Neutral citation number: [2025] UKFTT 129 (GRC)

Case Reference: FT/EA/2024/0387

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing

Decision given on: 12 February 2025

Before

JUDGE HAZEL OLIVER
MEMBER MARION SAUNDERS
MEMBER STEPHEN SHAW

Between

COLIN BUTTERWORTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 17 September 2024 (IC-323500-L4Z2, the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about a proposed desalination plant requested from Cornwall County Council (the "Council").

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 15 April 2024, the Appellant wrote to the Council and requested the following information ("Request 1"):

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"Will you under EIR please supply me with the information that Cornwall County Council has towards this desalination project."

4. On 16 April 2024, the Appellant wrote to the Council and requested the following information ("Request 2"):

"Will you under EIR please provide all environmental assessments that have been carried out on the project."

5. The Council responded to Request 1 on 13 May 2024 and refused the request under regulation 12(4)(b) EIR (manifestly unreasonable) as the estimate for providing a response was in excess of 160 hours. The Council said it may be able to assist with the request if the Appellant was willing to narrow the terms of the search by time period, additional keywords to search, or specific documents/information. The Council responded to Request 2 on 16 May 2024 and stated that it did not hold the requested information.

6. The Appellant requested an internal review, and the Council maintained its position in relation to both requests.

7. The Appellant complained to the Commissioner on 27 July 2024. The Commissioner decided:

a. In relation to the information on the desalination plant (Request 1), the Council was entitled to rely on regulation 12(4)(b) to refuse the request on cost grounds and it complied with its duty to provide advice and assistance under regulation 9. Based on the Council's estimate of 163 hours, the Commissioner was satisfied that responding to the request would clearly exceed the 18-hour limit set by section 12 of the Freedom of Information Act 2000 ("FOIA"), and the balance of the public interest favours the exception being maintained.
b. In relation to the request for environmental assessments (Request 2), the Council correctly confirmed that the information was not held and regulation 12(4)(a) applies.

The Appeal and Responses

8. The Appellant appealed on 30 September 2024. His grounds of appeal can be summarised as:

a. The main reason for not complying is cost, but open honest government is not the area that should be sacrificed. The Council was happy to have 3,000 emails on the issue with a water company and these need to be disclosed so the public can accurately make an informed decision during the upcoming consultation.
b. EIR requests are not subject to the same costs limits as FOIA requests, doubly so when emissions are involved.
c. The request for information came from participation in a public consultation, where concerns were ignored, and the power, wealth and access of the water company had an overbearing effect.
d. The Appellant was involved in public consultation on the Local Area Energy Plan, and he says that this "*has utterly shaken my belief that a open and unbiased*

consultation can be had, without the "backstory" and any predetermined being fully disclosed".

e. Water companies have a geographical monopoly, and desalination is a poor idea due to being energy intensive and costs being passed on to the people of Cornwall.

f. He has major concerns about the effect of the proposal on nature and the environment, desalination is one of the most energy intensive and polluting methods of producing water, and desalination is not appropriate for Cornwall.

g. Being given the opportunity to narrow the request is not reasonable, and the Council should know what it has so reducing timescale doesn't make sense.

9. The Commissioner's response maintains that the Decision Notice was correct. Given the amount of emails located by the Council, along with the potential further documents and notes that may be in scope, the Commissioner remains satisfied that there is a manifestly unreasonable burden being placed on the Council to comply with Request 1. The Commissioner also maintains that, given the burden of the request, the public interest favours maintaining the exception. The Commissioner says that the Appellant has not challenged the findings on Request 2 that the information was not held, and in any case the searches by the Council were sufficiently rigorous.

Applicable law

10. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) …"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

……

5(1) …a public authority that holds environmental information shall make it available on request.

……

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.

12(2) A public authority shall apply a presumption in favour of disclosure.

……

12(4) …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;

11. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

12. There is no further guidance on the meaning of "manifestly unreasonable" in the EIR. This can apply where the cost or burden of dealing with a request is too great. As confirmed by the Upper Tribunal in ***Craven v The Information Commissioner and the Department of Energy and Climate Change*** [2012] UKUT442 (AAC): *"Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable."* (paragraph 25).

13. Section 12 FOIA and the related fees regulations contain specific provisions on the costs limit for complying with a request, which is 18 hours of work for public authorities which are not part of central government. These limits do not apply to requests under EIR, but can be used as a starting point in deciding on the reasonable allocation of resources by a public authority.

14. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with regulation 12(4), the information is that held at the time the request is received.

15. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed*". This decision was cited by the Upper Tribunal in ***Andrew Preston v Information Commissioner & Chief Constable of West Yorkshire Police*** [2022] UKUT 344, which also confirmed the principle that the First-

Tier Tribunal has consistently applied the balance of probabilities when approaching this question.

Issues and evidence

16. The issues are:

    a. Was the Council entitled to refuse Request 1 under Regulation 12(4)(b)?
        i. Is Request 1 manifestly unreasonable due to the cost of compliance?
        ii. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
    b. Did the Council not hold the information requested in Request 2 at the time this request was made?

17. By way of evidence and submissions we had the following:

    a. An agreed final bundle of open documents with 421 pages.
    b. Some additional spreadsheets from the Appellant showing details of water company compliance and fines for pollution, and a renewable energy planning database.
    c. An audio recording from the Appellant, lasting 1 hour 16 minutes.

18. The Tribunal has not listened to the audio recording in its entirety. The audio relates to a conversation between the Appellant and a third party on a different topic from the issue that the Request is about. The Appellant provided this recording as evidence that public consultations are not of any value, and we discuss this point further below.

Discussion and Conclusions

19. ***Was the Council entitled to refuse Request 1 under Regulation 12(4)(b)?*** We have considered this in two parts – whether this exception is engaged due to the cost of compliance, and whether the public interest nevertheless favours disclosure.

20. ***Is Request 1 manifestly unreasonable due to the cost of compliance?*** The Council provided information to the Commissioner about its searches for the requested information. The Council says that a search for emails took one hour and identified 3,274 emails. Based on a sampling exercise, the Council determined that it would take three minutes per email to determine whether it was within scope, extract and then redact information. This would take a total of 163 hours. This did not include additional documentation within scope, such as documents and notes. The Commissioner was satisfied that this was a reasonable estimate.

21. The Commissioner remains satisfied that this would place a manifestly unreasonable burden on the Council. We have considered whether the estimate of time given by the Council is reasonable. We note that the Appellant has asked for <u>all</u> information held on the desalination project. The Council explained to the Appellant in its response to Request 1 that the date range searched was 1 January 1990 to 12 April 2024. The keywords searched were ‘desalination’ and ‘St Austell Bay’, and we agree that these were appropriate for locating the requested information. The Tribunal is not satisfied that it would necessarily take three minutes to consider every one of the 3,275 emails. However, even if this reduced to one minute per email on average (which is likely to be an under-estimate), this would still take 54 hours – which is three times the 18 hour limit set by FOIA. We also accept that the Council would then need to search

for and review all other held information such as documents and notes, which would add significantly to the time and cost involved.

22. The Appellant has not challenged the Council's time estimate, but he makes the point that open and honest government should not be sacrificed to cost. We agree that this level of work by a public authority would not always be manifestly unreasonable, as the strict cost limit in FOIA does not apply to an EIR request. However, in this case we find that Request 1 is manifestly unreasonable due to the cost of compliance. Dealing with emails alone is likely to take between 54 and 163 hours. It is very likely that considerable additional work would also be needed to deal with other documents and records. The 18 hour limit in FOIA gives an indication of what level of work Parliament regards as reasonable. More work than this can often be expected in EIR cases, particularly due to the importance of environmental issues and the presumption of disclosure. However, there comes a point where this becomes manifestly unreasonable. The level of work in this case would be a very significant diversion of the Council's resources from delivering its services, at a time when public services are under considerable pressure. The Appellant was given the option of narrowing the scope Request 1 in order to reduce the burden on the Council, but has chosen not to do so. In all the circumstances, we therefore find that this exception is engaged.

23. ***If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?*** The Appellant has put forward arguments and supporting evidence which show there is a clear public interest in disclosing the information. Desalination in the UK is a controversial topic, due to the direct effect on the marine environment, and due to the wider environmental effects of energy usage and pollution. The Appellant has provided background information about the scale of pollution incidents by water companies. The public have a strong interest in understanding the Council's involvement with a desalination project, so that it can be held to account and its decisions can be scrutinised.

24. The key issue is whether this undoubtedly strong public interest in disclosure is outweighed by the public interest in maintaining the exception. Diversion of the Council's resources in order to respond to a manifestly unreasonable request is clearly not in the public interest. We have found that there would be a disproportionate diversion of the Council's resources from its other work.

25. We have considered whether there are other options open to the Appellant which would go some way towards satisfying the public interest in disclosure, without involving such a high burden on the Council. The most obvious option is to reduce the scope of the Request to focus on more specific information. The Council did suggest this to the Appellant, but he says that this is not reasonable. We disagree. The Appellant had simply asked for all information held without limiting this in any way in terms of time, keywords, or specific types of information. A narrower request could focus on the type of information that is of most interest to the public. The Appellant says that narrowing the timescale does not make sense because the Council should know what it has, but we consider that this would (for example) enable a requester to focus on the most recent events that are relevant to whatever specific desalination project is currently under discussion. A refusal Request 1 because of cost does not prevent the public interest from being served by a more focussed request. This would not divert the Council's resources to the same extent, while still providing valuable transparency to the public.

26. The Commissioner also took into account the fact that the proposed desalination plant is subject to public consultation, and to public scrutiny through the planning application process.

The Appellant says that, during public consultation, concerns were ignored and the power, wealth and access of the water company had an overbearing effect. He also says that public consultation on the Local Area Energy Plan was not open and unbiased.

27. The Appellant has provided considerable amounts of information relating to a different public consultation on electric vehicle technology, in support of his argument that public consultations do not actually provide citizens of the country with any protection. This includes the audio recording of a conversation between the Appellant and a representative from the Advanced Propulsion Centre, relating to his own technology proposal/application. He says this recording supports his arguments that the government is pushing electric vehicles in public consultations and an internal policy is biased against other fuel types. We have not considered these additional documents and the audio recording in detail. They do not relate to the desalination plant. It is unclear how the arguments about electric vehicle consultations are directly relevant to the issue we have to decide.

28. In any event, even if we accept the Appellant's argument that all public consultations are flawed and ineffective, the public interest in disclosure is still outweighed by the public interest in not requiring the Council to respond to a manifestly unreasonable request. There will be a planning process which involves further public scrutiny. Most importantly, as already explained, a more focussed request could be used to obtain specific information and hold the Council to account outside any public consultation process.

29. We therefore find that the public interest in maintaining the exception does outweigh the public interest in disclosing the information.

30. ***Did the Council not hold the information requested in Request 2 at the time this request was made?*** This has not been challenged by the Appellant in his appeal, so we can deal with the point briefly. The Council explained to the Commissioner how they searched for this information by contacting multiple officers in the planning service. This is where environmental assessments are most likely to be held, as they are completed as part of a planning process. Searches included laptops, emails, SharePoint areas and case recording systems. We agree with the Commissioner's finding that this was a reasonable search and, on the balance of probabilities, the Council did not hold the requested information.

31. We dismiss the appeal for the reasons explained above.

Signed: Judge Hazel Oliver **Date:** 6 February 2025