IN THE FIRST-TIER TRIBUNAL **EA/2010/0072**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision No: FER0204414
Dated: 11 February 20010

Appellant: Dr Kaye Little

Respondent: Information Commissioner

Second Respondent: Welsh Assembly Government

Determined on the papers

Date of decision: 30 December 2010

Before

Anisa Dhanji
Judge

and

Jacqueline Blake and Gareth Jones
Panel Members

Subject matter:

EIR regulation 12(4)(b) – whether request is manifestly unreasonable

Cases:

DBERR v Information Commissioner and Platform *EA/2008/0096*

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DECISION

The Tribunal upholds the Decision Notice and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This is an appeal by Dr K. Little (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 11 February 2010, upholding a refusal by the Welsh Assembly Government ("WAG"), to provide the Appellant with information under the Environmental Information Regulations 2004 (the "EIR").

The Request for Information

2. The requests for information which are the subject of this appeal were made by the Appellant to WAG on 11 February 2008, 29 February 2008, and 15 July 2009, respectively. We will refer to these as Requests 1, 2 and 3, respectively. The requests were for information in relation to the Cefn Croes wind farm, then the largest on shore wind farm in the United Kingdom.

3. The material part of Request 1 was as follows:

   "…I request all documentation, held in either electronic or print form, relating to the legal advice re. disposal of FC [Forestry Commission] *Wales managed land for wind developments…*

   …This would include the discussions for Cefn Croes (1997 – 2003) and subsequently from 2003 onwards for TAN8 and the tendering process…

   … Please include all communications between Forestry Commission Wales's lawyers, Forestry Commission GB, DEFRA lawyers, the Welsh Office, the Assembly Government ministers and NAW's [National Assembly for Wales] *legal department re. disposal of the National Forest Estate for wind developments…"*

4. On 29 February 2008, the Appellant clarified that Request 1 related to:

   "…the legal advice given to Forestry Commission Wales, the Assembly Government Forestry Minister and officials in the Planning and Energy Departments in advance of NAW's response to the DTI i.e. Cefn Croes Windfarm application 2001. The information should include that from NAW's internal in-house team, FC lawyers and any independent opinions from outside law firms or DEFRA".

5. The Appellant's letter also made a further request (Request 2) in which she sought the following information:

"… the legal discussions with FC Wales & the Assembly Government relating to further use of FC Land i.e. the public forest estate for industrial development. The advice should relate to Section 83 GOWA 1998 & its section 41 agreement, and identify the risks of the Assembly's disposals, for purposes other than forestry. The implications of the Regulatory Reform Order – Forestry 2006 on TAN8 implementation should also be made available.

6. WAG wrote to the Appellant with its interpretation of Request 1 and asked her to clarify that it represented an accurate description of the information being sought. On 2 March 2008, the Appellant confirmed that WAG's interpretation of her request was correct, but said that it should also include:

"… copy of the written instructions from Ministers re. Disposal of FC land for Cefn Croes, or from Ministers to Forestry Commissioners giving them authority to effect the disposal."

7. On 12 March 2008, WAG refused Request 1. It stated that the information was subject to legal professional privilege and was therefore exempt under regulation 12(4)(e) (internal communications). WAG considered that the public interest in maintaining the exception outweighed the public interest in disclosure. On 2 April 2008, WAG refused Request 2 for the same reasons.

8. The Appellant requested an internal review of both decisions. In the course of that review, WAG decided that Requests 1 and 2 were exempt under regulation 12(4)(b) as being manifestly unreasonable, because of the time it would take to locate and retrieve the information. It considered that dealing with the requests would place an unreasonable burden on its resources and disrupt its day to day work. It also considered that the public interest in maintaining the exception outweighed the public interest in disclosure. In short, WAG maintained both refusals, but did so on the basis of regulation 12(4)(b) rather than 12(4)(e).

9. Following the Appellant's complaint to the Commissioner (see below), and during the course of the Commissioner's ensuing investigation, the Commissioner advised WAG to engage with the Appellant pursuant to its obligation under regulation 9(1) to advise and assist, to see if the requests could be refined such that at least some information could be provided. WAG contacted the Appellant accordingly.

10. In response, the Appellant submitted a refined request on 15 July 2009 seeking information as to:

".. the early deliberations between Christine Gwyther/Carwyn Jones and the wind developers and Forest Enterprise Wales and Forestry Commission GB – including correspondence/email/or a minutes of meetings with the then Forestry Commissioners (Gareth Wardell &

Anthony Bosanquet). The legal recommendations for disposal of forestry land for industrial purposes should also be included".

11. Although this was an attempt by the Appellant to refine her previous requests, it was considered by WAG to be sufficiently different from Requests 1 and 2 so as to constitute a further request (Request 3). WAG refused this request as well, on the basis that the information was exempt under regulation 12(4)(b).

The Complaint to the Commissioner

12. On 9 June 2008, the Appellant wrote to the Commissioner to complain that WAG had not completed its internal review in respect of Requests 1 and 2. In fact, the review was not concluded until 3 February 2009.

13. Following the internal review, the Commissioner requested further information as regards WAG's reliance on regulation 12(4)(b). On 30 June 2009, a member of the Commissioner's staff attended WAG's premises and reviewed the files containing the withheld information. As noted above, the Commissioner also advised WAG to provide advice and assistance to the Appellant to help her to refine her request.

14. When it seemed to the Commissioner that an informal resolution was not possible, the Commissioner issued a Decision Notice. He set out his findings which were as follows:

    (a) WAG was entitled to rely on the exception in regulation 12(4)(b) in relation to all three requests; and

    (b) WAG had committed the following procedural breaches:

        (i) breach of regulation 11(4) in not providing the Appellant with the outcome of the internal review for Requests 1 and 2 within 40 working days;

        (ii) breach of regulation 14(2) for failing to refuse Request 3 within 20 working days; and

        (iii) breach of regulation 14(5)(c) for failing to provide details of the rights conferred in regulations 11 and 18 in its refusal notice in respect of Request 3.

    The Commissioner did not require any steps to be taken in respect of the breaches referred to above.

The Appeal to the Tribunal

15. The Appellant appealed to the Tribunal against the Decision Notice. WAG was joined as a party. There has been no cross-appeal against the Commissioner's findings set out in paragraph 14(b) above.

16. The Appellant makes a number of points in her grounds of appeal, Some of these points do not constitute substantive grounds of appeal or do not come within the jurisdiction of this Tribunal. We have

addressed some of these points in paragraphs 82 to 90, below. The main point the Appellant makes, however, is that the requests are not manifestly unreasonable and hence, that the exception in regulation 12(4)(b) is not engaged.

17. All parties requested that the appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.

18. We have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including in particular, the documents contained in the agreed bundle of documents.

The Tribunal's Jurisdiction

19. Regulation 18 of the EIR provides that the enforcement and appeals provisions of the Freedom of Information Act 2000 ("FOIA") shall apply for the purposes of the EIR (save for the modifications set out in the EIR).

20. Under section 58(1) of FOIA, if the Tribunal considers that a Decision Notice is not in accordance with the law, or to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, if the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

21. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Statutory Framework

22. The EIR implements Council Directive 2003/4/EC on public access to environmental information. There is no dispute that the information requested in the present case constitutes "environmental information" as defined in regulation 2(1), and therefore comes within the scope of the EIR.

23. A public authority which holds environmental information must make it available on request (regulation 5(1)). It must make the information available as soon as possible, and no later than 20 days after receiving the request. If it refuses to do so, it must issue its refusal within the same time frame.

24. Under regulation 12(1), a public authority may refuse to disclose information if:

(a) it comes within one of the exceptions in the EIR; and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

25. As already noted, WAG relies on the exception in regulation 12(4)(b). This provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.

26. It is important to note that unlike the FOIA, the EIR contains an express presumption in favour of disclosure (regulation 12(2)).

27. There are other provisions in the EIR that are also relevant to mention, in particular:

- Under regulation 7(1), the public authority may extend the time for compliance to 40 days if the complexity and volume of the information makes it impracticable to comply within 20 days;

- Under regulation 8, the public authority may charge the applicant for making the information available;

- The right to refuse a request for being "manifestly unreasonable" under regulation 4(1)(b) is separate from and additional to the right to refuse a request if it is too general (regulation 12(4)(c)); and

- Article 4 of the Directive requires the exceptions to be interpreted "in a restrictive way".

Issue

28. The key question for the Tribunal in this appeal is whether the Appellant's requests were manifestly unreasonable. If not, then WAG was not entitled to refuse the Appellant's requests under regulation 12(4)(b).

29. If the requests were manifestly unreasonable, then it is necessary to go on to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

Findings

Manifestly unreasonable

30. As already noted, WAG has relied on regulation 12(4)(b) on the basis that the amount of time that would be involved in complying with the requests makes them "manifestly unreasonable".

31. The correct approach to be taken when determining whether and to what extent a request is "manifestly unreasonable" under regulation 12(4)(b) because of the time involved in complying with the request,

was considered by a differently constituted Tribunal in DBERR v. the Information Commissioner and Platform, to which we have been referred by the Commissioner and WAG. The Appellant has not argued that the principles in that decision are either incorrect or inapplicable. We consider that they are directly on point and we adopt the guidance set out by the Tribunal in that case. Paragraphs 32 to 42 below, are largely derived from that decision, adapted to the circumstances of the present case.

32. The EIR contains no definition of "manifestly unreasonable". Under regulation 2(5), except as otherwise provided, expressions in the EIR have the same meaning as in the Directive. However, the Directive also does not define "manifestly unreasonable".

33. From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable". The temptation to attempt to define the expression any further, should be resisted. There is a danger that expressions such as "indisputably" or "self-evidently" can only lead to greater uncertainty. It is also not appropriate to regard the expression as importing an element of condemnation of the request, nor is it necessary or helpful to think in terms of the degree of unreasonableness that must be established, or in terms of a standard of proof threshold (so for example whether the unreasonableness must be established to a level higher than a balance of probabilities). None of these formulations add any greater clarity.

34. Under section 12 of FOIA, a public authority is not obliged to comply with a request if it estimates that the cost of compliance would exceed the cost limit set by regulation (which for a Central Government department such as WAG, would be 24 hours). As already noted, the EIR does not contain an equivalent provision to section 12. In the absence of such a provision in the EIR, can requests that are resource intensive be refused as being "manifestly unreasonable"?

35. In our view, "manifestly unreasonable" is a broad expression capable of covering a variety of situations and taking into account many different factors. There is no reason why, on a proper construction of that expression, the resource implications that are involved in meeting a request should not have a bearing on whether a request is "manifestly unreasonable".

36. The question that then arises is how much time must be involved before a request can be said to be manifestly unreasonable? We do not consider that the cost limits in section 12 of FOIA can be viewed as a yardstick in this regard. To the extent that WAG and indeed the Commissioner, have used such an approach, we consider that that is misconceived. There is no 24 hour limit under the EIR. Such an approach assumes that regulation 12(4)(b) operates as some kind of

equivalent to section 12. It does not. Section 12 involves a straightforward computation of the time required to comply with a request. It allows a public authority to look at the time involved in isolation from any other factors, for example, the ability of the public authority to meet the request, or the extent to which the time required to meet the request would detract from other functions. Also, the substance of the request has no bearing on the application of section 12; all requests are treated alike.

37. Regulation 12(4)(b) is quite different. There is no "appropriate limit" to act as a cut off point. It is the request that must be "manifestly unreasonable", not just the time required to comply with it, nor indeed any single aspect of it. We consider that this means that regulation 12(4)(b) requires the public authority to consider the request more broadly. It does not render the time required to comply with a request, irrelevant. Rather, it is one factor to be considered along with others when assessing whether a request is "manifestly unreasonable". Support for this view may be found in the Implementation Guide to the Aarhus Convention, the parent document to the Directive, which, at page 57, states that:

> *"Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable".*

38. It is clearly not possible to identify all the situations in which a request will be manifestly unreasonable. In the DBERR case, the Commissioner gave two examples of where a request may be manifestly unreasonable because of the time involved in complying with it. The first is where the time required is clearly disproportionate to the importance of the issue at stake. The second is where the time required is so substantial that it would significantly interfere with the normal conduct of the authority's activities or entails a significant diversion of resources from other functions. The Additional Party in the DBERR case suggested that a request is manifestly unreasonable where it both imposes a significant burden on the public authority and either (i) has no serious purpose or value, and/or (ii) is designed to cause disruption, annoyance or harassment.

39. The Tribunal in that case accepted, as we do, that in these scenarios, the request may properly be described as being manifestly unreasonable. This is subject to two caveats, however. The first is that these should be regarded only as examples. Whether a request is or is not manifestly unreasonable must depend on the facts of each case. Second, in considering whether a request is manifestly unreasonable, it is not appropriate to embark on the public interest balancing exercise.

Pursuant to regulation 12(1)(b), that must be undertaken only after it is clear that the exception is engaged.

40. It follows, from the principles set out above, that situations may well arise where a public authority is required to respond to a request for environmental information even if the time involved is considerable. It is not that the EIR fails to recognise that requests can be complex or time-consuming. It does. Under regulation 7(1), a public authority may extend the time for compliance to 40 days if the "complexity and volume of the information requested makes it impracticable to comply within 20 days. It is simply that unlike the FOIA, the EIR does not permit a public authority to refuse a request purely on the basis that it is complex or time consuming. It may be surmised from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under the FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which the FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that Recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information.

41. There are two further points made by the Tribunal in the DBERR case which we also adopt. First, when dealing with a request under the EIR, the public authority must bear in mind the presumption in favour of disclosure contained in regulation 12(2). Depending on the facts of the case, this may mean that before treating a request as manifestly unreasonable under regulation 12(4)(b), a public authority must consider whether the time concerns can be addressed by providing some of the requested information. It may, in any event, be difficult for a public authority to successfully refuse a request for being manifestly unreasonable if parts of it are not.

42. The second point which is of particular relevance to the present case, relates to whether the public authority must first show that it has complied with its duty to advise and assist under regulation 9 before it can rely on time considerations to refuse a request. As the Tribunal noted in the DBERR case, there is a material difference between regulation 12(4)(b) and regulation 12(4)(c). Compliance with regulation 9 is a stated pre-condition for reliance on the exception in regulation 12(4)(c), but the same is not true for regulation 12(4)(b). This does not mean, however, that a public authority can simply refuse a request as being manifestly unreasonable without engaging any further. Although much must depend on the circumstances of each case, regulation 12(4)(b) requires a public authority to consider a request more fully. This means that a public authority should expect, in the appropriate case, to have to engage with the request, and the requester, to consider whether a more manageable and reasonable formulation of the request can be achieved, before refusing a request for being

manifestly unreasonable. In some cases, the reasonableness or unreasonableness of a request may only become clear or manifest after such engagement.

Application to the Facts of this Case

43. We turn now to consider the application of the above principles to the present case, by reference to the following matters in particular:

- the evidence as regards the time that would be required for WAG to comply with the requests;
- the implications for WAG in devoting such time to complying with the requests;
- whether the issues at stake are proportionate to the burden that complying with the requests would place on the public authority; and
- the extent to which WAG has complied with its duty under regulation 9(1) to advise and assist.

The time that would be required for WAG to comply with the requests

44. WAG's evidence is that the information is held in the form of paper files. WAG has identified 231 files as potentially containing information relevant to Requests 1 and 2. To estimate the time required to search all 231 files, WAG undertook a search of one of the files. This contained over 200 individual documents and reviewing it took over 2.5 hours.

45. WAG accepts that not all the 231 files will contain the same number of documents and therefore it used an average figure of 1.5 hours per file. On that basis, WAG calculated that it would take 346.5 hours to review the 231 files and extract the relevant information.

46. In relation to Request 3, WAG says that 148 of the 231 files potentially contain relevant information. On the basis of 1.5 hours per file, it estimated that it would take between 222 to 274.5 hours to comply with Request 3.

47. During his visit to WAG, the Commissioner inspected the files. Applying the premise that public authorities are expected to adopt the most efficient search strategy available, he was satisfied that the estimate of 1.5 hours to search each individual paper file was reasonable.

48. On the evidence before us, we see no reason to doubt that this is indeed a reasonable estimate and we note that in her grounds of appeal the Appellant does not dispute this time estimate. However, we note that WAG and the Commissioner have estimated that it would take 346.5 hours to deal with Request 1 and a further 346.5 hours to deal with Request 2, giving a total of 693 hours. Given that the same files would need to be searched for both Requests 1 and 2, we find it

unlikely that the appropriate way to conduct the search would be to examine all 231 files for information relevant to Request 1 and then to examine the same files again for information relevant to Request 2. Clearly, the most efficient approach would be to examine the files for information relevant to both requests, at the same time. We recognise, of course, that the requests were made separately, but it would be artificial not to also recognise the factual link between the requests or that Requests 1 and 2 were made within a short time of each other (on 11 February 2008 and 29 February 2008, respectively).

49. The same reasoning applies to Request 3. We note that at least 148 files which WAG has identified as containing information potentially relevant to Request 3 overlap with the 231 files identified as being relevant to Requests 1 and 2. Although Request 3 was made some time later (in July 2009), given that Requests 1 and 2 had not by then been dealt with, the time involved in a hypothetical search would not have involved a further 1.5 hours per file to identify information relevant to Request 3.

50. In short, we consider that a more realistic figure for the amount of time involved in dealing with the three requests would be 346.5 hours in relation to Requests 1 and 2 and for that part of Request 3 involving 148 of the 231 files, and a further 52.5 hours for the additional 35 files relevant only to Request 3. This gives a total figure of 399 hours. On the basis of 7 hours per working day, this would involve 57 days worth of time. On any analysis, this is a very significant amount of time.

The implications for WAG in devoting 57 days worth of time to complying with the requests

51. We turn now to the impact that such a time commitment would have on the normal functioning of WAG. As already noted above, a public authority may well be required to respond to a request for environmental information even if the time involved is considerable. This appears to be the legislative intent in not having a fixed number of hours as a cut off point as is found in FOIA. This does not mean, however, that a public authority must comply with a request even if to do so, involves a significant interference with its normal functioning.

52. The Commissioner found, in his Decision Notice, at paragraphs 52 to 55, that complying with the requests would disrupt WAG's day to day work and prevent WAG from carrying out its wider obligations fully and effectively with the result that the needs of the communities it serves might not be met. This would impact negatively on the public at large. It is not clear whether the Commissioner relied on any evidence to reach these findings or simply made a logical inference that the amount of time in issue would inevitably interfere with WAG's normal functioning.

53. There is no witness statement before us from WAG on the implications that complying with the requests would have for its day to day functions. We note, however, that in its Reply dated 30 July 2010, WAG says that compliance with the requests would require a significant diversion of staff. It also says that there are three

departments that would be required to consider the Appellant's requests. These are relatively small offices and their scarce resources would be unduly burdened if they had to comply with the requests.

54. Although we consider that WAG could and should have done more to identify and explain the implications for it of complying with the requests, the fact that compliance would require 57 days worth of time, we accept it as inevitable that complying with the requests would place a considerable burden on WAG and divert a significant amount of resources from its statutory functions.

Whether the issues at stake are proportionate to the burden that complying with the requests would place on the public authority

55. As already noted, in assessing whether a request is manifestly unreasonable, it is relevant to consider whether the issues at stake are proportionate to the burden that complying with the requests would place on the public authority.

56. Various submissions made by the Appellant indicate that she and the Cefn Croes Action Group she represents, have a range of concerns in relation to the development of wind farms on land managed by the Forestry Commission Wales ("FCW"). The requests seek information relating in particular to legal advice obtained in relation to such disposal. It goes further, of course, to a range of other communications including authorisation to effect the disposal. The thrust of the Appellant's concerns appear to be that in permitting the redevelopment of such land for wind farms, WAG acted in some way improperly. The Appellant does not appear to be making specific allegations but rather, appears to be seeking information to confirm her concerns.

57. EIR requests, like requests under the FOIA, are motive-blind. It is not the function of this Tribunal to decide appeals based on how serious or frivolous the purpose of a request appears to be. To the extent that the subject of a request is relevant, it is only in that a request that is going to take considerable time to comply with corresponding implications on a public authority's day to day work, may be more likely to be regarded as being manifestly unreasonable if it has no serious value or purpose. However, there is nothing in the present requests, that would support the view that the requests have no serious purpose or value and indeed it has not been suggested that that is the case. It does not, however, follow that serious requests cannot be manifestly unreasonable. Whether they are must be determined on all the circumstances of the case.

The extent to which WAG has complied with its duty under regulation 9(1) to advise and assist

58. As noted above, while compliance with its duty to advise and assist under regulation 9(1) is not a precondition for a public authority to rely on regulation 12(4)(b), a public authority should expect, in the appropriate case, to have to engage with the request and the requester, to consider whether a more manageable and reasonable

formulation of the request can be achieved, before refusing a request as being manifestly unreasonable.

59. Request 1 was made on 11 February 2008 and WAG sought to clarify this request on 18 February 2008. However, it does not appear that it did so with a view to assisting the Appellant to formulate her request in a manner that could enable WAG to comply with it. Rather, this was done in order to assist WAG to understand what it was that the Appellant was seeking. At this point, it is not clear that WAG was even alive to the time burden that the request would give rise to.

60. On 20 July 2008, WAG wrote to the Appellant. It explained the complexity of the request and the fact that it covered three different policy areas and an 11 year period. It asked her to clarify and narrow the scope of Requests 1 and 2. However, this did not result in a narrowing of the requests.

61. Following the Commissioner's inspection of the files in situ, and the Commissioner's advice, during the course of that meeting, that WAG should invite the Appellant to refine her requests, on 10 July 2009, WAG wrote to the Appellant again. This came well after its refusal of the requests. A public authority's obligations under regulation 9 should of course precede a refusal.

62. We also note that WAG offered to meet the Appellant although that proposal was only made in early 2010. Again, that offer should have been made much sooner. As it is, the meeting did not take place because these appeal proceedings were initiated before the proposed meeting date.

63. That said, WAG did explain the time implications to the Appellant and gave the Appellant a reasonable opportunity to redefine the requests. By doing so, we find that WAG did comply with its obligations under regulation 9. This only requires a public authority to provide advice and assistance. It is of course for the requester to use such advice and assistance. The Appellant is clearly an experienced campaigner and it seems somewhat surprising, therefore, that she did not engage more fully in a process that could have assisted her. Although she attempted to redefine her request, there seems to have been no genuine effort to try to narrow its scope.

64. In her Reply Submissions dated 8 November 2010, the Appellant indicates that had she had certain information sooner, she would have been able to narrow the requests. She says, *inter alia*, that she had only recently learnt that the files were held in paper form. However, we note that this fact was clearly stated at paragraph 33 of the Commissioner's Decision Notice dated 11 February 2010. She also says that it was only when she received the open bundle from the Commissioner on 1 October 2010, that she saw the list of files that had been sent by WAG to the Commissioner on 27 May 2009. Had she seen this sooner, she says she would have been able to reject 90% as not being germane to the requests. She then goes on to identify 15 of the 231 files which she says would be the only relevant files, and she

identifies 3 files, which, from their description, she says would clearly not be relevant.

65. In its Supplementary Submissions dated 15 November 2010, WAG responds to the Appellant's contentions by referring, *inter alia*, to paragraph 78 of the Decision Notice where the Commissioner stated that it would have been unreasonable for WAG to have given any further details of any information it may hold because, given the broad nature of the requests and the fact that the Appellant was not able to narrow her requests to a particular subject or time period which she was interested in, this would have required WAG to carry out a search to locate information falling within the scope of the requests and the cost of this would have been significant.

66. We have to say that we do not follow the Commissioner's reasoning in this respect. It cannot have been unreasonable for WAG to have given further details of the information it held where such information may have assisted the Appellant to narrow her requests so as to make the time required to comply with the requests more manageable.

67. There are several observations we would make about the list of files. First, we note that the list was created by WAG specifically for its meeting with the Commissioner. Nothing in the EIR requires a public authority to create information for a requester. The obligation is simply to provide the information it already holds. At the time of the refusal, the list was not in existence.

68. Regulation 9(1) requires that a public authority shall provide advice and assistance, "so far as it would be reasonable to expect the authority to do so". We do not consider that it would be reasonable to expect a public authority to produce a 20 page list of files in order to meet its obligations under regulation 9, particularly given that the preparation of such a list is itself likely to involve a considerable commitment of time.

69. It is not clear to us why, having produced the list for the benefit of the Commissioner, WAG did not see fit to provide it to the Appellant. However, while the fact that it did not do so may not cast WAG in the most favourable light and it may lend some credence to the Appellant's claim that WAG appears to have spent a considerable amount of time in defending its refusal, this does not mean that WAG was in breach of its duty under regulation 9.

70. Self-evidently, the list does now exist and the Appellant has a copy. If as the Appellant says, the list would allow her to narrow her request to 15 files, then there is nothing to prevent the Appellant from making a further request in relation to those 15 files. That would, however, be a fresh request and therefore falls outside the scope of this appeal.

71. The Appellant has referred to 3 files from the list, the description of which she says makes it obvious that they would not be relevant to her requests. She says that this indicates that WAG has exaggerated the number of files, and hence the amount of time it would take to comply with her requests. This is not a point to which WAG has responded. We

note, however, that the Appellant has referred only to 3 files which she says are clearly irrelevant. Although she says these are just examples, there is no evidence before us to support a finding that the number of irrelevant files are such as to materially undermine the time estimates referred to in paragraph 48, above.

Conclusion

72. For the reasons set out above, and having regard in particular to the time estimates referred to in paragraph 48, above, as well as the likely impact on WAG of committing that amount of time to complying with the requests, we are satisfied that the requests can properly be regarded as being manifestly unreasonable and that WAG was entitled to refuse the requests under regulation 12(4)(b).

73. For the avoidance of doubt, we should say that although, for the purposes of the analysis above, we have looked at the three requests as a totality because of the factual links between them, our decision would be the same if the requests were looked at individually. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, made pursuant to section 12 of FOIA permits public authorities, under the FOIA regime, to aggregate requests received within any period of 60 consecutive working days. There is no corresponding provision, however, under the EIR. The issue has no material bearing on the facts of this case, however. As the time estimates in paragraph 48 indicate, even taken individually, the time required to comply with Request 1 is the same as for Request 1 and 2 taken together and Request 3 is not so materially less as to support a different finding on whether the request is manifestly unreasonable.

The Public Interest Balancing Exercise

74. As already noted, even where regulation 12(4)(b) is engaged, a public authority may only refuse to disclose the information requested if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information (regulation 12(1)(a)).

75. In the present case, the public interest in maintaining the exception does not relate to the subject matter of the information requested. The analogy the Appellant seeks to draw with the disclosure of the Attorney General's advice regarding the legality of the military action in Iraq, is therefore not applicable. Rather, the public interest in maintaining the exception arises from the impact on the public authority in devoting the time required to comply with the requests. We have already addressed this impact, above. The Commissioner says and we agree that there is clearly a very strong public interest in a public authority being able to carry out its wider obligations fully and effectively and not to have significant resources diverted in order to comply with one or more requests for information.

76. The countervailing public interest in disclosing the information is both generic and specific. In generic terms, there is always an important

public interest in the accountability of public authorities and transparency in the way in which they function and make their decisions, in relation, in particular (in the EIR context), to information which affects or is likely to affect the environment. We also accept that there is a wider public interest in information relating to the development of renewable energy sources and initiatives to increase electricity generation in the UK. We note that WAG's assertion, recorded in the Decision Notice, that in the 3.5 years since the opening of the Cefn Croes wind farm, the public at large had not demonstrated an interest in the matter, is strongly rejected by the Appellant.

77. The specific public interest is in relation to the Cefn Croes wind farm and how and on what basis WAG reached its decision to approve its development on FCW land. What is less clear, however, is how the disclosure of the information requested by the Appellant would further the public's understanding of these matters, and what it would add to the information that is already in the public domain.

78. There is no clear evidence before the Tribunal as what information relevant to the request is already in the public domain. In its Decision Notice, the Commissioner notes that there has been a background of 10 years of campaigning by the Appellant and Cefn Croes Action Group against the wind farm. The Commissioner says that there is already a significant amount of information in the public domain, relevant to the Appellant's request. In particular, he says that the information as to what was considered by the Secretary of State when she made her decision to grant the planning application for Cefn Croes is already in the public domain. There are various letters in the open bundle (for example WAG's letter dated 1 April 2009 to the Commissioner, a letter dated 13 May 2009 from the Dept of Rural Affairs to the Appellant, a letter dated 30 June 2009 from Plaid Cymru to the Appellant), which refer to disclosure of relevant information and which, in our view, supports the Commissioner's view that there is, already in the public domain, a significant amount of information relevant to the Appellant's request. That does not mean, of course, that all the information is in the public domain. We accept it as likely, from what the Appellant has said, that certain information has not yet been made public although it is not clear from her evidence precisely what this information consists of.

79. The Appellant has not adduced any evidence to show how the public interest will be furthered by the information she has requested. The Appellant is clearly of the view that there have been shortcomings or wrong doings on the part of WAG in relation to the Cefn Croes wind farm, but her allegations in this regard have been notably general. Her grounds of appeal, for example, allege "legally shifty dealings behind closed doors". She also alleges cover ups and lies. In her letter to WAG on 23 April 2008, she refers to a "cover up of actions known by their legal advisers to be unlawful". She also suggests that Minister Brian Wilson has personally benefitted from the wind turbines. In a letter dated 11 July 2009, she states that the Cefn Croes wind farm was constructed illegally on a FCW site. However, she has not

adduced any evidence that would indicate that there is any basis for such allegations. The Appellant may be hoping that the information requested will provide material to substantiate the allegations. There is no bar, in principle, to requests for information under the EIR or FOIA being used for what may perhaps fairly be described as a fishing expedition. However, in the absence of evidence to indicate that there is a proper foundation for such allegations, it does not follow that there is a strong public interest in disclosing such information. The Appellant has provided, with her letter dated 22 April 2010 to the Tribunal, a note on a Report which says that the environmental impact of wind turbines in the Welsh uplands has not been fully assessed. We accept that that may be so. However, we do not see how that furthers the public interest in the disclosure of the information in question.

80. In short, we consider that there is very little before the Tribunal to support a finding that there is a material public interest in disclosing the information, apart from the generic public interest referred to in paragraph 76. Against that public interest, we have to weigh the public interest referred to in paragraph 75 in maintaining the exception. Given the considerable time commitment that compliance would involve and the likely impact that would have on WAG's day to day functions, and given the paucity of evidence as to any material specific public interest in disclosure of this information, in all the circumstances of the case, and even taking into account the presumption in the EIR in favour of disclosure, we find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

81. For all these reasons, we agree with the Commissioner that WAG was entitled to rely on the exception in regulation 12(4)(b) in relation to all the Appellant's requests.

<u>Other Issues</u>

82. There are a number of other issues which have been raised, which though not directly relevant to the substance to this appeal, we will address for completeness.

83. The Appellant says that she has repeatedly offered to help with the file search and that this would alleviate the need for WAG to dedicate its own resources to the requests. We do not consider this to be a tenable solution. Apart from legitimate concerns about maintaining the integrity of the public authority's files, there would quite likely be concerns about granting a member of the public access to files which might contain information of a confidential nature or containing other information (for example personal data of third parties).

84. The Appellant has also requested, in her letter for 1 November 2010, that "for administrative ease", her separate request for information addressed to the FCW be amalgamated with Requests 1, 2 and 3, in the present appeal. We agree with WAG that any request made to FCW is a separate request made to a separate public body. There is no statutory or procedural provision that would justify a consolidation of any such request with the requests made to WAG.

85. The Appellant has taken issue, in her grounds of appeal, with the fact that WAG changed the basis for its refusal in respect of Requests 1 and 2 from regulation 12(4)(e) to 12(4)(b). We note that in the case of both Requests 1 and 2, WAG relied on the exception in regulation 12(4)(b) at the internal review stage. The Commissioner says, and we accept that this is within the time permitted by regulation 11 of the EIR. There is nothing in regulation 11 to prevent a public authority, on reconsideration, to revise the basis of its refusal. There is, in any event, no absolute bar to a public authority changing the basis of its refusal. Everything depends on the circumstances of the individual case, and in the present case, this change was made at a relatively early stage, with no prejudice to Appellant. The issue does not arise in the case of Request 3 since the exception in regulation 12(4)(b) was relied when the request was refused.

86. In her grounds of appeal, the Appellant appears to question the impartiality of the Commissioner. There is no evidence before the Tribunal to substantiate the concerns indicated by the Appellant but such an issue would, in any event, be outside the jurisdiction of the Tribunal. If the Appellant wishes to make any specific allegations about the Commissioner's conduct, she is free to take the matter up through the proper channels.

87. In her grounds of appeal, the Appellant has taken issue with why the Commissioner did not require WAG to take any steps in respect of the procedural breaches referred to in paragraph 14(b). The Commissioner says that there are no steps that could have been ordered in respect of those breaches. There is nothing on the evidence before us, to suggest that the Commissioner did not act properly within the scope of his powers and discretion in this regard.

88. The Appellant has also queried the status of communications between the Commissioner and WAG. The Commissioner has responded stating that the Appellant is free to make a request for such information. In our view, since the Commissioner's communication with WAG was for the purposes of investigating the Appellant's complaint, there is something to be said for the requester being informed about such communications to alleviate any concern which might otherwise arise as to the Commissioner's neutrality. However, we accept that that is a matter for the Commissioner's procedures and not within the jurisdiction of the Tribunal.

89. The Appellant has also taken issue with how WAG manages its files which she says, does not lend them to being searched efficiently. The EIR, like the FOIA, places no obligation on a public authority in relation to how it records or manages the information it holds. The obligation is only to disclose what it does hold, subject to the provisions of the relevant Act.

90. The Appellant also questions why some information could not have been disclosed up to the "appropriate limit". As we have already explained, the notion of an "appropriate limit" is founded in the FOIA

regime, not the EIR. It seems unlikely, on the facts of the present case, that WAG could have itself limited the scope of the Appellant's requests so as to provide meaningful information to the Appellant within any notional limit of time. If WAG had, for example, undertaken a review of the first, say 20 or 30 files, it seems unlikely that it would have satisfied the Appellant's requests in any meaningful way.

91. In our view, although for the reasons set out above, this appeal must be dismissed, we recognise that the Appellant's campaign in relation to the Cefn Croes wind farms may result in further requests for information made to WAG. Now that the Appellant has the list referred to in paragraph 64 above, it may well be that she can narrow any further requests considerably. In our view, the meeting proposed by WAG that did not take place, perhaps ought to take place now in order to see what information WAG can provide that would satisfy the Appellant. This may avoid the need for further formal requests with the additional commitment of time for both sides that that would involve, as well as the further delay for the Appellant in obtaining the information she seeks.

Decision

92. For all the reasons set out above, this appeal is dismissed. Our decision is unanimous.

93. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First-tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website.

Ms A Dhanji

Judge

Date: 30 December 2010