



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2019/0251**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice Nos: FS50764077**

**Dated: 19 June 2019**

**Appellant: Vince Kane**

**First Respondent: The Information Commissioner**

**Second Respondent: Tamworth Borough Council**

**Before**  
**HH Judge Shanks**  
**and**  
**Stephen Shaw and Andrew Whetnall**

**Heard at Leicester Tribunal Hearing Centre on 10 December 2019**

**Representation**

**Appellant: in person**  
**First Respondent: did not appear**  
**Second Respondent: Katherine Taunton**

**Legal subject matter:**

Environmental Information Regulations 2004 (EIR)

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

**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal dismisses the appeal.

**REASONS FOR DECISION**

**Background**

1. On 20 April 2018 the Appellant, Mr Kane, wrote to the Second Respondent, Tamworth Borough Council, making a request for information in the following terms:

**Background**

**Tamworth Borough Council (TBC) sometimes attaches conditions to Planning Applications where the applicant has to make an “Open Space Contribution” towards the enhancement of local Open Space facilities. I would like to understand how TBC uses these Open Space Contributions to enhance Open Space facilities. I’m considering submitting a planning application and would like to have a better understanding of the Open Space Contributions process.**

**Request for Information**

**I would like to know how much money TBC collects as “Open Space Contributions”. Also, for this request, I’m not interested to know how much TBC has spent maintaining local Open Space, but I would like to know how much TBC has spent enhancing (or improving the quality of) local Open Space facilities.**

**(1) Open Space Contributions**

- i) Could you please provide details about how much money as “Open Space Contributions” TBC has collected ... each year from the year 2009 to the year 2018?**
- ii) Could you please provide details about how much money TBC has spent *enhancing* Open Space facilities each year from the year 2009 to the year 2018?**

**(2) Enhancement of Open Spaces**

**For each *enhancement* of Open Space facilities completed from the year 2009 to the year 2018, could you please provide details about the following:**

- i) Location of the Open Space facility that was enhanced**
- ii) Description of the work carried out**
- iii) Who carried out the work**
- iv) Date(s) when the work was carried out and completed**
- v) Actual cost of the work that was carried out**

2. Following some clarification, internal reviews and the involvement of the Information Commissioner, it was common ground that the information still in issue was that requested at paras 1(ii) and 2(i) to (iii) of the letter, that it was “environmental information” and that the request therefore fell to be considered under the Environmental Information Regulations 2004 (EIR) rather than the Freedom of Information Act 2000. By a review letter dated 26 November 2018 Tamworth stated that the information was not held in the format requested, that to provide it in that way would take more than 18 hours and would require a manual trawl through many records and that that they were relying on regulation 12(4)(b) (manifestly unreasonable request) to refuse the request.
3. In a decision notice dated 19 June 2019 the Information Commissioner upheld the decision that the request was “manifestly unreasonable” because of the time and cost of compliance and decided that Tamworth were entitled to rely on regulation 12(4)(b) of the EIR to refuse to supply

the information. The Commissioner also found that the Council had breached the time limits in regulations 5(2) and 11(4) of EIR but that it had complied with the duty to provide reasonable advice and assistance provided by regulation 9.

4. Mr Kane appeals against that decision notice. In addition to the documents in the bundle prepared for the hearing, we were provided with Tamworth's Response and a witness statement from Anna Miller, Assistant Director, Growth and Regeneration at the Council (whose responsibilities include planning). Ms Miller also gave oral evidence at the hearing and was cross-examined by Mr Kane and we heard helpful submissions from him and Ms Taunton for Tamworth. The Commissioner did not appear. We have considered the whole matter afresh in the light of the material now before us.

### **The legal framework**

5. Regulation 5 of EIR provides that in general a public authority must make available any "environmental information" which it holds on request. That is subject to regulation 12 which allows a public authority to refuse to disclose such information if (1) the request is "manifestly unreasonable" and (2) in all the circumstances of the case, the public interest in maintaining this exception outweighs the public interest in disclosing the information (see: regulation 12(1) and (4)(b)). The public authority (and the Commissioner and the Tribunal in due course) should also consider the presumption in favour of disclosure in regulation 12(2) in a case like this: this provision serves the purpose of providing the default position in the event the two interests are equally balanced and of informing any decision that may be taken under the EIR (see the recent decision of the Upper Tribunal in *Vesco v Information Commissioner and GLD* [2019] UKUT 247 (AAC) at paras [16]-[20] to which we were helpfully referred).
6. It is well established that a request under EIR may be considered "manifestly unreasonable" on the basis that compliance would be

extremely burdensome on grounds of cost alone (see: *Craven v Information Commissioner and DECC* [2012] UKUT 442 (AAC) at para [25]), provided at the very least that the cost would exceed the limits provided by section 12 of FOIA (in a case like this, 18 hours work)

7. It is therefore necessary to consider in this case (i) the likely cost of compliance and whether it makes the request manifestly unreasonable; (ii) the public interest balance; and (iii) the presumption in favour of disclosure.

### **Cost of compliance**

8. The Council's case was that it would take in excess of 3,500 hours (or more than two years of one full-time officer's work) to obtain the information in question. We are bound to say that the evidence provided in support of this assessment was far from satisfactory, not least because Ms Miller, although an excellent witness, is not personally responsible for the department at the Council which spends money on open spaces, and we consider that it is speculative and greatly exaggerated.
9. However, notwithstanding that, we do accept:
  - (a) that the Council did not (and were not required to) maintain a single, catch-all record of spending on enhancing open spaces in a given year;
  - (b) that there is a computer record of orders placed by the Environmental Management Department (which we understand to be the relevant one), of which there are about 530 per year, which would be the starting point for seeking the requested information;
  - (c) that in order to answer the request each of the orders would need to be looked at and, if appropriate, analysed by reference to other records (including paper records) to establish the details of how much of any order was spent on enhancing public spaces, the location of those

spaces, what work was done and who did it (ie the answer to Mr Kane's requests);

(d) that, in addition, answering the requests may well involve time and judgement in deciding whether a particular piece of work was indeed an "enhancement" or involved only maintenance.

10. Bearing in mind that the request was for information covering ten years we are therefore confident that the work involved in providing it would be very substantial and that it could well take several weeks of full-time work for one officer to put it together. Taking into account that the relevant department has only five members of staff and responsibility for many other important areas of work including burial services and highway cleansing we are therefore quite satisfied that, notwithstanding our views on the Council's evidence, the request for this information was indeed "manifestly unreasonable".

### **Balance of public interest**

11. It is therefore necessary to consider the public interest balance and whether the public interest in avoiding the very substantial burden of complying with the request outweighed the public interest in disclosure of the requested information in this case.

12. There is always, as Mr Kane stresses, a strong public interest in the disclosure of environmental information. In this case it would clearly be in the interests of transparency and proper accountability that the Council disclose specific details of the work done to enhance public spaces in their area over the last ten years.

13. Mr Kane's particular interest in the requested information is that, as a prospective developer, he wishes to check that Tamworth have indeed spent all the money paid by way of "open space contributions" for the purpose for which it should have been used, ie to enhance open space facilities, and to check that Tamworth will be able to prove to him that any contribution he has to make will also be used appropriately. It is clearly in

the public interest that information bearing on these matters should be disclosed. However, we consider that in this case that public interest is lessened for the following reasons:

- (a) given the form of his request, which emphatically did not seek information designed to show any link between specific contributions and specific enhancements, it is hard to see that much useful information bearing on the issues he raises would come from disclosure;
- (b) the Council's response to his request has established that they were not in a position to show (at least not without wholly unreasonable expenditure) that money from open space contributions has been properly spent over the period covered by the request, and to that extent it has succeeded in its purpose (although we should say that we do not consider that there is any basis for Mr Kane's expressed suspicions of fraud on the material we have seen);
- (c) we were told and accept that the general regime in relation to accounting for planning contributions is becoming more rigorous;
- (d) it appears that in practice developers do not seek confirmation as to how open space contributions (or other "section 106" contributions) have been spent; but it would always be open to a developer to do so and the Council would regard themselves as bound to comply with such a request; further it would be open to Mr Kane himself to negotiate specific terms in any section 106 agreement to give himself reassurance on the use of any open space contribution made by him.

14. It is also relevant in considering the public interest in disclosure in this case to note that there is information openly available on the Council's website which goes some way to answering the request, in particular the contents of the planning portal and information about any item of expenditure over £500.

15. Taking account of all these points we are satisfied that the public interest in disclosure of the requested information was outweighed by the public interest in maintaining the regulation 12(4)(b) exception and avoiding the very substantial burden of complying with the request in this case.

### **Presumption**

16. We have kept the presumption in favour of disclosure well in mind in considering the appeal, in particular when assessing the weight of the public interest in disclosing the requested information, and our conclusions are informed by it.

### **Other matters**

17. As well as arguing that the Council ought to have provided the information he requested, Mr Kane has invited the Tribunal to find that the Council and the Commissioner have together engaged in what he calls “extreme and outrageous behaviour” which he says has caused him numerous physical and psychological symptoms (see in particular page 51 in the bundle). Apart from the question of the Council’s compliance with the duty in regulation 9 of EIR to provide advice and assistance, none of the matters raised in this context are within the purview of the Tribunal, but we nevertheless feel bound to say that we consider that this part of his case involves a very large measure of hyperbole and an apparent lack of appreciation on Mr Kane’s part that public bodies such as the Council and Commissioner’s office are staffed by fallible human beings who are generally doing their best in difficult circumstances with tight resources.

18. As to the question of advice and assistance, Mr Kane’s basic complaint as we understand it is that the Council failed to invite him to “refine” his request. We have considered the correspondence at pages 61 to 80 in the bundle and we agree with the Commissioner that it is difficult to see how the Council could reasonably have been expected to respond to the request in this way, particularly given the firm position adopted by Mr



Kane about his wish to have the request answered according to its terms. We also note that there was no question of the request being too “general” for the purposes of regulation 9(2); in fact it was pretty specific: it just covered a large amount of material.

### **Conclusion**

19. For all those reasons we consider that the Commissioner’s decision notice came to the right conclusions and we dismiss Mr Kane’s appeal.

20. Our decision is unanimous.

HH Judge Shanks

2 January 2020