**Case Reference: EA/2022/0390**

**Neutral Citation Number : [2023] UKFTT 779 (GRC)**

**First-tier Tribunal**
**General Regulatory Chamber**
**Information Rights**

**Heard: by CVP**

**Heard on: 11 September 2023**
**Decision given on: 25 September 2023**

**Before**

**TRIBUNAL JUDGE LIZ ORD**
**TRIBUNAL MEMBER SUZANNE COSGRAVE**
**TRIBUNAL MEMBER JO MURPHY**

**Between**

**SHEELAGH CASEY-HULME**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER**
**(2) THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

Respondents

**Representation:**
For the Appellant: Clíodhna Kelleher (counsel)
For the First Respondent: No appearance
For the Second Respondent: Robin Hopkins (counsel)

**Decision:** The appeal is dismissed

# REASONS

## Factual Background

1. The appeal concerns information relating to a landfill known as "Walley's Quarry", which is situated close to residential properties. For some time it has been emitting hydrogen sulphide, which smells of rotten eggs. It is understood that some residents experienced an impact on their health and two of them brought separate public law proceedings against the Environment Agency (EA), who is the main regulator of pollution from the site.

2. On 16 June 2022 the Appellant requested information from the Department for Environment, Food and Rural Affairs (Defra) in the following terms:

   *"The Secretary of State for the Environment, Food and Rural Affairs is requested to provide all information that he has with respect to Walleys Quarry Landfill site, Cemetry Road, Silverdale, Newcastle-under-Lyme, including but not limited to all communications he has had with the Environment Agency relating to this Landfill site."*

3. Defra refused the request on 15 July 2022 relying on the "manifestly unreasonable" exception in the EIR (12(4)(b)), and it upheld its original decision on 10 August 2022 at an internal review.

4. It provided the Appellant with advice on formulating a fresh, narrower request, which the Appellant made. Whilst no information was forthcoming in response to the modified request, this is not the subject of this appeal.

5. The Appellant referred the refusal of the original request to the Information Commissioner (the Commissioner) on 16 August 2022, and in his decision notice of 31 October 2022, he concluded that Defra were entitled to rely on the manifestly unreasonable exception.

## Legal framework

6. The relevant provisions of the Environmental Information Regulations 2004 (EIR) are regulations 5(1), 12 (1), (2) and (4)(b)

7. Regulation 5(1) provides a general duty to make environmental information available on request and regulation 12 sets out exceptions to the duty as follows:

> "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 the 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) […]
> (4) For the purposes of paragraph 1(a), a public authority my refuse to disclose information to the extent that –
> …
> (b) the request for information is manifestly unreasonable."

8. The relevant date for the assessment of the public interest test is the date on which the request for information was first refused: ***Montague v Information Commissioner & Department for International Trade*** [2022] UKUT 104 (ACC) at §25.

***Role of the tribunal***

9. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

10. The Upper Tribunal has confirmed that an appeal against a decision notice made under FOIA or EIR is to be regarded as an appeal by way of re-hearing. Support for this approach is found in *Malnick v IC and ACOBA* [2011] EWCA Civ 31.

11. The jurisdiction of the tribunal is not supervisory; the appeal is not a judicial review of the Commissioner's processes. The tribunal has no power to quash the decision notice on the basis of a procedural flaw in the Commissioner's processes.

***Other legislation and case law***

12. We have taken account of all other legislation and case law referred to by the parties and primarily set out in the skeleton arguments of the Appellant and Defra, and the Commissioner's response to the appeal (p30 Core Bundle (CB)).

**Decision Notice**

13. The Commissioner's decision notice (reference IC-186765-D0M1) referred to Defra's reliance on the burden of providing the information in terms of costs and the diversion of resources. He noted that, if this had been a Freedom of Information Act (FOIA) request, it would have been subject to an upper cost limit of £600 with respect to the amount of work required to produce the information. Whilst there was no upper cost limit under EIR, the FOIA limit of £600 provided a useful reference point when considering the manifestly unreasonable test, albeit it was not the determining factor.

14. He noted that public authorities may be required to accept a greater burden in providing environmental information than other information. Furthermore, the "manifestly unreasonable" test was a robust one, such that the term "manifestly" meant an obvious or clear quality to the identified unreasonableness. This imposed a high burden on the public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose an unreasonable burden on it.

15. The Commissioner referred to Defra's workings, which demonstrated that conservatively it would take at least 122 hours of work involving:

"*Determining whether the information is held, Locating the information, or a document which may contain the information, Retrieving the information, or a document which may contain the information and Extracting the information from a document containing it."*

There was also the prospect of there being more. He noted that the appellant had essentially asked Defra to disclose everything it held on Walleys Quarry, and was not limited in any way by time, specific departments or members of staff.

16. Due to the broad nature of the request and the number of documents identified, the Commissioner was satisfied that it would place a significant burden on Defra in terms of time and resources. In his view, this amounted to a "manifestly unreasonable" burden, despite the size of Defra and the resources it had.

17. The Commissioner then carried out the public interest balance. He noted Defra's acknowledgment that it was in the public interest to disclose information on Walleys Quarry, and that there was a lot of information on the EA's website. The EA prepared weekly updates for the community to keep them informed, and the EA were currently investigating matters. This all contributed to transparency and public understanding and went some way to meeting the public interest in disclosure.

18. Defra considered the public interest rested in maintaining the exception due to the manifestly unreasonable burden involved in disclosure. Compliance would disproportionately divert Defra's resources away from the provision of other services and key functions.

19. The Commissioner considered there were very compelling arguments in favour of disclosure, which would enable the local community to understand more closely what was being done to mitigate the impacts of the site. However, there were weighty public interest arguments in favour of protecting Defra's resources. It was not in the public interest to divert resources away from Defra's other functions and services when compliance would take such a significant amount of time. Disclosure would place an overwhelming burden on Defra in terms of time and expense and despite its size and resources, this could not be justified.

20. For the above reasons, the Commissioner decided that the public interest in favour of disclosure was outweighed by the public interest in favour of maintaining the exception.

**Grounds of Appeal**

21. The Appellant appealed on 28 November 2022 on the following grounds:

22. Ground 1: The Commissioner erred in determining that the request was manifestly unreasonable.

23. Ground 2: The Commissioner erred in determining that the public interest in disclosure was outweighed by the public interest in withholding information.

**Submissions and evidence**

***The Appellant's case (contained in her appeal, witness statement, skeleton argument and oral submissions)***

24. In her witness statement the Appellant refers to the longstanding emissions of hydrogen sulphide from the quarry, causing a nuisance, and impacting the health of the local

community including being life threatening to some vulnerable people. She did not understand why there had not been urgent action at the highest level to address this very serious problem. She felt the EA and Defra were not being transparent and honest about what was happening.

25. The Appellant says that the EIR and European Directive must be interpreted in light of the Aarhus Convention, and cites *Department for BEIS v IC and anor* [2017] PTSR 1644 at [14]:

    *"The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself give effect to international obligations arising under the Aarhus Convention….."*

26. She refers to Recital 9 of the Directive, which records that relevant environmental information is to be disclosed *"to the widest extent possible"*.

    *Ground 1: The Commissioner erred in determining that the request was manifestly unreasonable.*

27. There are two flaws in the Commissioner's approach.

28. The first is that his decision treats the cost limit under FOIA as being applicable and dispositive of the question of whether the request was manifestly unreasonable. It is wrong to treat it as an indication of an appropriate threshold beyond which compliance with an EIR request becomes disproportionate, as EIR has no cost limit. Environmental information is afforded special protection under EIR and is not simply an addendum to FOIA or variant of the same rules. She cites *Mersey Tunnel Users Association v IC and Halton BC,* 24 June 2009, EA/2009/0001 in support, which held that the request in that case was not manifestly unreasonable in spite of the fact it would involve *"considerable time and expense"*.

29. Secondly, "manifestly unreasonable" is not to be decided in a vacuum, but in the context of the request. Put simply, *"Is the cost too great?"* is a question that cannot be sensibly answered unless one knows what one is buying. The Commissioner's decision engaged in no analysis of the context of the request or the importance of the underlying information to the community. Nor did it analyse the nature of the request, any wider value of the requested information, or the importance of the underlying issues. The fact that it may have been considered under the public interest test is no defence, as the decision making process involves two distinct steps. The danger of eliding the two means that, what ought to be two separate checks, devolves to one.

    *Ground 2: The Commissioner erred in determining that the public interest in disclosure was outweighed by the public interest in withholding information.*

30. The Appellant refers to the substantial environmental and health issues surrounding the site and the resultant public law cases taken by residents. She refers to *R (Richards) v Environment Agency* [2022] Env LR 14 where the health impacts from the landfill emissions were set out.

31. She says that EIR are to be interpreted in light of the European Convention on Human Rights (ECHR), which is incorporated into domestic law by The Human Rights Act 1998.

Articles 2 (right to life) and 8 (right to private and family life, encompassing an individual's physical integrity) are of particular relevance. This appeal engages these rights, and they were found to be engaged in *Richards*. She also cites the case of *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [90] in the European Court of Human Rights, which said:

*"……particular emphasis should be placed on the public's right to information".*

32. The decision notice makes no reference to the local population's Article 2 or Article 8 rights, which are engaged by the pollution. There is no recognition of the fact these rights are impacted by the decision and no analysis of how those rights factor into the EIR public interest test. The fact they have not been considered means that neither Defra nor the Commissioner were in a position to fully weigh competing factors and properly undertake the public interest balancing test. This is fatal to the conduct of the exercise as the public interest test has been improperly carried out.

33. Defra's reliance on *Moss v Information Commissioner* [2020] UKUT 242 (ACC) does not help it. In that case the Appellant argued that he had a right under Articles 10 (freedom of expression) to receive the information sought. Ms Casey-Hulme does not advance such an argument of entitlement.

***The Commissioner's case (contained in his response)***

34. The Commissioner relies on the reasons set out in his decision notice, as well as his submissions below.

35. The "manifestly unreasonable" exception in regulation 12(4)(b) can apply if the cost or burden of dealing with a request is too great, see *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT 442 (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."* [§25]

36. He referred to the Commissioner's guidance on regulation 12(4)(b), which explains that proportionality is a consideration, taking account of all the circumstances including the nature of the request, any wider value, any underlying issue, the size of the public authority, context, the need to accept a greater burden for environmental information, standard £25 hourly rate and FOIA fees limits.

*Ground 1*

37. He did not treat the FOIA cost limit as being applicable and did not try to introduce a limit by stealth. However, the FOIA cost limit is relevant as a comparator. He considered the context of the information sought and the importance of any underlying issues and that is clear in his decision. With respect to the size and resources of Defra, he referred to the balance which has to be struck and the First Tier Tribunal case of *Havercroft v Information Commissioner* [EA/2012/0262) at §30:

*"Public bodies are responsible for the delivery of vital services and the use of large sums of public money: they are under a duty to deliver those services effectively and use their resources economically and efficiently. In carrying out their roles they must be publicly accountable and the FOIA regime is intended to enhance that accountability. However, there are many aspects to accountability, and the FOIA is not the sole means, nor can it substitute for the others. The primary function of public bodies is the delivery of services and if management time and resources are disproportionately spent in dealing with FOIA requests then those services, and the decision-making around the delivery of services, may suffer to the detriment of the public."*

*Ground 2*

38. The Commissioner referred to the acknowledgment in his decision that there was strong public interest in disclosure, but pointed to the factors that brought him to the decision that the burden of disclosure meant that the balance weighed in favour of maintaining the exception. He submitted that the EA's consistent disclosure of important information diminished the value of further information being disclosed and gave further weight to the public interest in maintaining the exception.

***Defra's case (contained in its response, Thomas Parrott's witness statement, its skeleton argument and oral submissions)***

39. The regulation of the quarry is principally the responsibility of the EA, who have issued enforcement notices and are conducting ongoing criminal investigations into the situation. It hosts a website with regular, detailed updates about the quarry including its plan to reduce emissions, and there have been significant improvements in air quality over the past two years.

40. The quarry has been the subject of two applications for judicial review, which sought unsuccessfully to establish that the management of the situation by the EA and/or Defra was unlawful or in breach of the state's positive obligations under Articles 2 and 8 of the Human Rights Convention (see *R (Richards) v Environment Agency* [2022] EWCA Civ 26; *R (Lally*) *v Secretary of State for Environment, Food and Rural Affairs and the Environmental Agency* (unreported, 27 October 2022).

41. The approach to "manifestly unreasonable" in regulation 12(4)(b) should be applied in accordance with principles from the case of *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT 442 (AAC), summarised as:

    (1) The same as the approach to vexatiousness under s14(1) FOIA. Neither the existence of the explicit public interest test in EIR, nor the statutory presumption of a restrictive interpretation of regulation 12(4)(b) should mean that, even at the margins, it is in some way *"easier"* to get a request accepted under EIR than under FOIA.

    (2) The concept of *"vexatiousness"* (and by analogy, *"manifest unreasonableness"*) is flexible and there is no prescriptive approach to applying it.

    (3) 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).

(4) The existence of a public interest in the disclosure of information cannot act as a trump card so as to tip the balance against a finding of vexatiousness under FOIA (or, analogy, manifest unreasonableness under EIR) (*Parker c IC* [2016] UKUT 0427 (AAC) §45.

*Ground 1*

42. Defra put the following arguments:

43. First, the Appellant's request for *"all information"* relating to the quarry is extremely broad and unfocused and the burden of compliance would be too great. It covers an enormous amount of information, potentially going back over many years, and responding to it would involve a significant cost and diversion of resources from the Department's other work.

44. The Appellant does not contest that it would take at least 122 hours to comply. Subsequent searches have revealed that Defra in fact holds even more information than was identified at the time and the timescale is more likely to exceed 300 hours. Disclosure would be a manifestly unreasonable burden.

45. Secondly, the Appellant's contention that the Commissioner treated the upper cost limit applicable to FOIA requests as being applicable to EIR is incorrect. The Commissioner referred to the upper costs limit of £600 as an indicator of an appropriate threshold. The fact the cost of compliance in this case would exceed the upper limit by an order of magnitude is a strong indicator that the request is manifestly unreasonable.

46. Thirdly, the Appellant's contention that the Commissioner erred in failing to take account of the importance of the underlying issues at the quarry is misplaced. The underlying issues were set out and, although the relevant reasoning is found in the section of the Decision Notice dealing with the public interest test, the Grounds of Appeal themselves acknowledge that there is a necessary degree of overlap between these two issues.

47. Ultimately, other factors also need to be taken into account, such as context. In this case, there is already a significant volume of information in the public domain about the quarry, including emission levels, and regulatory action taken, which continues to be updated on a regular basis. This information is likely to be far more illuminating than the indiscriminate disclosure of every document relating to the quarry in Defra's possession. The fact that quarry information was already in the public domain was taken into account by the Commissioner.

48. Defra remains committed to providing information within the bounds of proportionality and reasonableness and has helped the Appellant to narrow down her request.

49. Defra has finite resources, and operates under significant resource constraints. Responding to the request in full would necessarily divert staff away from other important priorities, including Defra's substantive work in relation to the issues of the quarry itself.

50. It is clear from the Decision Notice that the Commissioner took these factors into account.

*Ground 2*

51. In essence the Appellant argues that the Commisioner's assessment of public interest balance was flawed because he failed to give sufficient weight to the importance of the information requested and failed to apply the test in a manner compatible with Articles 2 and 8 of the Convention.

52. Defra puts much the same reasons forward as for *Ground 1*.

53. In the circumstances it is not in the public interest for Defra to be required to devote the disproportionate time and resources that would be required to respond to this single unduly broad request.

54. The Appellant's arguments in relation to Articles 2 and 8 of the Convention do not take her case any further for the following reasons:

55. First, as a matter of principle, rights under the Convention are not relevant to the application of the public interest test under EIR.

56. In *Moss v Information Commissioner* [2020] UKUT 242 (ACC), the Upper Tribunal found that, even if the Appellant had had a right under Article 10 to the information he sought, the application of an exemption under FOIA could not be said to interfere with that right. This was because:

    (1) FOIA is not intended to be the exclusive and exhaustive legal means of accessing information in domestic law;

    (2) The fact that an exemption applies under FOIA does not mean the relevant public body is prohibited from disclosing the relevant information outside FOIA. Therefore, FOIA cannot be said to be the cause of a violation of the Convention right.

57. *Moss* applies equally to EIR. As EIR does not prohibit disclosure of the requested information by other means, the reliance on an EIR exception cannot itself be said to be the cause of any interference with any Convention rights. As such, there can be no requirement to interpret the EIR to make it compatible with any such right.

58. The EIR is intended to protect public interests, not private rights. It would be wrong in law to introduce special considerations, or give certain issues additional weight, by reference to the rights the individual requester may have under a separate legal regime.

59. Second, in any event, the Appellant does not have a right under the Convention to access *"all information"* held by Defra in relation to the quarry.

**Issues**

60. The issues agreed at the start of the hearing are:

    Whether in all the circumstances of the case:

1) the request for information is manifestly unreasonable due to the cost and burden on Defra's resources, and

2) the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Evidence**

61. We had before us the following documents:

    a. A core hearing bundle (414 pages), which included witness statements from the Appellant, and Thomas Parrott on behalf of DEFRA;

    b. An authorities bundle (601 pages);

    c. Skeleton argument on behalf of the Appellant;

    d. Skeleton argument on behalf of Defra.

62. We heard submissions from both the Appellant's and Defra's representatives.

63. We did not hear any oral evidence from the Appellant or Mr Parrott.

64. The witness statements of the Appellant (p52 CB), Mr Parrott (p114 CB) and a set of Ministerial Briefings from the Environment Agency (EA) to DEFRA (p312 CB) have been produced since the Commissioner's decision.

**Discussion and conclusions**

65. We have dealt with this appeal on the basis of a full merits review and have approached the matter de novo. We have considered the public interest test as at the time of the first refusal.

***Ground 1 - Whether, in all the circumstances of the case, the request for information is manifestly unreasonable due to the cost and burden on Defra's resources***

66. Having regard to *Craven*, we note that, even with the presumption in favour of disclosure, it should not be easier to get a request accepted under EIR than under FOIA. Furthermore, a public authority is entitled to refuse a single extremely burdensome request.

67. The request seems to have come about because the Appellant believed nothing was being done to prevent the pollution from the site (her WS para 2, p52 CB), and the EA and Defra were not being honest and transparent. However, it is unclear why asking for so much information would answer that question.

68. The request is extremely broad and we find it difficult to see what would be a larger request. It simply asks for all information held with respect to the quarry without any qualification whatsoever. This would include matters wider than the pollution issue and the impact on the community.

69. It is accepted by the Commissioner and Defra, and indeed by this tribunal, that the health and environmental impacts from the quarry are serious. In response, the EA, as the main

regulatory body for the quarry, has been taking enforcement action and had commenced criminal investigations. Therefore, contrary to the Appellant's belief, things were being done.

70. The EA has been continuously ensuring that the public was informed about the regulatory action being undertaken, and about other environmental concerns including emission levels. This has been achieved through the EA's website, which was regularly updated with information. Furthermore, the *Richards* and *Lally* litigation has put more information into the public domain.

71. Consequently, there has been transparency, and disclosure of a considerable amount of information, and it is unclear what incremental value the requested disclosure would give.

72. It is not disputed that at least 122 hours of work would be needed to comply with the disclosure request, although this is a conservative estimate and it is likely to be more in the region of over 300 hours. Defra has shown its workings on how it reached this figure, explaining how it estimated the timings for each activity. The Appellant has not challenged whether this looked reasonable.

73. There is no need to consider how much this might cost. It is clear from the time it would take to comply with the request that this would be a substantial burden on Defra. However, the Commissioner was entitled to refer to the FOIA costs limit of £600 as an indicator of an appropriate threshold and did not err in law by doing so.

74. Whilst Defra is a large government department, it operates under significant resource constraints and dealing with the request would involve a significant diversion of public resources, including diverting staff away from substantive work relating to the quarry.

75. Taking account of all the above factors, and weighing in the balance what was already in the public domain, we find that the request was disproportionate. Accordingly, bearing in mind the presumption in favour of disclosure, we conclude that the request for information was manifestly unreasonable and regulation 12(4)(b) is engaged.

***Ground 2 - Whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.***

76. We again took account of the factors set out under Ground 1, given the overlap of considerations.

77. Whilst we accept that the health and wellbeing issues are serious, taking account of what was already in the public domain at the time, we are unclear as to what benefit there would be to the public interest in disclosing the requested information.

78. On the other hand, diverting such significant public resources away from Defra to deal with the request would clearly not be in the public interest.

79. Balancing the two, we conclude that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

80. With respect to the Appellant's submissions concerning Articles 2 and 8 of the Human Rights Convention, we take the view that these Articles are irrelevant to the public interest test under EIR, which is intended to protect public interests and not private rights. Consequently, we have not factored them into our considerations.

**Summary of decision**

81. For the above reasons, we conclude that Defra was entitled to withhold the requested information under regulation 12(4)(b) EIR.

Signed Liz Ord Date: 22 September 2023

Judge of the First-Tier Tribunal

Promulgated Date: 25 September 2023