First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0173V

Before

Judge Stephen Cragg Q.C.
Mr Dave Sivers

Heard via the CVP Platform on 6 December 2021

Between

Annette Carrabino

Appellant

and

The Information Commissioner

Respondent

The Appellant represented herself

The Commissioner was not represented

DECISION AND REASONS

DECISION

1. The appeal is allowed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. The Appellant joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. This appeal was due to be heard by a three-member panel, but one member was unable to sit. The parties agreed for the appeal to be heard by a two-member panel and the Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

4. The Tribunal considered an agreed open bundle of evidence comprising 606 pages, and a skeleton argument from the Appellant.

BACKGROUND AND DECISION NOTIC

5. On 13 February 2020 the Appellant submitted the following request for information to the Royal Borough of Kensington and Chelsea (the Council).

> In RBKC's response to the EIR request submitted in November 2018 [link redacted] RBKC has relied on the "manifestly unreasonable" exception to refuse disclosure of the requested information. The information requested relates solely to RBKC's involvement in the piano dispute of 2014 to 2017 in which RBKC squandered hundreds of thousands of pounds of public funds in a failed attempt to ban two children from playing the piano in their family home. RBKC relies on the manifestly unreasonable exception claiming that the information requested comprises:
>
> 1243 items over 254 email accounts;
>
> 502 items of information regarding acoustic recordings;
>
> 18 items of information over 4 email accounts relating to "maternity".
>
> 1. Please confirm that all 1243 items of information over 254 email accounts were in relation to the piano dispute that is the subject of this request.
>
> How many of those email accounts belong to RBKC officers, employees and agents?
>
> How many of those email accounts belong to RBKC councillors?
>
> Please name these RBKC councillors. or other UK public figures?
>
> Please list the names of these other elected officials and public figures.
>
> How many of those 254 email accounts belong to other public authorities?

Please name these other public authorities.

How many of those 254 email acounts [sic] belong to private individuals?

Apart from the complainant, who were these other private individuals?

2. Please confirm that the 502 items of information regarding acoustic recordings RBKC claims to have identified, actually relate to the piano dispute? If not, please confirm how many are in relation to the piano dispute?

3. Please confirm that the 18 items of information over 4 email accounts relating to "maternity" over the period in question (from 1st March, 2014 until 8th April, 2015) actually relate to the piano dispute. If not, please confirm how many are in relation to the piano dispute?

6. The background to this case is that the Appellant has been in dispute with the Council for several years regarding the Council's handling of noise complaints submitted by the Appellant's neighbour about the Appellant's family home (which related to piano playing by the Appellant's children). The Council issued an abatement notice in 2015, which the Appellant appealed via the Magistrates' Court in 2016. The Court upheld the Council's decision to serve the abatement notice, but varied the terms of that notice. The Court awarded the Appellant her costs of bringing the appeal. The Council appealed by way of 'case stated' to the High Court but the matter was settled and the notice withdrawn before a hearing took place.

7. In a decision notice dated 4 June 2021, the Commissioner explains further:-

> 4. The Commissioner has issued several decision notices in respect of requests made by the complainant seeking information relating to the Council's handling of the noise complaints. The request that is the subject of this decision notice follows an earlier request refused by the Council in November 2018 (the 2018 request).
>
> 5. The Commissioner issued a decision notice in respect of the 2018 request on 30 January 2020 [FER0808893], finding that the Council was entitled to refuse the request as manifestly unreasonable under regulation 12(4)(b). The Commissioner accepted as reasonable the Council's explanation regarding the activities required to deal with the 2018 request.

8. That previous decision was footnoted in the current decision notice, and it appears that the 'manifestly unreasonable' decision was based mainly on the burden on the Council in complying with the request.

9. The Appellant appealed the outcome of the previous decision notice but that appeal (EA/2020/0090) was withdrawn. However, the Appellant says in a schedule to her witness statement that that is because there had been 'disclosures throughout 2020 and the Commissioner's recommendation to submit narrower requests for information'. We have nothing from the Commissioner to dispute this.

10. Thus, with the current request, the Appellant is effectively seeking more detail about the information that the Council has previously said was too burdensome provide.

11. The Council responded to the request on 12 March 2020. It refused parts 1 and 2 of the request, again on the basis of regulation 12(4)(b) of the Environmental Information Regulations 2004 (EIR) . It provided information in response to part 3 of the request.

12. The Appellant contacted the Commissioner on 16 March 2020 to complain about the Council's response to her request.

THE LAW

13. Regulation 12(4)(b) EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. In this case the Council is citing regulation 12(4)(b) EIR due to the burden the request would place on it if it were to be fulfilled, but other factors have also been noted.

14. Thus, regulation 5 EIR obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIR. Regulation 12 EIR provides, insofar as relevant:-

> (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–
> ….
> (b) the request for information is manifestly unreasonable.

15. Under the EIR a public authority can take into account the time and cost involved in redacting exempt information, whereas under FOIA this is not a permittable task. In *Craven v Information Commissioner and DECC* [2012] UKUT 442 (AAC), Judge Wikeley stated that:-

> … in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" within FOIA. The conceptual structure for decision-making is different, but the outcome will surely be the same, whichever route is adopted. Insofar as a request is for environmental information, it therefore follows that the meaning of the expression "manifestly unreasonable" is essentially the same as "vexatious". (§30)

16. In *Craven* the Tribunal confirmed that public authorities could rely upon regulation 12(4)(b) EIR if the cost of complying with the request was excessive:-

> …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.

DECISION NOTICE

17. As mentioned, the Information Commissioner produced a decision notice dated 4 June 2021

18. The Commissioner set out why the Council said it would be excessively burdensome to provide the information. This essentially related to the need to manually review the 1243 items referred to in the request. The Commissioner also said that the Council had submitted that the Appellant had been unduly persistent in her requests, and was attempting to reopen the noise complaint issue which had been dealt with by the court, and that she made numerous requests for information which were sometimes overlapping. The Commissioner said that she interpreted these arguments 'as setting out that the request was also manifestly unreasonable on the grounds of being vexatious' (para 20).

19. The Commissioner set out the Appellant's position in response and said the Appellant:-

> 22…argued that she had requested "factual data that should be very easily verifiable". She presumed that the Council's search tool should be sufficiently sophisticated as to combine search terms, such as her surname and the word "piano". The complainant considered it extremely likely that information meeting these search terms would be relevant to her request.

20. The Commissioner noted that 'First and foremost the Commissioner observes that information relating to the noise complaint may include the complainant's personal data' (para 25). The Commissioner says that:-

> 26.The Commissioner recognises that the complainant's request only asks whether each item is relevant to the noise complaint; it does not ask about the detailed content of the information in question. However, the Commissioner is mindful that information relating to the noise complaint is likely to relate to the complainant and may include her personal data. Accordingly, if any of the 1243 items comprises the complainant's personal data, then those items must be excluded from the requested information since they will fall outside the scope of the EIR.
>
> 27.The Council's submissions did not include explicit reference to the need to exclude the complainant's personal data from the requested information. However the Council did provide an estimate of the time required to assess each item for relevance to the request, and the Commissioner considers that this estimate reasonably ought to include the time required to check whether the item comprises personal data of the complainant.

21. On that basis the Commissioner considered that the Council would need to spend time on considering whether any of the results of the search identified the Appellant's personal data as these would need to be excluded. The Commissioner then notes that the Council would need to decide whether the information relates to the noise complaint and consider the breakdown of the information as requested by the Appellant, which would also mean considering the personal data protection rights of third parties.

22. It is then quite difficult to understand the conclusions reached by the Commissioner. First, she says:-

> 34. The Commissioner is generally of the opinion that the bar regarding what makes a request "manifestly unreasonable" is, and ought to be, reasonably high. It is insufficient to claim that regulation 12(4)(b) is engaged purely because compliance with a request may require substantial effort. There is no threshold of time beyond which a request is automatically considered manifestly unreasonable, and no direct equivalent to the cost limit at section 12 of the Freedom of Information Act 2000. The Commissioner

also recognises that the complainant has tried to submit a more focused request in view of the previous decision.

23. Thus the Commissioner does not go so far as to say that the burdensomeness of the request is enough to make it manifestly unreasonable. Indeed, this paragraph suggests the opposite when it is stated that 'It is insufficient to claim that regulation 12(4)(b) EIR is engaged purely because compliance with a request may require substantial effort', which appears to be the Council's main argument.

24. Next, the Commissioner appears to find that the request is manifestly unreasonable because the Appellant is seeking her own personal data, and the Commissioner states:-

> 35. However, the Commissioner is satisfied that this request is also manifestly unreasonable. The Commissioner accepts that the Council would again need to spend considerable time examining and inspecting information in order to separate out the complainant's personal data, and then to determine whether any of the remaining information was relevant to the request. The Commissioner recognises that the complainant has already received her own personal data (to the extent that she is entitled to receive it), and she has been advised that this information falls outside the scope of the EIR by virtue of regulation 5(3) of that access regime. Nevertheless the complainant has continued to submit requests for information that will almost certainly include her own personal data, knowing that the Council would need to spend time separating this out in order to respond under the EIR.

25. However, we note that the Appellant has not asked for her personal data and has instead asked for information as to whether the items she has listed all refer to the piano noise complaint.

26. Finally, the Commissioner concludes that:-

> 37. The Commissioner is also persuaded by the argument that the complainant's request is vexatious, over and above the arguments relating to burden. The Commissioner further accepts that, even if the Council did comply with this request, it would be unlikely to satisfy the complainant, who has submitted numerous requests for information on this matter since the noise complaint was originally dealt with. It would be more likely to result in further requests for information on the same topic of the noise complaint, even though the complaint itself has long since been closed.

27. Not surprisingly, having found that the request is manifestly unreasonable, the Commissioner goes on to find that the public interest balance is in favour of non-disclosure 'even taking into account the presumption in favour of disclosure' (para 51).

THE APPEAL

28. On 1 July 2021 the Appellant submitted an appeal which states:-

> I believe the Information Commissioner has incorrectly found that Regulation 12(4)(b) applies to the information requested. The Royal Borough of Kensington and Chelsea ("RBKC" or "the Council") has already identified the 254 email accounts that were involved in the litigation proceedings that are the subject of this request. Having identified these 254 email accounts involved in the dispute, the request for information relating to the accounts should be relatively simple to respond to, and if it is not then it must be in the public interest that the Council do so:
>
> (a) If all the email accounts involved in the dispute were RBKC accounts (aside from the sole complainant on whose behalf RBKC took action), or those of RBKC's legal advisors and fellow triborough councils, then RBKC merely needs to confirm this to be the case.
>
> (b) If other public authorities were involved in the litigation proceedings, then it is in the public interest to know this so as to better understand how local authorities deal with matters of environmental health and when they expand the matter to wider government bodies.
>
> (c) If elected officials were involved in the dispute, it is in the public interest to know this.
>
> (d) If RBKC's elected councillors and officers carry out their official duties using private email accounts, recent events bring to the fore the need for the public to be made aware this.

29. The Appellant also confirmed that she was no longer seeking the information referred to in the second part of her request. As information in relation to the third part has been provided, the subject matter of this appeal is restricted to the first part of the request.

30. The Commissioner's response (in which she also applied to strike out the appeal) recognised again that it was insufficient to claim that reg 12(4)(b) EIR was engaged purely because compliance with a request may require substantial effort, and relied in addition on the Appellant's unreasonable persistence, and the fact that a response to this request 'would be unlikely to satisfy the Appellant who has submitted numerous requests for information since the conclusion of the court matters'. The response does not mention the finding in the decision notice that the request was manifestly unreasonable on the

basis that the Appellant was aware that she was requesting information which she knew would entail the Council having to extract her personal data.

31. On 7 September 2021 the Registrar declined to strike out the appeal and directed the Appellant to file a witness statement with additional documents concerning previous requests and documents from the court proceedings, which she has done.

THE HEARING

32. The hearing of this appeal took place via the CVP platform and the Appellant represented herself. The Commissioner was not represented. The Appellant told us that her main concern was to obtain information as to why the Council had appealed the magistrate's decision to the High Court and who was involved in that decision-making process. The Appellant accepted that a number of requests for information had been made on the topic of the piano noise issue but said that this was often because disclosure from the Council revealed other information which might be available.

33. The Appellant also drew our attention to the fact that, during the Commissioner's investigation, the Commissioner had written to the Council to say that 'the Commissioner would be unlikely to accept regulation 12(4)(b) to be engaged on the grounds of burden', but had encouraged the Council to ensure that it provided any other arguments about the unreasonableness of the request that the Council wanted the Commissioner to consider. The Appellant argued that there was a clear public interest in disclosing the information for the purposes of transparency and accountability, even if the request was found to be manifestly unreasonable.

DISCUSSION

34. The various documents from the Commissioner indicate that the burden of responding to this request for the Council was not sufficient, in itself, for the Commissioner to find that the request was manifestly unreasonable for the purpose of reg 12(4)(b) EIR. It also seems to us that, in any event, there is some force in the Appellant's argument that fairly simple search terms could be used to find the response to her request.

35. We note that the decision notice relies on other factors to establish manifest unreasonableness, namely unreasonable persistence, overlapping requests, and an argument to do with the Appellant making repeated requests for what she knew was her own personal data which would need to extracted.

36. This last point, as the Commissioner accepts, was not advanced by the Council, and is not relied upon by the Commissioner in the response to the appeal. It seems to us clear from the request that the Appellant was not seeking her personal data but was simply requesting whether the 254 email accounts included items of information that relate to the piano dispute, and in our view the decision notice was wrong to label the request as manifestly unreasonable for this 'personal data' reason.

37. In relation to unreasonable persistence and overlapping requests, we accept that this is a matter which has exercised the Appellant for some time and she has made a number of requests aimed at the same issue. We also accept that some of these requests have been triggered by previous disclosures from the Council, but that can be justifiable where disclosure reveals the existence of other information.

38. Although in this case there was a magistrates' court hearing which addressed the issue of the noise nuisance appeal, there was also an appeal from that hearing to the High Court brought by the Council, which was eventually settled and the noise abatement notice withdrawn. As the Appellant made clear to us in the hearing, the information she seeks is not an attempt to reopen the magistrates court case, but to find out information about why the Council decided to appeal the case (especially as it later settled the appeal and withdrew the notice). It seems to us that that is not synonymous with the Appellant seeking to re-open the findings of a final court decision.

39. In our view if, as we agree, there is not enough in the excessive burden argument to make this request manifestly unreasonable, the additional reasons linked with unreasonable persistence and overlapping requests, even when linked with burdensomeness, do not bring this request within the manifestly unreasonable definition. Although there have been a number of requests, there have, in fact, only been a handful, and there does seem to us to be a legitimate live issue being pursued by the Appellant.

40. This is not a clear-cut case, as there is a degree of persistence and overlap, but having reached this conclusion we have also considered, as we must, the presumption in favour of disclosure set out in regulation 2(2) EIR. As was stated in *Vesco v Information Commissioner*

[2019] UKUT 247 (AAC), paragraph 19, one of the purposes served by the presumption is to inform any decision which may be taken under the regulations. In this appeal, the presumption reassures us that, in what is quite a finely balanced case, we have reached the correct decision.

41. Having decided that the request is not manifestly unreasonable it is not necessary for us to go on and consider any public interest factors.

42. We should also make it clear that our decision does not mean that further requests by the Appellant cannot be labelled as manifestly unreasonable: each request has to be considered on its own merits. Although the Appellant is of the view that there may have been wrongdoing involved in the decision to appeal the magistrates' court ruling, it strikes us that there would have been sound legal reasons for pursuing the appeal by way of case stated, even if the appeal was later compromised.

43. For the reasons set out above, the appeal is allowed. That does not necessarily mean that the Council must disclose the information sought. As predicted by the Registrar when refusing the strike out application, we will substitute a decision notice and require the Council to respond, within 35 days, to the original request of 13 February 2020 without relying on the "manifestly unreasonable" exception. It would be open to the Council seek to rely upon other exceptions in the EIR.

44. As the Council is not a party to these proceedings, steps should be taken to ensure that a copy of this decision is sent to the Council.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 9 December 2021

Date Promulgated : 10 December 2021