



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

Appeal Reference: EA/2018/0219

**Decided without a hearing
On 9 May 2019**

Before

**JUDGE ANTHONY SNELSON
MR PIETER DE WAAL
MR ANDREW WHETNALL**

Between

MR GAVIN RATTRAY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

WEST LANCASHIRE BOROUGH COUNCIL

Second Respondent

DECISION

The unanimous decision of the Tribunal is that:

- (1) The appeal is allowed.
- (2) The First Respondent's decision that the Second Respondent correctly applied the Environmental Information Regulations 2004, **reg 12(4)(b)** is set aside and the Tribunal substitutes its own decision that reg 12(4)(b) was not correctly applied and the Second Respondent was not entitled to rely on that provision as entitling it to refuse the Appellant's request for information dated 27 October 2017.

REASONS

Introduction and procedural history

1. The Appellant, Mr Gavin Rattray, to whom we will refer by name, lives in Burscough, West Lancashire. The area is prone to drainage problems and he has, since 2012 if not earlier, played an active part in pressing responsible bodies for action to protect local people from flooding and associated damage.
2. There is no doubt that the concerns raised by Mr Rattray are serious. He describes without challenge (supported by photographic and other evidence) consequences of heavy rainfall which frequently include blockage of highways and rights of way by standing water and the overflow into roads and gardens of raw sewage.
3. The concerns raised by Mr Rattray are also complex. Physically, they involve the interplay of surface watercourses, groundwater sources and the sewer networks. Legally and administratively, they involve an intricate structure of related and sometimes interlocking responsibilities attached to a number of bodies. The key legislation is the Flood and Water Management Act 2010 which creates, and attaches duties to, Risk Management Authorities ('RMAs').
4. The Second Respondent (hereafter 'the Council') is the local planning authority for the area in which Burscough lies and, as such, one of the RMAs responsible for managing flood risk locally.
5. Other RMAs with relevant responsibilities are Lancashire County Council ('LCC') and United Utilities ('UU'), the private utilities company which holds the contract for the supply of water and waste water services for the area.
6. On 27 October 2017, through his MP, Ms Rosie Cooper, Mr Rattray wrote to West Lancashire Borough Council requesting information connected with a planning decision relating to a local property. His request was for:
 1. Copies of all legal and non-agreements (sic) and accommodations between WLBC and United Utilities made since 2005 concerning the local plans/local development frameworks. This would include the 'partnership text' referenced in section 4.17 of [the Council's] Infrastructure Delivery Plan Update 2016/17 (Part 1).
 2. Copies of all communications, notes taken, meeting agendas and minutes meetings between UU and WLBC since January 2013 concerning flooding in Burscough and the local plans/local development frameworks (please don't supply anything already supplied in 1 above).

3. Copies of all communications, notes taken, meeting agendas and minutes meetings between WLBC and the environment agency concerning surface water flooding (including sewers) and water management in Burscough and its outlying areas of New Lane, Crabtree Lane and Martin Mere. This would include 'information from the environment agency' for [the Council's] Delivery Plan Update 2016/17 (Part 1) and referenced in section 4.17 of it.
7. The Council, through Mr John Harrison, Director of Development and Regeneration, responded in a letter of 7 December 2017, addressed to Ms Cooper. He referred to a "protracted correspondence" between Mr Rattray and Council officers over a number of years regarding drainage matters and to Mr Rattray having issued requests for information under the freedom of information legislation and complaints under the Council's formal complaints procedure. He continued:

Such voluminous amounts of correspondence have caused a disproportionate level of disruption to the Council which is not a good use of the Council's limited resources and which has distracted officers from the day-to-day running of council business. It is the Council's view that Mr Rattray's actions have been an improper use of the formal procedures for which the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 were intended.

S14(1) of the FOIA¹ is designed to protect public authorities by allowing them to refuse any requests which cause a disproportionate or unjustified level of disruption, irritation or distress. Mr Rattray in his correspondence has been unreasonably persistent on matters which the Council feels it has already comprehensively addressed. He appears to have taken an unreasonably entrenched position and has submitted frequent correspondence about the same or overlapping issues. It is the Council's view that Mr Rattray's requests for information, be that directly with the Council or indirectly, regarding drainage matters in and around Burscough are vexatious and therefore the information is exempt from disclosure under section 14(1) of the Act.
8. M Rattray was dissatisfied. Following a review, Mr Terry Broderick, Borough Solicitor, advised him on 30 January 2018 that the information requested fell within the scope of the Environmental Information Regulations 2004 ('EIR') (rather than FOIA) but that the request was "vexatious or 'manifestly unreasonable'" and the exception from the duty to disclose under EIR, reg 12(4)(b) applied. Accordingly, relying on that provision, the Council maintained its refusal.
9. By a letter of 2 January 2018 Mr Rattray complained to the First Respondent ('the Commissioner') about the way in which the Council had dealt with his request.
10. The Commissioner proceeded to carry out an investigation, considering the written representations and supporting documents submitted by Mr Rattray and the Council.

¹ The 2000 Act. We will adopt the same abbreviation below.

11. By a decision notice dated 19 September 2018 the Commissioner determined that the Council had correctly applied EIR reg 12(4)(b) and that the public interest favoured maintaining the exception.
12. By a notice of appeal dated 9 October 2018, Mr Rattray contended that the Commissioner's decision was wrong. He made numerous points in support of his central contention that his request of 27 October 2017, and his prior requests for information and other communications with the Council on the subject of flooding risk, had been reasonable and made in the public interest. He further asserted that he had resorted to the freedom of information legislation because of a culture of secrecy in the Council (and other statutory bodies) designed to understate the seriousness of the flooding problem locally and avoid taking necessary remedial action.
13. By her response dated 7 November 2018 the Commissioner resisted the appeal contending that her decision of 19 September 2018 was correct. In the same document, she noted that it was apparent from the contributions of Mr Rattray and the Council that they disagreed on matters of fact and that in the circumstances it might be necessary to add the Council as a party to the proceedings.
14. The Council was duly joined as Second Respondent.
15. The Council's response to the appeal, dated 4 January 2019, defended its reliance on reg 12(4)(b), and developed the arguments already made in response to Mr Rattray's request. It repeated the broad complaint of frequent and overlapping requests and of "unreasonable persistence" on his part. It also charged him with using an "accusatory" tone.

The applicable law

16. EIR, reg 5(1) requires a public authority holding 'environmental information' to make it available on request.
17. 'Environmental information' is defined broadly in reg 2(1) as:
 - ... information in written, visual, aural, electronic or any other material form on -
 - (a) the state of the elements of the environment ...
 - (b) factors ... affecting or likely to affect the elements of the environment ...
 - (c) measures (including administrative measures), such as policies, legislation, plans ...
18. Reg 12 sets out exceptions to the reg 5(1) duty. It includes:
 - (1) Subject to paragraphs (2) ... a public authority may refuse to disclose environmental information requested if -

- (a) an exception to disclosure applies under paragraphs (4) ...; and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- ...
- (4) For the purposes of ... a public authority may refuse to disclose information to the extent that –
- ...
- (b) the request for information is manifestly unreasonable ...

19. In our view the effect of these provisions is clear. Reg 12(1)(b) places the burden firmly on the public authority relying on an exception to show two things: first, that the exception (here, that under sub-para (4)(b)) applies, and second, if (but only if) it does, that the public interest favours maintaining it. That the onus is on the public authority is evident from the wording of the legislation and confirmed by the authorities. The point is further reinforced by sub-para (2), which operates at both stages of the analysis.
20. We note with some consternation that our understanding of the statutory framework seems incompatible with the Commissioner's written case. As we have recorded, she contends that the appeal should be dismissed on the footing that the public interest favours maintaining the exception. On our reading of reg 12, the public interest test does not arise at all unless and until the public authority shows that the exception is applicable. This divergence has caused us anxiously to examine our thinking afresh. Having done so, and with diffidence, we stand by it. We regret that we were not able to explore these matters with the parties face-to-face. The disadvantages of deciding disputes like this without an oral hearing have been commented upon at a higher level (we will come back to this later).
21. Not surprisingly, the Regulations do not offer a definition of 'manifestly unreasonable'. Our duty is to give those familiar words their natural meaning, guided by authority binding upon us.
22. Given the fact that the parties agree that EIR is the applicable regime, it might seem strange that representations by the Respondents have been modelled largely on FOIA and case-law thereunder. This is, however, appropriate. By the Act, s14(1), a public authority is excused from complying with a request for information if the request is "vexatious". In *Craven v Information Commissioner and Department for Energy and Climate Change* [2012] UKUT 442 (ACC) the Upper Tribunal ('UT') (Judge Nicholas Wikeley) held that the tests under s14(1) and reg 12(4)(b) are to all intents and purposes the same. On appeal, the Court of Appeal (reported at [2015] 1 WLR 5316) agreed. Giving the lead judgment, Arden LJ remarked that any difference was "vanishingly small" (para 78).

23. With *Craven* the UT considered two other appeals, *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 (AAC) and *Ainslie v Information Commissioner and Dorset County Council* [2012] UKUT 441 (AAC), and gave judgment in all three on the same day. In *Dransfield*, a case under FOIA, s14(1), Judge Wikeley, at para 27, expressed agreement with an earlier first-instance decision that –

“... vexatious”, connotes “manifestly unjustified, inappropriate or improper use of a formal procedure.”

The judge continued (para 28):

Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations ... are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list.

24. *Dransfield* and *Craven* were heard together in the Court of Appeal. Arden LJ noted (para 60) that the UT’s guidance just cited was not directly in issue on the appeal, but added these remarks (para 68):

In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and this is consistent with the constitutional nature of the right.² The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.

In another significant passage, Arden LJ remarked (para 72):

Before I leave this appeal, I note that the UT held that the purpose of section 14 was “to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA” ... For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied.

25. The Council relied heavily on the Guidance published by the Commissioner. The UT passed certain comments on the Guidance relating to vexatious requests which, we understand, led to parts of it being modified. On appeal, Arden LJ commented (para 32):

² This echoes remarks in paras 2 and 3 about the importance and constitutional significance of the right to freedom of information.

The IC has a statutory obligation ... to issue guidance ... The guidance covers such matters as dealing with vexatious requests. Various government departments have also issued guidance ... As this guidance does not have special status in matters of interpretation, it is not necessary for me to cite it in my conclusions. For my own part, while I welcome the issue of such advice, I do not find it provided assistance in resolving the issues on these appeals.

We likewise note the Guidance but our interpretation of the law is founded on the statutory language and relevant decisions of the higher courts.

26. The appeal is brought pursuant to the Freedom of Information Act 2000, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal consider -

- (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.

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

The Council's case

27. In its letter to Ms Cooper of 7 December 2017, the Council stated that Mr Rattray had been involved in a "protracted exchange of correspondence" with its officers over a number of years and that the "voluminous amounts of correspondence" had caused "a disproportionate level of disruption to the Council". His actions were characterised as "an improper use of the formal procedures" for which the freedom of information legislation was intended. It was said that he had taken "an unreasonably entrenched position" and had submitted "frequent correspondence about the same or overlapping issues".
28. By a letter of 27 June 2018 responding to the Commissioner's questions, the Council supplied further detail in support of its case. It traced Mr Rattray's pursuit of concerns back to January 2012. It claimed that its position was vindicated by a Planning Inspector, who had found that the Local Plan was "sound" and dealt appropriately with flooding and drainage matters, but that Mr Rattray had refused to accept that finding and had persisted in raising the same or similar points. In particular it cited limbs (1) and (3) of the request of 27 October 2017 as "directly related to similar requests already dealt with", but did not identify those requests. It referred to Mr Rattray's activity in his personal capacity and as secretary of the Burscough Flooding Group ('BFG'), noting that other members of that body had written to the Council seeking

“very similar information” and observed, “the collective, repeated enquiries of a similar nature from the BFG [was] a key part of the context to the Council considering the request vexatious”. Wrongly (as it now admits), it identified ‘Mr C’ as a member of the BFG and prayed in aid the fact that he had submitted 10 freedom of information requests between March and December 2017, which resulted in 41 exchanges of correspondence involving four officers of the Council. Reliance was also placed on the fact that Mr Rattray had sent communications outside the scope of the freedom of information legislation and had invoked the Council’s complaints procedure as well as pursuing a complaint to the Local Government Ombudsman.

29. Turning to the effect of this activity, the letter of 27 June 2018 complained that a great deal of time had been spent responding to “multiple and overlapping requests”, which had placed “a huge strain on time and resources”. It was said that the requests were the work of “a number of requestors acting in concert as part of their campaign” and that the disruption caused was out of proportion to “any wider valuable public interest in making the requested information publicly available”. In the circumstances, the Council contended that it was justified in refusing the request. In doing so, it acknowledged the need for a balancing exercise between “the serious purpose and value of the requests, the requestor’s aims and motivation and the wider public interest against the detrimental effect on the authority”. It added that its position would, “of course”, be kept under review.
30. In a further letter to the Commissioner, dated 30 July 2018, the Council set out in table form some information concerning the 10 information requests submitted by Mr C and the five by Mr Rattray, but (although it is clear that all requests related to flooding and drainage aspects) the detail is too sparse to enable one to assess the extent if any to which requests were duplicated or overlapped. In support of the assertion of a concerted campaign, the Council drew attention to the fact that Mr Rattray had copied certain correspondence to Mr C. The Council’s letter made it clear that its reliance on the ‘vexatiousness’ defence was confined to part of Mr C’s last request and Mr Rattray’s last request.
31. The Council’s response to the appeal, dated 4 January 2019, develops the points made in the earlier documents already reviewed. It acknowledges that the prior assertion that Mr C was a member of the BFG was wrong but insists that his activities are nonetheless relevant to the defence of Mr Rattray’s claim. It complains of the length and detail of Mr C’s correspondence, citing in particular a 79-page document prepared by him in support of Mr Rattray. It passes similar comment on Mr Rattray’s response to the Local Plan Review Preferred Options Public Consultation, attached as part of his written case.
32. In the response, paras 21-26, the Council is also critical of the “accusatory tone and manner” in which, it is said, Mr Rattray’s case has been pursued (a charge

also levelled at Mr C). Reference is made to emails sent in November and December 2018 (*ie* well over a year after the request under consideration) in which he referred to the Council making “bogus claims”, offering a “dubious fictional account” and, making allegations of vexatiousness and malicious time-wasting “as a convenient tactic to discourage interested residents.” The Council also quotes an article written by Mr Rattray and an email sent by him to a representative of a local newspaper, *The Champion*, both of which, again, appear to post-date the November 2017 request by a considerable period, which express anger and frustration at the perceived failure of the Council to deal with flooding problems locally. The Council draws attention to his remarks such as, “... as you’d expect battling to get Burscough’s flooding acknowledged by WLBC is going badly as normal.” The Council also places reliance on an anonymous social media post dated 4 October 2018 by the *West Lancashire Record* entitled, “If At First You Don’t Succeed, Become Vexatious”. It is evident that the piece was composed by someone with knowledge of the request of 27 October 2017 and the subsequent response of the Council and adjudication of the Commissioner. It is deeply critical of the Council’s perceived failure to deal with the flooding problems in Burscough and its response to the request. It ends by ironically congratulating “the complainant” for the successful outcome conveyed in the Commissioner’s subsidiary finding that the Council was in breach of the freedom of information legislation by failing to respond within the statutory 20 working days period, adding, “you’ve proved that those bureaucrats ARE accountable!” Despite its title, however, the post does not advocate the presentation of further requests for information, vexatious or otherwise. If anything, its general tenor is that no good would come of doing so.

33. At para 38 of the response, the Council says this:

Whilst the Council understands the Appellant’s concerns regarding flooding in Burscough, it considers that Mr Rattray has exhausted the use of FOI/EIR and that other more appropriate routes should be used to feed in his concerns and those of residents about flooding issues namely through the planning application process and local plan consultation.

The Commissioner’s case

34. The Commissioner explicitly acknowledges a clear public interest in favour of the disclosure of the requested information but concludes that it is outweighed by the public interest in favour of upholding the reg 12(4)(b) exception, on the basis that the burden of complying with the request would be disproportionate when compared with the benefit to the public of doing so. The Commissioner largely adopts the Council’s narrative of events, although very properly acknowledging that she is not in a position to resolve factual conflicts to which Mr Rattray has drawn attention.

Mr Rattray's case

35. Mr Rattray agrees that he has been an active and vociferous campaigner on planning and, in particular, flooding issues over an extended period. At some point before 2012 he joined the Burscough Action Group (BAG), a large body of local residents opposed to plans for local development and took on the informal role of 'researcher'. He was involved in the preparation and submission of freedom of information requests on behalf of BAG directed to the Council, LCC and the EA. He also used the Council's formal complaints procedure to complain about the behaviour of a particular councillor at a meeting with residents and pursued an appeal against the Council's decision to take no action against him.
36. BAG was closely involved in local debate concerning the West Lancashire 2012 Local Plan. Mr Rattray submitted to the Planning Inspector documents obtained through freedom of information requests. Contrary to the Council's case, he maintains that the Inspector imposed conditions in respect of two developments the effect of which was to prohibit any net increase in the burden on the surface water and sewer systems resulting from those developments. Moreover, in the course of public examination of the Plan, UU gave assurances about the longer term, promising to apply in 2015 for funding for the expansion and improvement of the sewer network.
37. BAG was disbanded as soon as the Local Plan was approved and Mr Rattray had very few dealings with the Council over the next three years or so, hoping that the favourable events of 2012 would lead to an end to the flooding and drainage problems. These hopes were disappointed. UU did not secure the anticipated funding and the sewer network was not improved. Frequent episodes of flooding, now exacerbated by the recent construction activity, continued.
38. In 2016 Mr Rattray was one of a handful of individuals who formed the Burscough Flooding Group ('BFG'). The body, which has five members, describes itself as a non-political volunteer flood action group. It was established at the behest of the Burscough Parish Council ('BPC'). It has a proper constitution and is a member of the National Flooding Forum. Mr Rattray was and is its secretary.
39. BFG has been an energetic and articulate advocate for local people concerned about drainage and planning matters in the area. It often provides advice to residents and makes representations to relevant bodies on their behalf. At the invitation of BPC, it prepares submissions on planning applications. It pursued formal complaints to the Council in respect of two particular developments and, when both were rejected, took the matter, at the Council's suggestion, to the Local Government Ombudsman ('LGO'). That proved a fruitless exercise

because, as BFG discovered in due course, LGO can only entertain cases brought by persons directly affected by the matter complained of.

40. BFG has been instrumental in achieving successful outcomes for local residents on occasions. One such, in or about 2016, was to secure the agreement of the developer of the Booths site at Ringtail Retail Park to abandon plans for a proposed connection of a surface water overflow to the Lordsgate Lane sewers, which was judged likely to create a significant additional flooding risk.
41. Another notable piece of work carried out by BFG was the publication in May 2017 of the Burscough Flood Records Report, prepared at the request of the BPC. It documents incidents of flooding between 2008 and 2017 and includes maps, photographs and an exceedingly detailed commentary. The executive summary states:

The [Burscough Flooding] Group has found that the causes of flooding were predominantly water discharging from United Utilities surface water and foul sewers in the urban areas; and inadequate capacity of ordinary watercourses, fed with urban surface water run-off, in the downstream rural areas.

The report, and the work of BFG generally, have been strongly commended by BPC. In 2018 LCC requested that the report, and further contributions from the BFG be included in a government-funded study of Burscough's drainage problems.

42. The freedom of information request which gives rise to this appeal was the fifth addressed by Mr Rattray to the Council. The first four spanned a period from 28 February to 22 May 2017 and all concerned flooding and drainage issues in the Burscough area. The Council responded to all of them. The Respondents contend that the requests overlapped to a certain extent and although the material before us does not enable us to verify that assertion we think, given the narrowness of the subject-matter, that it is more likely than not that there was a degree of overlap. Mr Rattray does not appear to say otherwise. He does, however, deny repeating requests for information. He says that the only exception occurred in 2017 when he re-issued a request concerning UU which had been refused some time before on, he says, what he came to realise was an unsustainable ground, namely commercial confidentiality.
43. Mr Rattray accepts that his requests were (at least in some instances) "voluminous", but stresses that they were necessarily so given the complexity of the subject matter.
44. The purpose of the freedom of information requests is explained by Mr Rattray in these words:

BFG's aim, in using FOI legislation, is to reveal information which would otherwise be hidden from the public, so that real change can be implemented to the benefit of the community.

He maintains that, without the information secured through freedom of information requests, it would have been impossible to secure the changes to the local plan in 2012, to produce the BFG report in 2017 and to protect local residents in other ways, such as through the amendment to the plan affecting the Lordsgate Lane sewers.

45. Contrary to the Council's case, Mr Rattray states that he, and BFG as a whole, have been and remain willing to attend meetings with the Council and that it is the Council which has refused to engage. He says that the Council also ignores his correspondence. Generally, he complains that the Council's stance has consistently been obstructive and characterised by an inappropriate preoccupation with secrecy. In that regard he cites a freedom of information request by BAG, again presented through the local MP, which took the Council 12 months to answer and, when it was answered, was accompanied by a request that the information be not released to BAG.
46. As the Respondents now accept, Mr C is not, and has never been, a member of BFG. He is a local resident and shares many of the concerns and aims pursued by BFG (and others) relating to drainage and flooding problems. Mr Rattray agrees that he has on occasions exchanged information and correspondence with him.
47. Mr Rattray denies the general charge of adopting an "accusatory tone", but does not dispute using robust language on occasions. He explains that the reference to "bogus claims" and a "dubious fictional account" responded to the untrue assertions of the Council about Mr C being a member of BAG and BFG and submitting freedom of information requests on behalf of BFG. He denies that the *West Lancashire Record* post was written by him or any other member of BFG. As for the email to *The Champion*, he protests that his message was intended to be private and not for public dissemination, but he stands by what he said and defends his (and BFG's) right to inform the public on flooding issues and put pressure on public authorities to bring about change.

Analysis and conclusions

48. Rightly, the parties agree that EIR is the applicable regime.
49. We preface our conclusions by observing that the agreement for the case to be decided on the papers may have operated to the disadvantage of the Council, on whom the onus rests to justify its reliance on reg 12(4)(b). Had we heard evidence from Mr Rattray and seen him tested in cross-examination, we might (or might not) have been persuaded to take a less indulgent view of his motivation in making the request of 27 October 2017 and/or in some at least of

his prior agitation. Likewise, we might (or might not) have been more impressed by the Council's protestations concerning the burden of the request and its predecessors, the pressure on resources generally and related points, had we heard from a witness on those matters and seen his or her evidence tested.³

50. Even with common ground that the matter was to proceed as a 'paper hearing', the Respondents could have presented evidence in written form, signed and dated, from an officer of the Council suitably qualified by experience and qualifications, adding hard facts to the general assertions contained in their formal documents. Evidence might, for example, have addressed such topics as (a) the amount of time spent on prior requests (and why); (b) the amount of time likely to be required to comply with the current request (and why); and (c) the extent to which dedication of resources to dealing with Mr Rattray's requests has prejudiced, or would be likely to prejudice, the Council's capacity to discharge its numerous other duties (and why).
51. We make these observations because they are important. We fully understand that the right to disclosure of information is not untrammelled and we are mindful of the fact that local authorities bear an unforgiving load of statutory duties which they are expected to discharge with diminishing resources. The Council is entitled to a sympathetic hearing. But cases are made out on evidence, not mere assertion. The Council's case before us consists very largely of assertion.
52. There is one further prefatory observation which must be made. The papers before us disclose some points of fact on which Mr Rattray and the Council disagree. These include matters such as the nature and effect of the Planning Inspector's adjudication in 2012 and the dispute as to which 'side' is responsible for the sad fact (apparently agreed) that meetings do not take place between them. Without evidence we are in no position to resolve such conflicts and we have not attempted to do so.
53. The Commissioner asks us to dismiss the appeal on the ground that the public interest in maintaining the exception outweighs the public interest in disclosure. As already explained, we think that this ignores the prior question whether the exception is shown to be applicable. We answer that question in the negative. We have seven main reasons for our conclusion. These correspond to a large extent with the points identified in the guidance provided in *Dransfield* at Court of Appeal and UT level, but we have been careful not to apply it mechanically or to treat it as a substitute for the statutory language. We are mindful of the need to consider *all* the circumstances and to adopt a rounded and holistic approach.

³ The potential disadvantages of 'paper' hearings were commented upon by the UT in *Craven* (para 73).

54. The first reason is that it is not shown that the request has no reasonable foundation (see the judgment of Arden LJ in *Dransfield*, para 68, cited above). Rightly, the Respondents made no such suggestion.
55. Second, it is not shown that the request under consideration, seen in isolation or in the wider context of prior requests, had a malign or improper purpose or motivation. On the material presented to us we find it quite impossible to say that Mr Rattray is or has ever been actuated by any improper motive. It is plain that the concerns which he has been raising over many years are serious and that the flooding and draining problems locally continued to be unresolved at the time of his most recent request. It is also plain that he genuinely believes that the Council has consistently neglected its risk management obligations. Moreover, he is clearly right to point out that, given the subject-matter, it is in the nature of things that circumstances change, new problems develop, new information is generated and new questions arise which can legitimately be directed to responsible bodies. Here, it is demonstrated that episodes of flooding have continued to occur and local developments over the years have put added pressure on water management systems generally. In such a case, the Council's objection that Mr Rattray is unduly persistent is not persuasive. The Tribunal would look much more critically at a request directed to an historical event which had already been fully explored (through information requests and otherwise), but in this case, we are concerned with something quite different, namely a long-standing but developing controversy. Lastly on the question of motivation, we think it significant that Mr Rattray had very few dealings with the Council for about three years from 2012 to 2015, hopeful that the successes (as he saw them) of 2012 would pave the way for a resolution of the problems. This argues against the suggestion of an obsessive or malicious mind-set on his part.
56. Third, it is not shown that the request was excessive in scope. The Council's own case appeared to acknowledge that the specific request, in itself, could not be characterised as excessive and that it was the wider historical context which made it so. That is plainly right. Having examined the evidence carefully, we are not persuaded that the requests for information presented by Mr Rattray, viewed collectively, have been excessive. We accept that some requests have overlapped to a degree, but the Council's case on this aspect (as generally) lacks sufficient clarity to enable a proper assessment to be made. Moreover, it is in the nature of things, given the subject-matter of the requests, that a degree of overlap will be hard to avoid and we remind ourselves that the freedom of information provisions are intended to be available to all (see generally *Craven*, UT, para 96) and must not be treated as demanding the drafting skills of the High Court practitioner. Moreover, to the extent that any request overlaps with a prior request there is little or no prejudice to the Council: it can refer to a previous answer rather than producing the information afresh. The evidence presented does not substantiate the Council's vague assertion that Mr Rattray has repeated requests for information, other than on the single occasion which

he has admitted and explained. We accept that it is legitimate in principle for a public authority to have regard to requests for information made by persons other than the requester. We also accept that the Council's case on this aspect is not defeated by the simple fact that Mr C is not and has never been a member of BFG. But its problem is that, for want of specifics and detail, and for the other reasons already given in respect of overlap with Mr Rattray's prior claims, the complaint of a cumulatively excessive set of requests is not sustained. We bear in mind here that the Council answered Mr Rattray's first four requests and Mr C's first nine without objection.

57. Fourth, it is not shown that the effect of the request would be to impose an excessive or disproportionate burden upon the Council. As already stated, in relation to the request viewed in isolation, that proposition is more or less conceded. Having regard to the context, and specifically the history of prior requests, we are satisfied that the same conclusion applies. We have already commented on the sparseness of the Council's case and in particular the absence of hard facts and evidence. We are not provided with any detail as to, for example, the number of hours of staff time which would need to be devoted to answering the current request, the hours spent on prior requests, the impact on other services, and so on. A case based on assertion and hand-wringing alone will not prevail.
58. Fifth, we are troubled by the logic of the Council's case, which it does not shrink from expressing in plain language, that the door must now be closed on any further request for information related to flooding risk in and around Burscough. That logic runs counter to the entire spirit of the freedom of information legislation. It seeks to deprive Mr Rattray and, by extension, other concerned individuals who might be seen as associated with him, apparently for ever, of an important constitutional right to seek information in order to hold a public body to account on a matter of obvious public significance. In addition, it ignores the point already made (see our second ground above) that the subject-matter of Mr Rattray's concerns is not an historic, cut-and-dried event but a phenomenon which recurs with notable frequency, the causes of which, and possible solutions for which, are prone to change as time passes and circumstances, in particular those that bear on the capacity of existing waste water management systems to cope with increasing demand, evolve.
59. Sixth, the fact that there may be other means (such as engaging in planning consultations) through which Mr Rattray is free to ventilate his concerns does not warrant an outcome denying him access to his right to freedom of information.
60. Seventh, on the material presented, and excluding points in dispute which we could not resolve without evidence, we reject the Council's contention that Mr Rattray's manner and tone in airing his concerns, through requests for information or otherwise, warrant the conclusion that the request under

consideration is “manifestly unreasonable.” It is certainly true that he has complained vociferously that the Council has failed to live up to its responsibilities and has tried to minimise the problems to which he draws attention. He has also not hesitated to rehearse the history going back to 2012 and before but there is of itself nothing vexatious about that. Indeed, without doing so he would struggle to make his essential complaint, namely that responsible bodies have had ample time to get to grips with the serious flooding problem and, far from doing so and resolving it, have overseen a state of affairs in which, if anything, it has deteriorated. His comments may be unwelcome and perhaps uncomfortable on occasions for Council decision-makers but in a democratic society those who hold public office must accept robust challenge from time to time. It is not shown that he has said or done anything before the request or since⁴ amounting to, or coming close to, harassment or abuse. There is no suggestion of distress or harm being suffered by Council staff.

Outcome and postscript

61. We do not suggest that any of these reasons is individually determinative of the appeal. But we are satisfied that, taken together, they lead irresistibly to the conclusion that reg 12(4)(b) was not correctly applied. It follows that the appeal must be allowed.
62. Finally, we think that Mr Rattray would do well to think carefully before having further recourse to the freedom of information legislation. With every new request the risk of the Council meeting it with a successful defence under EIR, reg 12(4)(b) is likely to increase, particularly if our observations about the need to substitute evidence for mere assertion are taken on board. We would suggest that before any decision to present a further request for information he should ask himself in particular the following questions. (a) Does the proposed request repeat, or overlap (to any extent) with, *any* previous request? (b) Is the information reasonably necessary for the purposes of furthering any legitimate goal or objective? (c) Is the information available from some other source? (d) Does the proposed request for any other reason expose him to a real risk of being legitimately accused of a misuse of the freedom of information provisions? (e) Even if he is satisfied that the proposed request is proper in principle can it be improved by (i) making it more concise and/or (ii) narrowing its scope and/or (iii) clarifying the language in which it is couched?

Judge of the First-tier Tribunal

Dated: 27 June 2019

⁴ The evidence relied upon by the Council is on its face irrelevant, since it post-dates the request.