Neutral citation number: [2024] UKFTT 361 (GRC)

Case Reference: EA/2018/0122

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard at: York House, Leeds
Heard on: 9 July 2021
Decision given on: 2 May 2024

Before

JUDGE LYNN GRIFFIN

Between

Terry Crossland

Appellant

and

1. Information Commissioner
2. Leeds City Council

Respondents

Representation:
For the Appellant: in person
The respondents did not attend and were not represented

Decision: The appeal is allowed.

Substituted Decision Notice:

i. On a balance of probabilities Leeds City Council does not hold further information that would fall under the terms of the Environmental Information Regulations 2004 (EIR).

ii. The Tribunal has decided that the Commissioner's decision notice is in error of law and concludes:
   a. There was no breach of regulation 5(1) EIR by the Council;
   b. There was no breach of regulations 11(3); 11(4) and 11(5);
   c. There was no failure as regards regulations 12(1)(b) and regulation 14(3)(b) by not setting out its analysis of the public interest test balancing exercise;
   d. There was a technical breach of regulation 14(3)(a) by the Council;
   e. There was a technical breach of regulation 14(5)(a) & (b) by the Council.

iii. The information concerned has been provided to the Appellant pursuant to a SAR and no further information remains outstanding.

iv. The public authority is not required to take any further action in this matter.

REASONS

Background

1. In 2011, one of Mr Crossland's neighbours raised the height of a wall without planning permission in a conservation area. Mr Crossland has provided me with a detailed account of his concerns and the history of the planning processes that then ensued. Mr Crossland made contact with Leeds City Council ("the Council") on his own behalf and on behalf of local residents. Mr Crossland strongly opposed the building of any extra height to the wall. Mr Crossland thought that the Council should take enforcement action against the wall's owner for non-compliance with a planning condition. Mr Crossland is of the opinion that there was inappropriate use of certain planning procedures and was not satisfied with the actions of the Council. In July 2015, the Council decided not to take action. After that decision, Mr Crossland has pursued the matter with the Council in various ways including a number of complaints and requests for information.

2. The Appellant is concerned with the conduct and impartiality of the Council employees charged with dealing with the issues relating to the garden wall and has formed the view that the Council had acted in a way that was unfairly favourable towards the individual who had built the wall. On four occasions in 2012 Mr Crossland complained to the Council about the way they had handled the planning matter. He made further complaints in September 2014 and in around October 2014 the Council carried out an internal audit into his complaints.

3. On 3 December 2014 the Leeds City Council CEO, Tom Riordan, wrote to the Appellant stating, inter alia,

   '*It is clear to me that the Council has made mistakes in how it has dealt with a number of issues relating to this matter. However, I do not accept that any officers acted in bad faith or deliberately set out to mislead any interested parties. I sincerely apologise that we have fallen short of the standards that I believe you are reasonably entitled to expect of this organisation but I consider that the Council is now taking all necessary steps to rectify the procedural errors that have occurred. Should you remain dissatisfied after those steps have been taken then, as stated previously, I can only suggest that you take up your complaints with the Local Government Ombudsman.*'

The request for information at issue in this appeal

4. Mr Crossland (the Appellant) has made other requests for information arising from the issues surrounding the construction of the wall and this is not the first time those requests have been considered by the First tier Tribunal. The Appellant submitted the request at issue in this appeal ('the Request') to the Council on 30 January 2017. At the date of the Request, the Appellant was pursuing an appeal to this Tribunal[1], following the Council's decision to treat a number of his previous information requests on the subject of the garden wall as 'manifestly unreasonable' under reg. 12(4)(b) Environmental Information Regulations (EIR).

5. The request dated 30 January 2017 read as follows, I have emphasised the part of the request with which I am concerned in this appeal

   a. ***"If correspondence was sent to me informing me of the details of what specifically was to be done to address these Council procedural and processes deficiencies, and to rectify procedural errors, please send me a copy.***
   b. ***Please send me information on all the actions you have implemented (including copies or(sic) all revised procedures, processes, etc.).***

      It is further noted that in your letter of 3rd December 2014 you also stated;

      '*In my letter to you of 14 November 2014 I acknowledged those procedural failings, particularly in the recording of decisions by officers, and confirmed to you that the Chief Planning Officer would now review the Head of Planning's original decision*

[1] The Decision of the Tribunal in Crossland v ICO and Leeds City Council is reference EA/2016/0182 6 June 2017

to proceed by way of non-material amendment[2]*. I also confirmed that you will be provided with a clear explanation of his decision.*'

Again I have checked my records and can't locate this information provided by Mr [redacted name], Chief Planning Officer. The only correspondence I can locate at that time is a letter dated 26th February 2015 from [redacted name] responding to my complaint that the Council was failing to comply with the EIR, FoIA & DPA regarding my requests for information. Mr [redacted name] stated that my correspondence/requests were vexatious and that I had made several including a statement that;

'*Nevertheless, I do believe that officers have done their best to resolve your concerns and, in doing so, have provided a significant amount of information to you. In addition, the council has conducted an Internal Audit investigation into the handling of this compliance case and has, further, provided a response to your concerns under its complaints procedure. In light of these facts, the authority reserves the right to treat any further information request on this matter as 'manifestly unreasonable' under Reg 12(4)(b) of the EIR. This is on the basis that any such request would fall under the ICO's definition of vexatious behaviour.*'

c. *Please provide a copy of the response you promised I would receive from Mr [redacted name], Chief Planning Officer (including about use of NMA planning process) and confirm it is different from the response dated 26th February 2015.*
d. ***Please confirm that the Council's position on matters was correctly expressed by you, CEO, in your letter dated 3rd December 2014.***
e. ***Please also therefore explain the apparent clearly extremely contradictions between the Council's position (including re my complaints) as expressed by the CEO in letter dated 3rd December 2014 and subsequently by Mr [redacted name], Chief Planning Officer in correspondence dated 26th February 2015."***

6. The Council responded to the request on 13 February 2017 providing some information. The information provided was a copy of correspondence addressed to the Appellant dated 19 December 2014 and quotations from other correspondence addressed to the Appellant dated 1 November 2015 but the Council stated that it was refusing to comply with part 2 of the request on the basis that it was 'manifestly unreasonable' as to which the relevant exception within the EIR is regulation 12(4)(b). In due course the Council were to withdraw their reliance on that regulation, see below.

[2] Non-material amendment of an existing planning permission following a grant of planning permission, pursuant to Town and Country Planning Act 1990.

7. The communication from the Council dated 13 February 2017 read, in part,

   "To be clear, I do not intend to enter into protracted correspondence on this as, as you are aware, your information requests on this matter are currently the subject of an appeal to the Information Rights First Tier Tribunal following the Council's decision to consider them as 'manifestly unreasonable' under the Environmental Information Regulations. In addition, you have also, on many occasions, been advised to contact the Local Government Ombudsman with respect to your complaints on this matter, having already exhausted our internal complaints process.

   ...

   Separately to the above, I can also advise (as referred to by Mr. Riordan in his email of 3rd December 2014) that all internal consultation responses are now published on the Council's website.

   I will not, however, respond to your request for 'all revised procedures, processes, etc' as, as previously stated, the Council considers your requests on this subject matter to be manifestly unreasonable. Nor will I enter into any further correspondence in respect of your other queries, as the Council's position has been comprehensively stated on a number of occasions."

8. On the same day Mr Crossland sent a reply and a request for a review, setting out in detail how, in his view, the Council would be able to comply with the EIR. He sought confirmation or denial as to the information held by the Council relevant to the Request as well as details of any EIR exemptions from disclosure claimed in respect of any information that was held together with the reasons for claiming any exemption(s).

9. In response to the Appellant's complaints expressing his dissatisfaction with how the Council was handling his requests for information and asking for a review. The Council's Chief Planning Officer wrote to the Appellant on 17 February 2017, confirming that the Council regarded the Appellant's continued requests on the subject of the garden wall as 'manifestly unreasonable'. The Appellant had initially complained that the Council had not responded to his request for a review but accepted in his reply to the Respondents' responses that the Council did respond to his request for a review by effectively refusing the request. However, he made submissions about whether the letter complied with regulation 11 at the hearing so I deal with the issue below.

10. Mr Crossland sent a second request for information on 26 February 2017 which concerned the correspondence he had recently received from the Council as outlined above and another letter from the Council's solicitor, acting a

Monitoring Officer, received in response to a complaint made by Mr Crossland on 6 February 2017. This second request is not the subject of this appeal but it forms part of the background and thus is set out at appendix 1 to this decision for completeness. That request arose from Mr Crossland's concerns about how the Council had managed the planning complaint and his subsequent requests for information.

11. Mr Crossland chased an answer to his second request on 3 March 2017. The Council responded on 14 March 2017 and on 23 March 2017 referring to its previous response, and directed Mr Crossland to the Commissioner and/or the Local Government Ombudsman should he remain dissatisfied.

12. On 25 April 2017 the Appellant wrote to Tim Hill, Leeds City Council, asking the Council to confirm it had been non-compliant with EIR, the Council did not respond.

13. On 12 May 2017 Mr Crossland wrote asking for an explanation of why the Council had not responded to his letter of 26 February 2017 and made a subject access request under the Data Protection Act 1998[3] ("DPA98"). The Council's reply dated 22 May 2017 acknowledged the subject access request and apologised for the delay in responding. This appeal is not concerned with any subject access requests ("SARs") to the Council made by the Appellant. The Appellant was provided with disclosure under DPA98 of his personal data in response to his SARs. The Appellant submitted complaints to the Commissioner about the handling of the SARs and these were dealt with by the Commissioner separately under that statutory regime under reference RFA0681544.

The Information Commissioner's decision

14. The Appellant made a complaint to the Information Commissioner's Office on 19 May 2017, resulting in an ICO decision notice reference FER0695235 dated 21 May 2018. This is the decision notice with which this appeal is concerned.

15. The Appellant sent two follow up emails with supporting documents to the Commissioner on 23 May 2017. The second included a completed complaint form.; I will call this the second complaint for these purposes but it is clear from correspondence sent by the Appellant to the Commissioner that as of 26 July 2017 he had at least five complaints pending with the Commissioner, four of which related to the Council.

[3] The Data Protection Act 2018 came into force on 25 May 2018 and replaced the Data Protection Act 1998.

16. In his complaint that resulted in the decision notice under appeal, the Appellant requested that the Commissioner consider the Council's conduct in relation to:

    (i) the public interest test at time of the refusals and review;

    (ii) confirmation of denial of specific documents;

    (iii) reasons for refusal; and

    (iv) compliance with review procedures.

17. On 10 August 2017 the Commissioner wrote to the Appellant acknowledging his correspondence, allocating a case reference (FER0695235) and apologising for the delay in responding. The Appellant says that correspondence relating to the two requests for information (dated 30 January and 26 February) have been conflated and confused by the Commissioner. He says further that the Information Commissioner's office wrongly combined his complaints to them of 19 & 23 May 2017, the former relating to a complaint about the Council's CEO and the latter about the Council's solicitor (Monitoring Officer). This is because the acknowledgement of his complaints were given the same reference number and he received one and not two acknowledgements. The Appellant wrote to the Commissioner to that effect on receipt of the acknowledgement, he also drew attention to his complaint under the data protection legislation and asked how that was to be dealt with. As already noted this was dealt with under that distinct statutory scheme.

18. On 24 November 2017 the Commissioner responded to say "This case (FER0695235) will investigate whether the Council has complied with the Environmental Information Regulations 2004 ("the EIR") in responding to your information requests. The Commissioner will then issue a decision notice to provide her determination."

19. As to the first request, during the course of the Information Commissioner's investigation, on 14 December 2017, the Council withdrew reliance upon regulation 12(4)(b), for the reasons outlined in Decision Notice FER0615064 dated 29 June 2016 and stated they wished to try and resolve the matter informally by providing as much information as they could.

20. Having spoken with the Commissioner's officer by telephone the Council on 16 January 2018 the Council told the Commissioner on 19 January 2018 that it had decided to respond to the Appellant's requests. On 7 February 2018 the Council issued a new response to both requests under the EIR.

21. In this new response the Council stated that it did not hold recorded information about 'revised procedures and processes', (part 2 of the first request paragraph (b)) stating that "With regard to your first and second requests[4], as suggested in Mr. Riordan's correspondence to you dated 3rd December 2014, the Council reviewed its arrangements for publishing consultation responses on the Council's website and all consultation responses are now publicly available to view when submitted. We do not hold recorded information with regard to revised procedures and processes" and that all relevant information to his first request that is held would represent Mr Crossland's own personal data, and would therefore fall under the terms of the data protection legislation.

22. At this stage the Council's position was that parts 4 and 5 of the first request, paragraphs (d) and (e) were not valid requests for information either under FOIA or under the data protection legislation.

23. The Council's response regarding the second request for information, (not the subject of this appeal) provided some information, similarly set out that the Council did not hold further information requested and that parts of the request were not valid requests for information either under FOIA or under the data protection legislation.

24. The Appellant made it plain in his correspondence with the Information Commissioner that he did not want any informal resolution of his complaints. He also clarified that he was not complaining about how the Council had dealt with the third part of his first request (paragraph (c)). Thus the purpose of the investigation undertaken by the Information Commissioner was to determine whether the Council held recorded information within the scope of the requests that is not the Appellant's (Mr Crossland's) own personal data, and which had not been otherwise been disclosed to him.

25. On 6 March 2018 the Commissioner wrote to the Council and asked questions about:

a. the manner in which its records are stored
b. the searches it had undertaken to identify information relevant to the Appellant's request
c. whether any of the information sought represents the Appellant's own personal data, which has already been disclosed to him

[4] I understand this as a reference to the first two parts of the first request.

d. why the Council considered that parts 4 and 5 of the Request are not valid information requests.

26. In response to the Commissioner's enquiries the Council explained through its Information Governance Officer the following facts which I accept:

a. all information relevant to the Request, if held, would be recorded electronically in emails or policy documents;
b. there would be no business purpose to hold the requested correspondence ;
c. it was not obliged to retain the requested information;
d. the Information Governance Officer was unaware of the correspondence mentioned in part 1 (paragraph (a)) of the request or the reason for any such correspondence;
e. although the Information Governance Officer would be the holder of any such information as the relevant Chief Planning Officer had retired the Information Governance Officer had searched the correspondence on his electronic file in relation to the Appellant's concerns including the Appellant's correspondence with all relevant parties, including the Chief Executive and Chief Planning Officer, in 2014 and 2015;
f. it was unlikely that any correspondence relevant to part 1 of the Request would have been deleted;
g. the Council had concluded that it holds no correspondence relevant to part 1 (paragraph (a)) of the Request after the correspondence of 3 December 2014 and, if any such correspondence were held, it would represent the Appellant's personal data;
h. as to part 2 of the Request (paragraph (b)), the Information Governance Officer told the Commissioner that the Council does not hold any information similar to that requested by the Appellant. He had liaised with the team leader in the Planning Service who implemented the changes referred to in the letter dated 3 December 2014. The team leader had confirmed that
    i. no revised procedure or process was produced
    ii. that staff were simply advised to make the documents in question available on the Council's website
    iii. she does not hold any emails from the relevant time and no one else would hold this information.

27. On 21 May 2018 the Commissioner issued her decision. The Commissioner's decision as set out in FER0695235 was that, on the balance of the probabilities, the Council does not hold further information that would fall under the terms of the EIR. However, at that stage, the Commissioner concluded that the Council breached regulation 5(1) by providing a response to the requests

outside the time for compliance. The Commissioner has since altered her position on that issue.

28. The reasons for the Commissioner's decision are summarised in the Commissioner's response to the appeal as follows

"a. The Council has provided the Commissioner with a clear explanation of how relevant correspondence is held and confirmed that this information has been considered by an officer most familiar with its content and the relevant officer within the Planning Service. The latter confirmed that no guidance documents were altered following the planning complaint, and general emails from that time (late 2014 to early 2015) are no longer retained (DN §25).

b. It is reasonable for the Commissioner to consider that any correspondence addressed to the Appellant within the scope of the Request and held by the Council will have already been sent to the Appellant, and, would represent his own personal data (DN §§26, 27). In accordance with reg. 5(3) EIR the Council is not obliged to provide the personal data of the requester. This information should be provided under the DPA (DN §18)[5].

c. The Commissioner disagreed with the Council in respect of parts 4 and 5 of the Request which she considered to be valid information requests for 'actions' in respect of previous correspondence. However, the Commissioner reasonably considered that such correspondence has already been sent to the Appellant and that it would represent his own personal data (DN §27). The Commissioner pointed out that the EIR do not obligate the Council to create 'new' information in response to a request (DN §28).

d. The Commissioner found no indication that the Council is likely to hold further recorded information that would fall under the terms of the EIR specifically, information that does not constitute the Appellant's personal data (DN §28). However, the Commissioner found that the Council had failed to respond to the Request within the requisite time-frame. Accordingly, the Commissioner should have found a breach of reg. 14(2) EIR instead of reg. 5(1) EIR in DN §2."

The grounds of appeal and the appeal process

29. The notice of appeal against the Commissioner's decision notice reference number FER0695235 was dated 11 July 2019. The grounds clearly stated that the appeal was limited to the first request dated 30 January 2017.

[5] On 21 May 2018 the Commissioner informed the Appellant that the DN §18 should have cited reg. 5(3) instead of reg. 13.

30. On 13 August 2018 the Council was made a party to the appeal. The Council supported and adopted the position taken by the Information Commissioner and maintains that it has disclosed all the information that falls within the scope of the request to the Appellant and that there is no indication that further information was likely to be held that would fall for disclosure within the scope of the request.

31. On 27 June 2018 case management directions were issued by the Tribunal's registrar, that pointed out

8. This Tribunal's jurisdiction is limited to considering whether the decision notice was, or was not, wrong in law.

9. The Tribunal cannot consider matters of prosecution – rule 19 offences are dealt with in the Magistrates' Court.

10. This Tribunal does not give "general advice" about EIR / FOIA; any such general guidance is to be found in case precedent, most notably in the case of The Department for Business, Energy and Industrial Strategy v Information Commissioner and Alex Henney [2017] EWCA Civ 844.

32. On 5 September 2018 the Registrar made directions about the provision of the bundles to the Tribunal. These directions were challenge first by the Council and then by Mr Crossland.

33. On 25 September the Registrar further directed

Mr Crossland's notice of appeal

3. Mr Crossland's notice of appeal and grounds of appeal give reasons why he says Leeds City Council were wrong to apply regulation 12(4)(b) to his request:

3.1 The Information Commissioner's Office did not find that regulation 12(4)(b) applied.

3.2 Therefore, any consideration of that question is outside the remit of the Tribunal Judge allocated to decide the merits of Mr Crossland's appeal.

4. The outcomes listed in Mr Crossland's notice of appeal do not appear to me to be within the remit of the Tribunal's narrow window which is to decide whether Leeds City Council did or did not hold information in respect of Mr Crossland's request.

34. The Registrar indicated she was considering striking out the appeal and gave Mr Crossland an opportunity to make representations on the issue. Mr

Crossland made an application under rule 4(3) of the Tribunal rules combined with his representations on the issues raised by the registrar. Judge McKenna upheld the directions and refused the application for permission to appeal. The appeal was stayed by the registrar pending any appeal to the Upper Tribunal. Mrs Justice Farbey, Chamber President of the Upper Tribunal AAC set aside the judge's decision on the bundles, in essence, because Mr Crossland had not been given an opportunity to comment on the issue before a decision was made. The Upper Tribunal decision was issued on 2 September 2020. The appeal against the decision to provide an opportunity to make representations about why the appeal should not be struck out, was itself struck out by Farbey J also on 2 September 2020.

35. On 12 March 2021 Judge Macmillan decided that the appeal should not be struck out. On 8 April I made further directions as to the material the Tribunal required to consider this appeal and directed a case management hearing to consider the format of the hearing and any reasonable adjustments to the Tribunal's usual process. After that case management hearing further directions were made which need not be summarised here.

The issues according to the parties

36. Mr Crossland invites me to consider the way in which the Council complied with its duties under EIR. He submits they have not done so. The way he submits this is relevant to the central issue in the case is that he suggests that the Tribunal should not accept what is said by the public authority because of the way his requests have been dealt with and the alleged non-compliance he has identified.

37. The alleged non-compliance with the EIR identified by Mr Crossland is

    a) Unlawfully claiming EIR R12(4)(b) manifestly unreasonable exemption
    b) Wilfully misleading the Appellant by not claiming exemption under Reg. 12(4)(a)
    c) Failure to provide a response compliant with Regulation 5(1)&(2)
    d) Non-compliance with Regulation 11(3) to 11(5) related to Representation and Reconsideration.
    e) Offence of altering records with intent to prevent disclosure.

38. Mr Crossland further submits that the Information Commissioner should consider the facts and circumstances as they are at the time the complaint is made to them. He says that otherwise a pubic authority can "block and

frustrate" requester's rights under EIR and any failure to comply will be effectively covered up.

39. In his grounds of appeal , the Appellant does not challenge the Commissioner's decision that, on the balance of probabilities, the Council holds no further information, that is not his own personal data, and which ought to be disclosed to him under the EIR. He acknowledges in his grounds at paragraph 31 that the Council would have been correct to rely on reg. 12(4)(a) EIR in its initial response, had it done so. The grounds centre on procedural aspects of the way his request was handled and allegations as to the motivation of the Council.

40. In an attempt to narrow the issues I directed that the parties agree a list of the questions for the Tribunal to decide. By the time of the hearing the focus was upon one paragraph of the first request. Mr Crossland provided a summary of issues in dispute, which was not agreed by the other parties, in which he stated

All parties also appear to agree that the EIR was breached by [the Council] in its response to request 1b), extracted and summarised as below, but the issues in dispute are which of the EIR Regulations were breached.

b) 'Please send me information on all the actions you have implemented (including copies or all revised procedures, processes, etc.).'

41. Mr Crossland also provided a table of issues in dispute cross referenced to the provisions of the EIR. This table states that he alleges breaches of the following regulations

    a. regulation 5(1) & 5(2) regarding the duty to make available environmental information on request
    b. regulation 9(1) & 9(5) regarding advice and assistance
    c. regulation 11(3) to (5) which are about representations and reconsideration. The grounds of appeal had raised an alleged failure to complete an internal review in accordance with regulation 11 EIR.
    d. regulation 12(1), (2) & (4) concerning exceptions to the duty to disclose environmental information, the grounds of appeal has raised, in particular, an alleged failure to conduct the public interest test for the purposes of regulation 12(1)(b)
    e. regulation 14(1) to (3) about refusal to disclose information. This mirrors the grounds of appeal which raised the issue of an alleged failure to issue a refusal notice in accordance with regulation 14 EIR;
    f. regulation 19(1) & (2) which contain an offence of altering records with intent to prevent disclosure

42. The respondents provided a schedule of agreed facts and issues that was not agreed by the Appellant this indicated as follows

    a. The scope of this appeal relates to parts 1; 2 ; 4 and 5 of the request of 30 January 2017 only.
    b. The respondents' submission was that the Tribunal should find that the Commissioner was correct to decide that, on the balance of probabilities, the Council did not hold any further recorded information which fell within the scope of the request as outlined above.

43. The Information Commissioner, has detailed her position in three documents over which her position has evolved

    a. decision Notice dated 21st May 2018,
    b. formal Response, to the Appellant's appeal dated 31st August 2018,
    c. draft 'Schedule of Issues in Dispute'.

44. In the document that had not been agreed by the Appellant, the Commissioner addressed each of the alleged breaches of the regulations and:

    a. invited the Tribunal to substitute her decision notice to remove the breach of regulation 5(1);
    b. retracted the invitation made at paragraph 21(d) of her formal response to substitute a breach of regulation 14(2) in place of the regulation 5(1) breach;
    c. invites the Tribunal to substitute her decision notice with a technical breach of regulation 14(3)(a);
    d. submitted that there is no basis for the Appellant's position that the Council "wilfully misled" the Appellant by not relying on regulation 12(4)(a);
    e. there is no breach of regulations 11(3); 11(4) and 11(5);
    f. Submits there was no failure as regards regulations 12(1)(b) and regulation 14(3)(b) by not setting out its analysis of the public interest test balancing exercise;
    g. invites the Tribunal to substitute the decision notice to reflect a technical breach of regulation 14(5)(a) & (b);
    h. submits that the allegations that the Council's actions amounted to a breach of regulation 19 were not matters within the scope of the appeal.

45. I also note that in correspondence during the investigation the Appellant raised a query about the reference to 'regulation 13' of the EIR in paragraph 18 of the decision notice. The Commissioner responded by accepting that it was a typographical error and that the wrong regulation had been cited and the reference should be 'regulation 5(3)' not regulation 13.

46. The reasons given by the Commissioner were that

a. the Council had provided a copy of its letter of 19 December 2014 and an extract from its letter to Appellant dated 1 November 2015 by way of attachments to its response/refusal notice of 13 February 2017 as regards the first request and the second limb of the second request of 30 January 2017.
b. the Council had relied on a valid exception, namely, regulation 12(4)(b) to refuse to comply with the first limb of the second request, and therefore had complied with regulation 14(2) insofar as this part of the request was concerned.
c. the Council did not rely on regulation 12(4)(a) in its refusal notice of 13 February 2017 when it is the Commissioner's position that requests four and five were valid requests for information but that no further information, other than what may have already been disclosed in response to a subject access request, was held (see paras 27 and 28 DN).
d. There is no procedural breach of reg. 12(4)(a) insofar as the Council, effectively, made a late claim of regulation 12(4)(a) on 7 February 2018 because the relevant letter was not a refusal notice for the purposes of the Regulations
e. As to an internal review and alleged breaches of regulations 11(3); 11(4) and 11(5), the respondents rely on the Council's email to the Appellant of 17 February 2017 in support.
f. A public interest test as required by regulations 12(1)(b) and regulations 14(3)(b) cannot be undertaken in regulation 12(4)(a) cases as, in practical terms, it would be impossible for a public authority to determine that the public interest test favoured the disclosure of information which it does not hold.
g. The Council's response of 13 February 2017 does not inform the Appellant of his ability to make representations under regulation 11 (i.e. to seek an internal review) or of the enforcement and appeal provisions of regulation 18. This is so notwithstanding that the Appellant is aware of the same from the actions he took thereafter.
h. Regulation 19 is properly dealt with by the Magistrates' Court.

47. In so far as its position departed from that of the Commissioner, the Council submitted that there was doubt over whether requests 4 and 5 were valid requests for information but did not ask the Tribunal to make a ruling on that issue. As regards regulation 19 the Council "vigorously denies" the allegations made against it by the Appellant in this regard.

The real issues in this case

48. The grounds of appeal set out alleged non-compliance with the EIR and submit that the appeal raises the issue of how the EIR should be interpreted by the Information Commissioner and how that office should deal with the concerns of citizens. However it is not the role of this Tribunal to supervise the function of the Information Commissioner's office, that responsibility lies with the Parliamentary and Health Service Ombudsman. The Tribunal does not direct what regulatory action can or should be taken by the Information Commissioner in relation to compliance with the EIR or Freedom of Information Act 2000 in the absence of any statutory power to do so. The Tribunal is limited by law as to what complaints about the Commissioner that it can deal with. This has been previously explained to the Appellant by the Upper Tribunal in the context of another case[6]

49. The appeal is brought under section 57(1) of the Freedom of Information Act 2000 ('FOIA'), as modified by Regulation 18 of the Environmental Information Regulations 2004. The real issue for this Tribunal is whether the decision notice is in error of law or involved the wrongful exercise of a discretion. In deciding that issue I shall consider those matters that determine my conclusions, it will not be the wide ranging decision, qua inquiry, that I am invited to make by the Appellant as that is neither necessary nor proportionate to the proper consideration of the appeal within the scope fo the Tribunal's powers.

50. This Tribunal cannot review or reconsider issues that were considered and decided in other cases brought by the Appellant. That is not to say that I am bound by any other decision of the First tier Tribunal and I shall follow such decisions only if I agree with it or it has been approved by the Upper Tribunal and is therefore binding upon me.

51. The following is agreed

    a. The information requested related to the planning matters in 2011.
    b. The requests for information were made under the Environmental Information Regulations 2004 ("the EIR") because the information requested relates to a planning complaint and associated information requests. The application of the EIR was not in dispute.
    c. Furthermore it is accepted that part 3 of the first request was made under the Data Protection Act 1998.
    d. The Council does not hold any further recorded information within the scope of the first request that is not the Appellant's (Mr Crossland's) own personal data, and which had not been otherwise been disclosed to him.

[6] See Crossland v Information Commissioner and Leeds City Council [2020] UKUT 260

52. An agreed chronology of surrounding events and correspondence has been prepared and is appended to this decision (Appendix 2).

The hearing and the evidence

53. The hearing took place in Leeds and was held face to face to better facilitate communication with Mr Crossland for the reasons previously given in case management directions. He was accompanied by a friend who supported him throughout the hearing for example, by helping him organise the papers. The panel was composed as required pursuant to the provisions in force at the time of the hearing.

54. When it became apparent to me during the hearing that the Appellant might benefit from a break, one was offered. The hearing began shortly after 10am and a break was taken for 15 minutes at 11am and an hour for lunch from 12.35. There was fifteen minute break from 2.50pm and the hearing ended shortly before 3.30pm. It was recorded by HMCTS.

55. The panel composition was determined by the composition statement in force at the time of the hearing.

56. At the hearing Mr Crossland asked to present his case through a series of documents that he intended to read to me and then provide the hard copy to me. He is a litigant in person and had clearly put in a lot of thought into how to structure his presentation. I allowed Mr Crossland to present his case in his preferred manner by reading out his notes to me. I asked any questions that I had of Mr Crossland having listened to what he had to say. After the hearing Mr Crossland provided me with electronic copies.

57. The notes provided to me by Mr Crossland were as follows

    i. Introduction
    ii. Part A – A Review of History of Concerns re Council's Planning Procedure Irregularities
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    iv. Part C - A Forensic Analysis to Determine the Council's Lawful Compliance or otherwise with each and every relevant Regulation of the Environmental Information Regulations 2004 Mandatory Requirements [Points of Law]

v. Point of Law Analysis. Re EIR Regulation 5 - Duty to make available environmental information on request
vi. Point of Law Analysis. Re EIR Regulation 9. Advice and assistance
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ix. Point of Law Analysis. Re EIR Regulation 14. Refusal to disclose information
x. Point of Law Analysis. Re EIR Regulation 19. Offence of altering records with intent to prevent disclosure
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58. Apart from these documents I have received the bundle containing 1,371 pages of documents plus index. There is also an Authorities Bundle of 147 pages and Schedules of 17 pages. I have considered all of this information but it is neither necessary nor proportionate to refer to every document in this decision. If I do not refer to a document or submission this does not indicate that it has not been considered.

59. I apologise to the parties for the time it has taken to promulgate this decision.

The legal framework

60. The powers of the Tribunal in determining this appeal are set out in section 58 Freedom of Information Act ("FOIA"), as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

61. Under section 58 FOIA the Tribunal conducts a full merits appeal (de novo) of the Commissioner's handling of the decision under appeal. The Tribunal does not have jurisdiction to consider and determine whether other requests for information that are not part of the requests leasing to the decision notice under appeal were dealt with properly by the public authority as recognised by the Upper Tribunal in Birkett v Defra and IC [2012] AACR 32, paragraph 50 "The consideration is limited by the terms of the request for information".

62. In the case of Birkett [supra] the Court of Appeal considered 'late' reliance by a public authority before the Tribunal on exemptions not considered by the Commissioner in the Decision Notice. This reliance is permitted subject to the Tribunal's case management powers when the public authority wishes to alter its position in the course of appeal proceedings.

63. As already noted there is no dispute in this case that the requested information would fall within the definition of environmental information that is contained in regulation 2(1) EIR.

64. The duty to provide environmental information on request is contained in regulation 5 EIR, the relevant parts of which read

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part [2] and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

65. Regulation 9 EIR concerns the duty to provide advice and assistance. It states as relevant:

9.-(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

…

66. The duty to make information available applies when the relevant public authority holds the requested environmental information. There are exceptions to the duty to disclose in regulation 12(4) EIR, which as relevant reads as follows

12(4)For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–

(a) it does not hold that information when an applicant's request is received;

67. Whether a public authority holds material is a question of fact to be determined on the balance of probabilities, see the case of Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007) which has subsequently been followed and approved by the Upper Tribunal. The type of fact that will be considered in determining whether the material is held may include the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. As noted in that case

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

68. If a public authority wishes to rely on an exception they are required to issue a refusal notice in accordance with regulation 14 which provides, as relevant to this appeal, as follows

14 (1) …the refusal shall be made in writing and ...

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4)… and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) ....

(5) The refusal shall inform the applicant –

(a) that he may make representations to the public authority under regulation 11;

and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18

69. Pursuant to regulation 11 EIR, public authorities should review their handling of an information request upon receipt of a written allegation of a breach of the EIR from the requester received within 40 working days after the alleged breach. The public authority must consider any such representations and supporting evidence provided by the requester (regulation 11(3)) and inform the requester of its decision about whether it has complied with the EIR, within 40 working days of receipt of the alleged breach, see regulation 11(4).

70. Regulation 11(5) EIR states that if the Public authority concludes it has not complied with the EIR there is an obligation to notify the requestor and

"…the notification … shall include a statement of –

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken."

71. Regulation 19 creates criminal offences, it states as relevant

19. – (1) Where –

(a) a request for environmental information has been made to a public authority under regulation 5; and

(b) the applicant would have been entitled (subject to payment of any charge) to that information in accordance with that regulation,

any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled.

Analysis and conclusions

72. The question for me is whether the Information Commissioner's decision notice is not in accordance with law or involves a wrongful exercised of discretion as set out in section 58 Freedom of Information Act 2000 ("FOIA").

73. The Appellant asserts that his appeal is of fundamental importance as to the interpretation of the EIR and the way in which the Commissioner should deal with any complaints arising. However, given the scope of this appeal and in the light of the issues I need to determine in order to decide it, the appeal is unlikely to hold the significance that the Appellant expects.

74. It is only the first request that is in issue in this appeal, I shall consider the substantive finding by the Commissioner as to whether information was held and then consider procedural matters as regards compliance by the public authority with the EIR.

75. The central finding of the Commissioner was that the Council does not hold further information that falls within the terms of the EIR. In other words that the Council had already disclosed all information that it held relevant to the first request under the terms of the DPA18 in response to the Appellant's SARs. The Appellant does not assert that any further information is held. His focus on whether the Council, and then the Commissioner properly applied the relevant processes and statutory provisions.

76. I agree with the parties in relation to the matter of whether further information is held. Having considered the evidence I have concluded that the Commissioner was correct to find that the Council did not hold further information at the date of the request (30 January 2017) that falls to be disclosed within the terms of the EIR that is not the Appellant's own personal data. His

data was disclosed to him as a result of subject access requests including part (c) of the first request. There is nothing further to be disclosed to Mr Crossland in relation to his request for information dated 30 January 2017.

77. That disposes of the first part of the decision as set out in paragraph 2 of the Commissioner's notice. I then turn to consider whether the Commissioner was in error of law in finding that there had been a breach of regulation 5(1) EIR by the Council in providing a response outside the time for compliance.

78. The Commissioner has invited the Tribunal to substitute the decision notice to remove the breach of regulation 5(1) EIR. Regulation 5(1) contains the duty to make information available and applies when the relevant public authority holds the requested environmental information. Regulation 5(1) is subject to regulation 5(3) which disapplies the duty to make information available where that information is the requestor's personal data. Furthermore, regulation 5(1) is subject to exceptions.

79. The Appellant argues that the Information Commissioner should have based the decision notice on the position as at the dates for compliance with the EIR. However, his submission fails in the light of the authorities including Birkett (supra). In that case the Court of Appeal held that late reliance even during the Tribunal appeal process was legitimate in the light of the need to reach the correct answer which properly balances all considerations and public interests. A process of de novo consideration is bound to discover, on occasion, errors and omissions which must be capable of correction if the correct answer is to be reached. This principle extends mutatis mutandis to the Commissioner's investigation and decision making process.

80. At the time of its response the Council had relied on regulation 12(4)(b) to refuse to comply with the first limb of the second request, and therefore it had complied with regulation 14(2) insofar as this part of the request was concerned. By the time of the decision notice the Council's position had changed and a new response had been issued on 7 February 2018 that no longer relied on the manifestly unreasonable exception in regulation 12(4)(b) and stated that the information requested was not held (regulation 12(4)(a)).

81. The Appellant submits that such an examination of the first response would reveal "blocking tactics" used by the Council to claim reliance on the manifestly unreasonable exemption in regulation 12(4)(b) when he submits the Council "would have and should have" known that such reliance could not be justified. He asserts that he has been mislead because the Council did not rely on regulation 12(4)(a) and inform him that the information was not held.

However, in my judgement no purpose within the parameters of the legislative framework would be served by an examination by the Commissioner, nor by this Tribunal, of whether the Council was correct to rely on the manifestly unreasonable exception in regulation 12(4)(b) at the date of its first response, when it was no longer seeking to do so. Such an examination of the substance of an exception that is no longer relied upon would be counter to the need to reach the correct answer and would disincentivise public authorities from reconsidering their position entrenching them in the position they first took regardless of later reflection. Furthermore if the Commissioner were bound to consider both positions taken by the public authority this would unnecessarily increase the regulatory burden.

82. It is also worth observing that the Appellant's submissions were predicated on the premise that the Council was wrong to rely on the manifestly unreasonable exception in regulation 12(4)(b). Had the Commissioner conducted an examination of the substance of that exception it would have been open to the Commissioner to have concluded that it was properly relied upon by the public authority notwithstanding the Council's decision to revisit that response.

83. Therefore I have concluded that it was not necessary for the Commissioner to consider whether the Council were correct to rely on the manifestly unreasonable exception in regulation 12(4)(b) at the date of its first response.

84. As to whether the reliance on the manifestly unreasonable exception in regulation 12(4)(b) at the date of its first response is indicative of blocking tactics or mishandling of the request for information by the Council I am not satisfied that the evidence demonstrates anything other than the Council's continued attempts to deal with the Appellant's numerous information requests in the context of a long running dispute about planning matters. There is no basis for the Appellant's position that the Council "wilfully misled" the Appellant by not relying on regulation 12(4)(a). I agree that with the respondent's position that insofar as the Council effectively made a late claim of regulation 12(4)(a) in its letter of 7 February 2018; there is no procedural breach for either relying on an exception which is later abandoned and/or found not to be engaged or for not specifically citing regulation 12(4)(a) in its correspondence of 7 February 2018 because this was not a refusal notice for the purposes of the Regulations.

85. In this case all parties are agreed and I have decided that the Council was entitled to rely on regulation 12(4)(a) in refusing to disclose the requested information because it did not hold that information when it received the request. Where a public authority relies on one of the other exceptions within

regulation 12(4) EIR (i.e. not regulation 12(4)(a)) those exceptions provided for in regulation 12 are made subject to the public interest test in regulation 12(1)(b) EIR, in all the circumstances of the case as indicated by the use of the word "and" within the regulation between 12(1)(a) and (b).

86. Whilst it is correct to state that the regulations appear to make reliance on regulation 12(4)(a) subject to regulation 12(1)(b) I agree with the Information Commissioner's position that the public interest test has no practical value in respect of the exception in regulation 12(4)(a). This is because there is no information upon which the public interest test can bite. There is no information to disclose, thus whilst the public authority could consider the theoretical public interest in disclosing such information were it to be held, the public authority cannot disclose that which it does not hold and thus a consideration of the public interest would be hypothetical, of academic interest only and superfluous. In my view Parliament cannot have intended that public authorities should carry out a purely hypothetical balancing exercising of no practical utility. The Appellant submits that had the Council carried out the public interest test and issued it to him it would demonstrated that "withholding this information was absurd" however this misses the point that there was no information to disclose. There was no failure as regards regulations 12(1)(b) and regulation 14(3)(b) by not setting out its analysis of the public interest test balancing exercise.

87. The Appellant's case is that the Council failed to provide a response compliant with regulation 5(1) within 20 working days of the request. The request was made on 30 January 2017, the response was sent to the Appellant on 13 February 2017 within the 20 working days allowed. The Council provided a copy of its letter of 19 December 2014 and an extract from its letter to Appellant dated 1 November 2015 by way of attachments to its response/refusal notice of 13 February 2017. The 13 February response relied on the manifestly unreasonable exception in regulation 12(4)(b) at the date of its first response. The Council was entitled to do so, see above, it complied with regulations 5(1) and 5(2) insofar as the first request is concerned. There was no breach of regulation 5(1).

88. There was no breach of regulation 14(2) as the Council relied on a valid exception in its response dated 13 February 2017, to refuse to comply with the request. By using the word valid I make no judgement as to the substance or engagement of that exception, see above, but it is an exception within the regulations rather than some other ground not permitted when responding to such a request for information under the EIR.

89. However, there was a technical breach of regulation 14(3)(a) in that the Council did not rely on regulation 12(4)(a) in its refusal notice of 13 February 2017 when it is the Commissioner's position that requests four and five (paragraphs (d) and (e)) were valid requests for information but that no further information, other than what may have already been disclosed in response to a subject access request, was held. See paragraphs 27 and 28 of the decision notice. I note the Council does not pursue its position that those parts of the first request were not valid requests for information and accepts the position of the Commissioner with which I agree.

90. There is also a technical breach of regulation 14(5)(a) & (b) in relation to the response of 13 February 2017. 17. Regulation 14(5) requires that a refusal to provide information requested shall inform the requestor that he may make representations to the public authority under regulation 11 and also of the enforcement and appeal provisions of the Act applied by regulation 18. The Council's response of 13 February 2017 does not inform the Appellant of his ability to make representations under regulation 11 (i.e. to seek an internal review) or of the enforcement and appeal provisions of regulation 18. There is thus a technical breach of those regulations. However, the Appellant clearly knew of those provisions as he requested an internal review on the same day he had received the refusal.

91. Turning to the question of internal reviews. The Appellant's original case was that the Council did not carry out an internal review in response to his request of 13 February 2017 and thereby has failed to comply with regulations 11(3); 11(4) and 11(5). However, on 17 February 2017 the Council wrote to the Appellant and the Council's Chief Planning Officer confirmed that the Council regarded the Appellant's continued requests on the subject of the garden wall as 'manifestly unreasonable'. The Appellant draws attention to some apparent confusion on the part of the Commissioner between the review concerning the first request and that concerning the second request which had been sent a day earlier. Any confusion is not perpetuated in the decision notice and in any event does not materially affect the central decision that the Council did not hold further information falling under the terms of the EIR.

92. My conclusion is that the letter dated 17 February 2017 complied with the relevant regulations. Regulation 11(3) is satisfied because it expressed the Council's decision that notwithstanding the representations made by the Appellant it was the Council's position that his request was manifestly unreasonable, in those circumstances there was nothing more to be said and no requirement to answer the Appellant's three questions posed in paragraph 5 of

his letter requesting a review. The Council complied with regulation 11(4) because it provided its review within the 40 days allowed, coming just 4 days after the request for an internal review. The Appellant submitted during the hearing that the officer who conducted the review did not comply with the Council's own procedure rules but that is not a matter which concerns this Tribunal as such. Regulation 11(5) is not applicable because the Council did not decide that it had failed to comply with the EIR, thus there is no breach of that regulation.

93. Regulation 9 concerns the advice and assistance that should be given to those who request information under the EIR. The Appellant argues that the provision of such advice is mandatory yet the Council's response was " as unhelpful as it could be". He draws my attention to the fact that this issue was not determined by the Commissioner in the decision notice. His argument is parasitic on his submissions as to the regulations 12 and 14 which I have dealt with above. In addition I would observe that it is not surprising that the Council expressed itself firmly in circumstances where it was relying on the manifestly unreasonable exception in regulation 12(4)(b) as regards the request.

94. The Commissioner had raised the matter with the Council as part of the investigation in the letter dated 6 March 2017. The Council responded that "There is no similar information to that specifically requested by Mr. Crossland, and there is no advice or assistance the Council could provide in this regard (particularly in light of the copious amounts of correspondence we have previously had with him)".

95. As the Appellant notes in his submissions the ICO guidance on dealing with such requests states at paragraph 16 that the Commissioner "would not expect a public authority that refuses a request as manifestly unreasonable on the grounds that it is vexatious to provide the requester with advice and assistance, although it is free to do so if it wishes''. Furthermore, the Appellant does not particularise what advice or assistance he would have welcomed at the of the Councils response in February 2017. It is plain from his correspondence, for example his request for an internal review, that he understood the structure and content of the EIR. I have concluded that in the circumstances of this case there was no failure to provide advice and assistance, as in these circumstances it would not be reasonable to expect the Council to do so. I have also concluded that there was no failure on the part of the Commissioner to deal with this issue in the decision notice.

96. Regulation 19 EIR is concerned with criminal liability, this Tribunal has no power to conduct criminal investigations or proceedings. Neither does this

Tribunal have any power to instruct the Commissioner to undertake either activity. The Appellant recognises in his submissions on this regulation that the First tier Tribunal is not a court empowered to take decisions in relation to regulation 19 but invites me to make comment requesting the Commissioner to consider the matters he has raised under regulation 19 and to consider issuing guidance relating to that regulation. I decline to do so. It is not the Tribunal's function to advise the Commissioner as to the steps he should take as regards an allegation of criminal activity. The Appellant's allegations that the Council's actions amounted to a breach of regulation 19 are not matters within the scope of this appeal.

97. For the reasons above I have determined that the Information Commissioner's decision notice is not in accordance with law as set out in section 58 Freedom of Information Act 2000 ("FOIA"). I do so on the basis of the reasons set out in the Commissioner's invitation to do so. Thus the appeal is allowed and a decision substituted but it should be noted that this has no practical effect and no steps are required to be taken by the Information Commissioner or the Council.

Signed: Judge Lynn Griffin Date: 1 May 2024

Appendix 1 – second request for information dated 26 February 2017

The second request read as follows, (with original emphasis)

> *"1. You are Monitoring Officer and it appears that [redacted name] is your direct reportee. Did Mr [redacted name] at anytime inform you that I was making such requests as covered by these concerns, and discuss with/brief/report or inform you in any way of how he was handling them? If so please detail specifically how.*
>
> *2. Were you informed, prior to sending your investigation findings on 16th February 2017, that I had objected/opposed/stated that for the Legal section to deal with these concerns/complaint (and Stage 2 Review) was unsatisfactory, that I did not want my complaint investigated by the Legal Section/City Solicitor?*
>
> *3. If you were informed; when were you informed and by whom? Please provide a copy of all related correspondence.*
>
> *Under these contentious circumstances of who should investigate this very serious complaint - Did you comply with LCC stage 1 Complaints procedure re*
>
> > *This is the first formal stage, and we will acknowledge receipt of your complaint within 3 working days. Our acknowledgement can be made verbally or in writing and will include:*
> >
> > - *An initial apology for the issue that has caused you to complain.*
> > - *Contact details for who will be dealing with your complaint.*
> > - *A date or timeframe by which you can expect to receive a response.*
>
> *4. If you claim you did comply; please provide a copy of the documentary evidence you rely on. If you breached the LCC procedure requirements, and it appears evident that you did: please clarify why you as Monitoring Officer breached this procedure.*
>
> *5. It was evident from my correspondence with the CEO that I had not detailed the specific concerns in my complaint but that I wished to go into these details with the Internal Audit. Why did you not seek clarification of what specifically I was concerned about, in accordance with LCC's Complaints/Concerns Policy?*
>
> *6. Did you at any time discuss or communicate in any way with LCC CE [redacted name] this concern/complaint I lodged with him re the Monitoring Officer/[redacted name]. If you did; then please provide details.*
>
> *7. Regarding Stage 2 Complaint re EIR: Why did you breach LCC Compliments and Complaints Policy Sections relating to EIR, FoIA & DPA and Stage 2 Review. 8 including: -*

At this stage, we will ask you to provide details in writing to aid the review, and let us know why you are still dissatisfied.

The complaint will be acknowledged in the same way as at the initial stage.

If you did not comply with these requirements, and it appears evident that you did not: please clarify why you as Monitoring Officer breached these LCC procedures.

In view of the fact that you apparently decided not to follow procedure, and did not ask me to clarify exactly what the 'detailed case with documentary evidence to present', it is essential that you now clarify exactly what you investigated and found not to be in breach of the law.

8. For the avoidance of any doubt then, as to exactly what you say you investigated and to what extent, please: -

Identify all requests for information from me and LCC responses which you investigated. Please provide copies of all correspondence, information and all the data you inspected. I would note that I am hereby requesting all the data falling within the definition of data under the DPA. This includes all correspondence, including that with only passing reference to me or copies of correspondence which had been overwritten with notes/comments etc.

9. Identify, within each category of requirement/legislation i.e. EIR, FoIA & DPA exactly which items of information/data had been requested by me. For each item of information/data so identified within each category, please state which was item of information/data was provided and which was not provided according to your investigations.

10. For each and every item of information not provided in each category (e.g. EIR): please state which your investigations found the Council had complied with the law by stating to me that it either held or did not hold the information, and state which were in breach of the law by not stating which it held or not. Please provide the documentary evidence that you investigated this compliance with the law, and provide to me all documentary evidence that you relied on.

11. For each and every item of information withheld, confirm that as part of your investigations you checked that there was a specific public interest test, justifying withholding, carried out at the time of the refusal related to the specific refusal of that specific item at that specific time based on the specific circumstances at the time of refusal. Provide a copy of the public interest test, carried out at the time of refusal, for each and every item of information where disclosure was refused.

12. You claim to have carried out a Stage 2 re information/data disclosure. Please provide a copy of each and every public interest test that was carried out at the time you claimed to have carried out the Stage 2 based on any changed circumstances at the time of the claimed stage 2.

13. You claim that you carried out a Stage 2 on the DPA requests. Please state what investigations you carried out and with whom, thorough enough and sufficient enough, to be able to conclude that there was no data (other than exchanges of correspondences between LCC and me). Please provide all data related to this investigation you claim to have carried out. You will appreciate that there will be, without doubt, documents clearly falling within the DPA definition of data."

Appendix 2 – Agreed Chronology compiled by the Appellant

Note - The Commissioner requested the inclusion of a general caveat that the Commissioner has not verified the extracts/summaries of the quotes provided here against the originals.

Date	**Event/Action**
07.11.14	LCC Internal Audit Report issued to LCC CEO; re Appellant's complaints, re LCC Planning and Legal Services. The Internal Audit report made:- • *Four Key Recommendations regarding ''the development of the principles and procedures*.'' Noting: • *''The implementation of these recommendations should ensure that the decision is determined in an open and transparent manner giving due regard to all relevant factors*.''
03.12.14	CEO letter to Appellant Following Internal Audit Report, including: a) LCC Chief Planning Officer (CPO) to do a Review re use of Non-Material Amendment (NMA) Planning process. b) ''I sincerely apologise that we have fallen short of the standards that I believe you are reasonably entitled to expect ...'' c) Council now taking steps to address procedural errors. d) If after this Appellant not satisfied suggest LG Ombudsman.
30.01.17	Request **1** - Appellant submits material requests a) to e) to LCC CEO re Audit Report and CEO's letter dated 03.12.14: 1a) Copies of LA's letters to him informing of improvements. 1b) Copies of all associated improved procedures, processes etc. 1c) Copy of promised Chief Planning Officer's investigation re use of Non-Material Planning Application (NMA).

	1d) Confirmation Council's position was correctly expressed in CEO's letter dated 03.12.14. 1e) Explain contradictory position of (new) Chief Planning Officer in letter dated 26.02.15.
13.02.17	Council (new CPO) responds to Request **1**, parts a) to e). Regarding the response to request 1b) [the subject of this appeal] the Council stated:- ''I will not, however, respond to your request for 'all revised procedures, processes, etc' as, as previously stated, the Council considers your requests on this subject matter to be manifestly unreasonable. Nor will I enter into any further correspondence in respect of your other queries, as the Council's position has been comprehensively stated on a number of occasions.''
13.02.17	Appellant's letter to LCC CPO: thanking LCC for response but noting CPO appears unaware of responsibilities under the Regulations and formally asks for a review re documents requested and not provided.
17.02.17	LCC CPO responded to Appellant's review request by stating: ''*As you have been previously advised, the Council considered your requests on these matters to be 'manifestly unreasonable' under the Environmental Information Regulations on 3rd December 2015*.'' And ''*We will not, therefore, respond again on this matter ...*''.
25.04.17	Appellant email to LCC CPO noting LCC breaches of EIR and of LCC procedures, including need to carry out Stage 2 complaints procedure.
19.05.17	Appellant's <u>Complaint **1**</u> re <u>Request **1**</u> complains to Commissioner. Summarised on bottom of page 2 of 'Confidential' Attachment as: ''*Similarly with EIR: the ICO needs to check lawful compliance with EIR by requesting evidence and inspecting key compliance actions, including:* • *Contemporary PIT at time of refusals and review.* • *Confirmation of denial of specific documents.*

	• *Reasons for refusal.* • *Compliance with review procedures.* • *Full compliance generally with EIR (or FoIA*)."
23.05.17	[Appellant's Complaint **2** to Commissioner, (included for completeness)].
10.08.17	ICO wrote to LCC informing it that Appellant had lodged complaints on 19th & 23rd May re LCC.
10.08.17	ICO wrote to Appellant confirming complaints 1(19.05.17) and 2 (23.05.17) had been accepted to be investigated under ICO ref FER 0695235.
12.08.17	Appellant wrote to ICO urging: • ''*I urge the ICO to give each case a separate case reference number to bring clarity and simplify rather than complicate and confuse matters*."
21.11.17	ICO wrote to Richard Brook, Information Compliance Administrator LCC (''*Copied to Mr Turnball as requested by telephone*'').detailing complaint, complaints process and specific information. And .. - ''*For the avoidance of doubt, you should now do the following..* • *Consider whether to change your response to the information request, and let us know the outcome.* • *Otherwise, and if still relevant, send us your full and final arguments in relation to regulation 12(a)(b).*"
14.12.17	LCC response to ICO letter of 21.11.17. Key points:- LCC stated: - • ''*The Council's reasoning for previously considering Mr. Crossland's requests on this particular subject matter as vexatious under Reg 12(4)(b),we comprehensively stated in our response to his initial complaint to the ICO of 3rd February 2016 (your ref:FERO615064).*

	• *As stated above, however, the Council no longer seeks to rely on Reg 12(4)(b) with regard to this particular complaint and I will, consequently, address each of Mr. Crossland's complaints (as detailed in the appendix to your letter) in turn.*'' • Re Request 1 - ''*We do not hold recorded information with regard to revised procedures and processes, however.*''
15.12.17	ICO Case Officer acknowledges LCC letter dated 14.12.17 and informs LCC that he hopes to determine case in January or early February 2018
16.01.18	ICO Telephone Note: ICO telephone call to LCC Richard Brook:- • ICO: ''*was currently unclear to me* (ICO) *how the Council wished to proceed in light of its submission, as it refers to withdrawing reg. 12(4)(b)- but then appears to state that no relevant information is held/the requests are not valid.*'' • ICO advised LCC - ''*that any revised response should be issued direct to the complainant.*'' • ICO:- ''*asked the Council to finalise its position and to contact me* [ICO] *as a matter of priority over the next few days. RB confirmed he wíll consult with the Council's solicitors and contact me further*.''
19.01.18	ICO Telephone Note: ICO telephone call to RB at Council:- • Council has decided to respond to comps requests. • ICO advised LCC ''*to shortly provide a clear response to comp ín which it confirms under which legislation it is responding, and confirms/denies information is held in respect of each part/each request.*'' ''*Council will copy ICO in*.''
07.02.18	LCC (RB) letter to Appellant setting out its reconsidered responses to the requests, including following which relate to requests relevant to the Appeal to FTT:- • Re request 2 [taken to mean request 1b)] - ''*the Council reviewed its arrangements for publishing consultation responses on the Council's*

	website and all consultation responses are now publicly available to view when submitted.'' • '' *We do not hold recorded information with regard to revised procedures and processes, however*." • Reiterated the history and subsequent process of the particular Planning case, as stated in initial response of 13.02.17. And confirmed that - ''*We do not hold any further information in this regard.*''
21.05.18	Decision notice (FER0695235) under appeal issued
15.06.18	Appellant files Notice of Appeal
31.08.18	Commissioner serves Response
03.09.18	ICO on ICO Response Form: - Does not undertake to provide bundles, and states Council is better positioned to produce bundles.
05.09.18	Tribunal Registrar issues Directions ordering the Council to prepare the bundles
06.09.18	Council serves Response
11.09.18	LCC email to GRC: opposing LCC providing bundles and requesting matter to be determined by a judge.
12.09.18	Judge McKenna issues Ruling on Rule 4(3) application upholding the Registrar's Directions of 5 September 2018, without giving Appellant opportunity to provide an 'in-time' submission (opposing GRC Registrar's CMD).
19.09.18	Appellant email to GRC: requesting Judge McKenna's Ruling on Bundles to be set aside and an afresh judicial decision.
21.09.18	Appellant serves Combined Reply

24.09.18	Judge McKenna issues Ruling on Application refusing to set aside earlier Ruling of 12 September 2018
25.09.18	Tribunal Registrar issues Directions inviting submissions from Appellant as to why the appeal should not be struck out
01.10.18	Appellant emails GRC with submissions as to why the appeal should not be struck-out.
03.10.18	GRC Registrar responds stating crucially: - ''*I do not consider that the appeal does not fall within section 58 of the Freedom of Information Act 2000 and my Case Management Directions do not say that*."
10.10.18	Judge McKenna upholds Tribunal Registrar's Directions of 25 September 2018
02.09.20	Upper Tribunal allows the Appellant's appeal (GIA/438/2019) challenging the Directions of 5 September 2018 and remits the matter back to the First-tier Tribunal
02.09.20 Issued 07.09.20	Upper Tribunal strikes out the Appellant's appeal (GIA/440/2019) challenging the Directions of 25 September 2018. [In that the Registrar had a right to ask the question.]
07.09.20	Appellant emailed letter to grc confirming earlier submissions including on 1st October 2018, and expanding with further detailing against strike-out
05.03.21	Tribunal issues Directions seeking submissions on bundles
12.03.21	Tribunal refuses to strike out the appeal
08.04.21	Tribunal issues Ruling on bundles and case management directions
	TRC 09.06.21