the public interest requirement in regulation 12(1)(b) led to a different result (see para [78]);

    (2) "Vexatious" connotes a "manifestly unjustified, inappropriate or improper use of a formal procedure" (see para [19]);

    (3) In considering whether such misuse of the procedure is established in any case all the circumstances must be looked at (see para [18]).

(4) It is helpful to consider four broad themes: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to the staff) (see para [19]).

(5) The previous behaviour of the requester and the number, breadth and pattern of previous requests are likely to be relevant in considering whether a request is vexatious, particularly in relation to the theme of the burden on the public authority (see para [20] and [69]).

(6) In considering regulation 12(4)(b), the costs of compliance with the request can in principle be taken into account, so that the costs of complying with "an extremely burdensome request" could be the basis for concluding that a request was manifestly unreasonable, but again the exception could only be relied on if the public interest in maintaining it outweighed the public interest in disclosure of the requested information (see paras [83] and [29]).

Conclusions on regulation 12(4)(b)

The history of requests

28. We have considered the history of requests by members of the Friends of Riverside group set out under the heading "Background Facts" above. We do not think that this history in itself gives rise to any inference that the requests in issue were vexatious or manifestly unreasonable. The requests relied on by the Council before 16 July 2017 (in effect four in four months) are all sensible, timely and focussed and do not appear to have involved any difficulty for the Council. The request of 1 August 2017 was perhaps excessive in view of the outstanding request of 16 July 2017 but does not appear to have caused any further work in practice and the next request on 14 August 2017 was different in kind (relating as it did specifically to Cllrs Greene and Beesley). It is also significant that the Council appears to have dealt with two further requests (2 October 2017 and 6 February 2018) without any difficulty or suggestion that it was vexatious of Mr O'Luby to continue to make requests for information under EIR.

29. If the Commissioner intended to suggest at para 38 of her decision notice in relation to the second request for information (when referring to "the tenaciousness and persistence" of the group in making requests) that the history did give rise to such an inference we would therefore disagree with her.

The first request

30. The main point relied on by the Council in relation to this request was the cost of compliance but before the Commissioner it was also suggested that Mr O'Luby had put forward his request in the way that he did in order to "cause disruption to the [Council]". We consider these points in the context of the "four themes" referred to in the *Dransfield* case.

31. ***Burden and cost of compliance***. The Commissioner accepted the figures relied on by the Council and we have no basis for doubting them as figures. However, we do not consider that it was open to the Council to rely on the cost (£2,775) of retrieving email data going back more than three months in this context: this extra cost apparently results from the fact that the Council has changed its email systems three times in three years and chosen to retain the data in a certain way as described by Ms Dover at p134. As for the cost of searching the mail boxes of each of the seven most relevant Council officers (£543.75 each), we do not understand why it would not have been open to the Council to apply the "A338-Wessex Fields" identifier as suggested by Mr O'Luby, rather than looking at every single email in detail. The relevant costs of compliance were therefore substantially lower than those relied on by the Council.

32. Furthermore, the Council accepted that they did not provide advice and assistance in relation to this request (see para 3 at p135 and also comment towards the bottom of p138 ("… we should have provided the applicant with advice and assistance …")). It seems to us that the correct approach to a request like this (which Mr O'Luby accepts was "formulated in too general a manner") was to engage with him constructively to find a way to refine the request so that he

could obtain the information he was seeking and, if that did not help, to rely on regulation 12(4)(c), which we have set out above. If the Council had adopted that approach we are satisfied Mr O'Luby would have reduced the three year period asked for and that there may have been other ways in which (notwithstanding his inability to provide names: see below) the request could have been refined if there had been a dialogue, such as confining the search to emails received by the Project Manager or her deputy bearing the A338-Wessex Fields identifier.

33. ***Motive for and value of request*** Mr O'Luby told us, as stated in his written representations put in before the hearing (on the eleventh page; unfortunately they are unpaginated), that the background to this request was that he was informed by someone that there were internal objections to the project by Council officers and his informant suggested that he make an information request formulated in the way it was; he was not told the names of any officers and was not at liberty to disclose the identity of his informant. We accept his evidence about this and we accept that his motive in making the request was to discover whether there were indeed such objections in order to assist in his campaign of opposition to the project.

34. We consider that in light of the controversial nature of the project and the fact that the Council was in the position of applying to itself for planning permission, this was a proper motive for making the request he did and we reject the suggestion that it was simply designed to cause disruption to the Council. In light of the objections to the project by Ms Edwards and her subsequent resignation which he also told us about (referred to on the seventh page of the written representations) the request may have had considerable value in practice, although it is obviously impossible for us to reach a firm view on that.

35. ***Harrassment and distress*** There is no suggestion that any Council officer has been caused harassment or distress by the requests and our perception was that Mr O'Luby's approach was, as we say, measured and reasonable.

36. Taking account of all the circumstances and in particular those set out in paras 30 to 35 above we do not consider that the first request in issue can properly be

described as vexatious or manifestly unreasonable, whether on grounds of costs of compliance or more generally, and we disagree with the Commissioner's view on this issue.

The second request

37. We have set out the basis for the conclusion of the Council and the Commissioner that this request was manifestly unreasonable at paras 18, 19 and 22 above.

38. ***Burden and cost of compliance*** The Council did not expressly rely on the cost of compliance in relation to this request, although Ms Dover states at p138 that they could have. Although the request covers an 18 month period and there are 11 councillors on the Planning Board and 40 officers in the Planning Department we consider that the focus on correspondence only with the two named councillors and on the topic A338-Wessex Fields would mean that the process of searching for material answering the request would not have been particularly expensive or difficult.

39. ***Motive for and value of request*** Mr O'Luby explained to us that the two named councillors are the leading proponents of the project and that he suspects that they may be exerting undue pressure on fellow councillors and officers in relation to the planning application and that the purpose of the request was to expose this if it was the case. He suggests that there is some basis for his suspicions. Ten of the 11 members of the planning board are in the same political party as the two councillors. In relation to Cllr Beesley it appears that an unrelated complaint of improper interference in the planning process was made against him in 2017 which was the subject of a police investigation at the relevant time (we are told it has since been dropped but that an internal investigation was to take place). In relation to Cllr Greene, Mr O'Luby points out that he has responsibility for the project but is not on the Planning Board but made a statement at a meeting of the Environment and Transport Overview and Scrutiny Panel on 13 July 2017 suggesting that he was in a position to defeat "the tiny minority" opposed to the project (see p72 of our bundle).

40. Having heard from Mr O'Luby in person we accept that his motive for the second request was as described and that it may have had some real value. It follows that we reject the Council's case that the purpose of the request was simply a "fishing exercise" and designed to cause disruption to the Council. We also reject the suggestion that it was just a response to the Council's rejection of the first request on the basis of regulation 12(4)(b) a few days earlier and the Commissioner's suggestion at para 41 of her decision notice at p64 that it was an expansion of the first request: although both requests were for internal Council communications relating to the project they had a quite different focus and background.

41. We have also taken account of the points made by Ms Dover at p136 in this context. Mr O'Luby accepts that he is against the project and will use any lawful means to oppose it. His complaint to the Local Government Ombudsman relating to the exclusion of the public and press from part of the Cabinet meeting on 9 November 2016 may be a valid one and does not in our view bear on the requests for information we are considering. His implied statement at a meeting on 12 February 2018 that he was seeking to delay the planning process, including by judicial review, to the point where funding was no longer available does not undermine our view that his motive in making the second request was to expose possible undue pressure from the named councillors in relation to the planning process and that there was potential value in the request.

42. ***Harassment and distress*** Again, there is no suggestion that officers have been harassed or caused distress.

43. Taking account of all the circumstances and in particular those at paras 37 to 42 we also reject the notion that the second request was vexatious or manifestly unreasonable.

The public interest balance

44. Since we have concluded that the requests were not manifestly unreasonable, strictly speaking the public interest balance does not arise but we have nevertheless gone on to consider this issue.

45. ***The public interest in maintaining the exception*** It is clear that the Council would have been put to some considerable trouble and expense if it had complied with the requests and/or provided the advice and assistance required by regulation 9 in relation to the first request, although as we have indicated we do not accept that it was as great as they maintain. There is no indication that compliance would involve any harassment or distress to officers.

46. The Council make a point in relation to the public interest that they are obliged to provide accurate information under EIR and that the nature of the requests (the first in particular) and the data they will be searching means that there is a danger that not "all the information would be captured" (see p136). We do not consider this to be a compelling point: the fact that the Council cannot guarantee to provide all the information coming within a request cannot be an argument for deciding that it would be better if they supplied none at all.

47. ***The public interest in disclosure*** The Council accept that there is a general public interest in accountability and transparency in respect of development matters, particularly in relation to developments of the size and impact of the A338-Wessex Fields link (see the response to the Commissioner at page 135 of the bundle). That public interest is a weighty one and Mr O'Luby is correct to point out that that is especially so where the developer and the decision maker are both the Council. We are not sure that the Council or the Commissioner paid sufficient regard to this additional feature.

48. The Council point out that the planning process itself is open and transparent and allows objectors to make their case and that there is a wealth of material in the public domain resulting from it. That is a highly relevant consideration but it is of little relevance in this case because, as we have found, the purpose of the requests was to expose matters which would not necessarily emerge in the formal

planning process but which, if true, it would be very much in the public interest to have in the open.

49. Balancing the competing public interests and in particular the factors we have identified above, we are satisfied that the public interest in disclosure of the requested information outweighed that in maintaining the exception in relation to both requests. The Council would not therefore have been entitled to rely on regulation 12(4)(b) even if the requests had been "manifestly unreasonable".

Disposal

50. Having had the benefit of hearing direct from Mr O'Luby (which in fairness the Commissioner did not), we have therefore reached the view that she was wrong in her conclusions on the applicability of regulation 12(4)(b) and we therefore allow the appeal in that respect. As we have indicated the Council appears to accept (rightly in our view) that they did not comply with regulation 9 in relation to the first request and we allow the appeal on this issue too.

51. Having allowed the appeals we must consider what steps are to be taken by the Council. In relation to the second request we see no objection to directing that the information is supplied as requested within a suitable period, which we consider to be four weeks from this decision. In relation to the first request, as we have indicated, Mr O'Luby himself accepted that it was too broad. It is not clear in such circumstances that the Tribunal has the means to require its enforcement and we have concluded that the best course is not to require any further action at this stage. We do not think that this prejudices Mr O'Luby's position in practice: things have moved on and it will now be open to him if he sees fit to make a more informed and focussed request on the same theme which will be more helpful to him than trying to resurrect the existing request.

52. Our decision is unanimous.

HH Judge Shanks

Date: 8 January 2019