



Neutral citation number: [2022] UKFTT 523 (GRC)

Case Reference: EA/2023/0065

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights Decision Notice IC-191314-R0K4**

**Heard: on the papers**

**Heard on: 24 August 2023**

**Decision given on: 07 September 2023**

**Before**

**TRIBUNAL JUDGE HUGHES  
TRIBUNAL MEMBER GRIMLEY-EVANS  
TRIBUNAL MEMBER COOK**

**Between**

**JONATHAN ARMSTRONG**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Decision:** The appeal is Dismissed

## **REASONS**

1. This appeal has arisen out of a planning application for the construction of an agricultural building which has rapidly become a small distillery. On 18 August 2022 the Appellant sought information about the process from Ashford Borough Council ("The Council"):-

*Freedom of Information Act Request*

*Under the Freedom of Information Act 2000, please provide me with the following relating to Planning Application reference 21/01862/AS in whatever format (including e-mails):-*

- *Copies of all correspondence between (a) Ashford Borough Council, including (without limitation) its planning officers (b) Jessel Farms Limited and (c) Wineburner LLP (together*

*with their respective agents, consultants and advisers) relating to Application reference 21/01862/AS.*

- Copies of meeting minutes of all Ashford Borough Council (ABC) planning case review meetings (including, without limitation, the “high level” case review meeting referred by the ABC planning officer, Karen Fosset, during the Planning Committee meeting on 17th August 2022).*
- Copies of all legal advice between from the ABC in-house legal team (and/or its external advisers) including (without limitation) advice on the opinions of Rural Planning Ltd and the AONB unit.*
- Copies of all internal and external correspondence concerning the L Brown Associates transport report dated December 2021, including all correspondence between ABC planning team and Kent Highways.*
- Copies of all correspondence between ABC planning team (including Karen Fosset) and Planning Committee members.*
- Copies of all internal and external correspondence relating to residents comments on the planning officer report submitted by Jonathan Armstrong to member services at Ashford Borough Council and Margaret Hill of Ashford Borough Council on or around 10.55am on Monday 15th August 2022.*

*Separately, please also provide details of ABC’s compliance programme and details of related internal and external training of staff undertaken during the past 24 months.*

*I understand that under the Act I am entitled to a response within 20 working days of your receipt of this request. If some parts of the request are easier to answer than others, please release information as soon as possible.*

*If any part of my request is denied, please justify any omissions by reference to the specific exemptions of the Act. You are required to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees. I would prefer to receive the information electronically to [email address].*

*If you require any clarification, I expect you to contact me under your section 16 duty to provide advice and assistance if you find any aspect of this FOI Act request problematic.*

*Please acknowledge receipt of this request, and I look forward to receiving the information in the near future.*

2. While the Appellant identified the Freedom of Information Act 2000 as the legal basis for his entitlement to the information; there is a separate legal regime for information relating to the environment (with broadly similar provisions) and the Council responded on the basis that the appropriate regime was that of the Environmental Information Regulations 2004 (UKSI 2004 No. 3391). These provide a right for individuals to access environmental information held by public bodies, makes provision for assistance in making a request and also provide for exemptions to that right:

*Advice and assistance*

*9. – (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*

*Exceptions to the duty to disclose environmental information*

12. – (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and  
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

(a) it does not hold that information when an applicant's request is received;

(b) the request for 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;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

3. The Council's reply on 25 August 2022 refused to provide the information relying on the manifestly unreasonable exemption (regulation 12(4)(b)) on the grounds of costs and diversion of resources. It indicated that simply to search for the information would exceed the cost limit of £450 (representing a notional 18 hours searching). It considered the balance of public interest between disclosing and withholding the information and stated that much information was already available:-

*Our planning process is as transparent as possible with details of the reasoning behind decisions explained in detail in the respective decision notices and/or officer's report, this includes summary information of all representations and assessment against appropriate planning policy. This is available on our planning portal against the respective application. In addition, for this case, I understand it was on the Planning Committee agenda recently and debated at some length. The minutes to which, if not already available, on the council's webpages will be in due course.*

*To conduct searches on the scale you have requested, would be complex, time consuming and take officers away from normal duties.*

*Our decision is that it is not in the public interest to place additional burden on the organisation, for a matter where the reason for any planning decision is already within the public domain.*

4. It provided guidance to assist him in refining his request:

**You may wish to reduce the scope of your request bringing it within an answerable scope, perhaps by identifying specific items associated to the application, that are not already in the public domain, that you wish to have visibility of.**

[emphasis in the original Council letter]

5. It also drew his attention to exemptions which might apply to a smaller scale request, being the exemption under regulation 12(4)(e) for internal communications and the exemption under 12(5)(b) for legal proceedings.
6. The Appellant sought an internal review of the decision. He argued that the Council had not properly considered the public interest and there were "serious concerns" about the transparency of the process. He claimed that the 18 hours figure was grossly inflated and criticised the Council for not following his instruction:

*My request for information was very clear, focused and commensurate. I also asked that "If some parts of the request are easier to answer than others, please release information as soon as possible." Nevertheless, you have decided to disclose no information whatsoever.*

7. The internal review of 18 September 2022 re-affirmed the position the Council had taken in responding to the original request and explained:-

*Unfortunately it is not for the information team to decide what to omit from an information request in order to bring a request within an answerable scope. To this end, as with your B120 request, where it is deemed that to answer a request in its entirety would go beyond the cost/time threshold deemed reasonable, requests are refused with the option provided to the requester to reduce their requests bringing them into an answerable scope.*

8. The Appellant complained to the Information Commissioner ("IC") who investigated and issued a decision notice on 18 January 2023.
9. The IC reviewed the process the Council had gone through (DN 8-13) noting the calculation that the Council had found 1070 emails with the appropriate planning reference number, and that its experience was that it took 2 minutes to look at each

email, therefore requiring an exercise exceeding 18 hours to review the material identified looking only at the first stage of the request. It was considered likely that part seven of the request (relating to training) would also be time consuming. The IC evaluated the council's submissions (DN 15-28); finding that a large amount of information was within scope, cutting down consideration of emails to one minute per e-mail which would still take approximately 18 hours, the training request would be a separate exercise and from a consideration of the wording would consider the whole of the Council's staff which would require further time. The Council was a small body and the request would require considerable resources. The IC was sceptical of the value of the request given the substantial material already publicly available and recognised that even if the request were not manifestly unreasonable, there was a strong likelihood that the Council would rely on regulation 12(5)(b) of the EIR to withhold some information – specifically legal advice and that where such information was being considered, *“The public interest is only likely to favour disclosure of such information in rare circumstances – which don't appear to exist here.”* The IC accordingly concluded that the request was manifestly unreasonable.

10. In weighing the public interest (DN 26-30) the IC acknowledged that planning applications caused friction between neighbours, however in a rural area these would be few, that there was a strong public interest in protecting the Council's resources and the public interest was met by the information already available. He concluded:-

*Dealing with the request would not advance that interest significantly and therefore the public interest favours maintaining the exception.*

11. The IC, in reviewing the handling of the application criticised the Council arguing that more useful advice and assistance could be given than the paragraph highlighted in bold (paragraph 4 above). The rationale for this conclusion was:-

*“33. Whilst a public authority is not required to lavish ingenuity on thinking up ways in which a request can be refined, it should at least give a requester some indication of how the request could be refined or the parts which would or would not be particularly burdensome. Simply telling a requester that they should try requesting less information is not providing advice and assistance.*

*34. The public authority has rightly pointed out that it is not obliged to comply with the less burdensome elements if the request as a whole is manifestly unreasonable. However, one way of fulfilling its advice and assistance obligations would have been to simply identify which elements it could have dealt with. This would have given the complainant the opportunity to restrict his request to only those elements or to have added additional parameters to the burdensome elements to limit the burden they would impose.*

*35. The public authority must now provide advice and assistance to the complainant to help him refine his request such that it no longer imposes a manifestly unreasonable burden.”*

12. In his notice of appeal the Appellant focused on the balance of public interest which he argued lay in favour of disclosure of the information request. He provided information about the planning process on this occasion, suggesting that the

planning advice to the Planning Committee had been incorrect and had not properly considered whether the building could have been removed as it had not been used for agricultural purposes for 10 years. He argued that the planning process had been used in bad faith, that 53 people had objected to the grant of permission and only those connected with the application had supported it. He concluded:-

*"The EIR/FOI application was to obtain information about the decision making process which led the Planning Officer to overrule their own adviser. In no way was the request manifestly unreasonable.*

*In my request, I explained to ABC that "If some parts of the request are easier to answer than others, please release information as soon as possible. If any part of my request is denied, please justify any omissions by reference to the specific exemptions of the Act. You are required to release all non-exempt material."*

*Some five months after the application, and as at the date of this appeal, ABC have still failed to disclose a single document to me. I believe this is a deliberate attempt by ABC to avoid proper scrutiny."*

13. The IC in responding to the appeal relied on and expanded the arguments set out in the decision notice:

*"In the Commissioner's submission the Appellants arguments in his grounds of appeal are insufficient to alter the Commissioner's findings. The DN correctly addresses the issues which were present at the time of the original request and has no further submissions"*

## **Consideration**

14. The Appellant in making his request formulated it very broadly, covering all emails between the Council and the planning applicants and their agents, all Council meeting records, all legal advice (including with external consultees), all transport advice, all communications between Planning Committee members and staff, all communications and comments concerning residents' comments on the planning report as well as extensive training records. He has sought to have disclosed extensive records; with some ingenuity attempting to net everything which might have a bearing on a planning decision about which he is concerned. While he is critical of the process and the outcome he has not demonstrated that it is of substantial public interest; as the ICO correctly identified there is a substantial burden involved for the Council, relatively little public engagement and a substantial amount of material already in the public domain. The tribunal is satisfied that the ICO's characterisation of the request as manifestly unreasonable is correct and the appeal is dismissed.
15. The tribunal notes the criticism made of the Council's approach to advice but considers that the response of 25 August 2022 is entirely appropriate by suggesting that the Appellant focuses in specific areas of concern which he feels are not in the public domain and by warning him of the exemptions which might apply within a smaller scale request. He had already specifically identified a number of discrete areas (although many may have overlapped) in his design of the information request.

He was not a naïve requester and was entirely capable himself of formulating a more focussed request or prioritising for himself.

Signed C Hughes

Date: 28 August 2023