IN THE FIRST-TIER TRIBUNAL **EA/2013/0252**
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FER0494509
Dated: **21st. October, 2013**

Appellant: **Robert Latimer ("RL")**

Respondent: **The Information Commissioner ("the ICO")**

Before

David Farrer Q.C.
Judge

and

Paul Taylor
and
Jean Nelson

Tribunal Members

Date of Decision: **4th. April, 2014**

Representation : Mr. Latimer appeared in person

The ICO did not appear but submitted a written Response.

Subject matter: (1) Environmental Information Regulations 2004 Reg. 5(1).

Whether the Department for Environment, Food and Rural Affairs ("DEFRA") held the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 4th. day of April, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

1 RL appeals a Decision Notice of the ICO dated 21st. October, 2013 upholding DEFRA`s denial that it held information meeting his request dated 20th. September, 2012.

2. The general subject matter of and the parties to this appeal are identical to those in Appeal EA/2013/0101. However, the public authority in that matter was the Environment Agency ("the EA"); here it is DEFRA. The issue on that appeal was whether a request similar to the one under consideration here was vexatious, that is, manifestly unreasonable. Whether it was vexatious – and the Tribunal found that it was – depended on the history and character of the communications between RL and the EA.

3. The issue in this appeal is whether DEFRA held information requested by RL which he had previously requested from the EA. That issue is entirely distinct from the issue facing the Tribunal in EA/2013/0101 and the findings of that Tribunal have no bearing on the decision here. RL`s requests to DEFRA are not alleged to be vexatious and the history of his dealings with DEFRA is clearly different from those with the EA. Two members of this Tribunal sat on the panel which decided EA/2013/0101. No objection was taken to their membership of this panel and, for the reasons indicated above, this Tribunal sees no difficulty in their participation in the determination of this appeal..

The Background

4. RL lives and carries on a business at Whitburn, Northumbria, close to the beach. Since 1996 Northumbrian Water Ltd has operated Whitburn Steel storm sewage pumping station next to his property.

5. This involves a combined collecting system serving the Sunderland area, which receives both rainwater and urban waste water which are then pumped in normal conditions to three further stations and thence to a treatment plant.

6. However, when the water stored in the system exceeds a certain rate of flow the excess is discharged into an interceptor tunnel which stores it until the flow subsides. If the volume of stored water exceeds the capacity of the interceptor tunnel, then the excess waste water is discharged into the sea at Whitburn beach through a mechanical screen. Although such use of the interceptor tunnel was expected to be quite rare, it is apparent that there were frequent discharges from an early stage of operation, resulting in the deposit of offensive – smelling sewage at or close to the high tide line. RL was active from the outset in contacting the EA and lodging entirely reasonable complaints.

7. From information received from the EA on 28th. January, 1998 and 13th. December, 1999, RL understood that discharge into the interceptor tunnel occurred when the rate of flow in the system reached “6 x DWF” – that is to say six times the normal rate of flow in dry weather. This belief led him to make both the request referred to at paragraph 13 and the one which gives rise to this appeal.

8. A public inquiry took place in 2001. The rate of flow at which sewage could be diverted into the tunnel and thence to the beach was a significant issue. RL states that the 6 x DWF figure was quoted at the inquiry as the basis for calculating a critical flow of 129 litres per second. The resulting report of the inspector, which was implemented in the consent issued to Northumbrian Water Ltd., stipulated a flow of 129 litres per second as the level at which diversion should occur. It is referred to as “modified Formula A”. It made no reference to dry weather flows but RL clearly understood that such a rate equated to 6 x DWF.

9. The problem of sewage deposit at Whitburn beach continued over the following years. In 2003 the European Commission issued written warnings to the UK Government as to possible violations of the EU Urban Waste Water Treatment Directive (91/271/EEC), which included Whitburn. Infraction proceedings ensued. The Commission recorded excessive discharges into the sea each year from 2005 – 2008.

10. Proceedings were protracted. The UK defence, lodged in 2010, included a submission that no single rate of flow applied to all points of the Sunderland area system and that the range over the whole system was 3 – 6 DWF with a median figure of 4.5.

11. An advisory opinion of the Advocate General to the European Court of Justice ("the ECJ") was published early in 2012. It referred to an MWH UK Ltd. report on the water quality at Whitburn Steel published in 2010 and quoted 4.5 x DWF as the basis for the permitted discharge consent. This evident discrepancy with the figure of 6 x DWF provoked RL to make a series of requests to DEFRA relating to the calculations leading to the "new" DWF figure. His concern was that a lower flow level had been adopted for the discharges into the interceptor tunnel. In a letter to RL dated 16th. April, 2012, the Head of Water Quality at DEFRA acknowledged that the previous statements made by the EA were incompatible with the suggestion that the system operated at 4.5 x DWF and suggested that he seek an explanation of the discrepancy from the Agency.

12. RL`s requests began on 14th. December, 2011 (before he saw the Advocate General`s opinion) when he asked for all the material used by DEFRA, that is the UK government, to defend the ECJ proceedings relating to Whitburn. In due course this was refused, in reliance on EIR reg.12(5)(a), since proceedings before the ECJ were pending. The ICO upheld that refusal following RL`s complaint.. Much of that information was later disclosed when the proceedings concluded.

13. On 18th. April, 2012 RL submitted to DEFRA a request strikingly similar to the one with which this appeal is concerned. It was for –

"all correspondence along with written proof from the EA to confirm the system was designed to spill at 4.5 x DWF and to confirm and show the calculations that show the CSOs are spilling at 4.5 x DWF . . ."

DEFRA provided some further information on 17th. May, 2012 but refused to provide material already in RL`s possession.

The Request

14. On 20th September, 2012 RL requested from DEFRA by email –

"copies of the calculations showing how 4.5 x DWF = 129l/s"

We observe that this is a very specific request. If this is a false equation then such calculations cannot be held by anybody. They cannot exist because, if incorrect, they do not produce the specified result. Since, as we understand it, RL contends that this is indeed a false equation, DEFRA`s denial that it holds such calculations is what he would expect. However, the Tribunal cannot say whether the equation is true or false and must approach this appeal on the footing that such calculations could be held by somebody. The Tribunal is not concerned with the question whether the stipulated critical flow rate has been materially altered since the 2001 consent was issued. It must decide simply whether the workings which lead to the above equation were held by DEFRA in September, 2012.

15. On 17th. October, 2012 DEFRA replied that it had nothing to add to its letter of 17th. May, 2012, which evidently denied that it held such calculations.

16. On the following day the ECJ published its decision in the infraction proceedings, finding the UK to have failed to comply with the Directive.

17. On 21st. January, 2013 RL again requested this information and was told again, the same day, that DEFRA did not hold it. He complained to the ICO.

The Decision Notice

18. The ICO upheld DEFRA`s claim that it did not hold the requested information. By Notice dated 17th. November, 2013 RL appealed to the Tribunal against that decision.

Our Decision

19. EIR reg. 5(1) provides that, subject to succeeding paragraphs immaterial to this appeal,

"a public authority that holds environmental information shall make it available on request".

Whether DEFRA held the requested information is a simple question of fact in this case, relating to the content of its electronic and paper records.

20. The explanation for the possible discrepancy between 4.5 and 6 DWF and whether they have ever been used as measurements of the same flow or pass forward rate remains unclear to the Tribunal. The account set out in the UK Defence to the ECJ proceedings to the effect that there was no single DWF throughout the system and that 4.5 was merely the median figure within the possible range would not, of itself, explain why 6 DWF was referred to before and after the 2001 Inquiry as the critical flow for discharge into the interceptor tunnel. It may be that different figures were adopted by different agencies or at different

times. It may be that, as suggested in correspondence, DWF is no better than an approximate value. What is quite clear is that, if DWF is a constant; the two statements – (i) 6 x DWF = 129l/s and (ii) 4.5 x DWF = 129l/s cannot both be true. Equally clear is the fact that the stipulated flow rate for discharge to the tunnel is measured in litres per second, not multiples of dry weather flow.

21. The Tribunal is not concerned with which, if either, DWF is relevant to the permitted discharge. Nor is its role to pass judgement on the performance of the relevant agencies in protecting the environment of Whitburn. That was, indirectly, the function of the ECJ. The wording of the request requires it rather to ask itself what evidence there is that DEFRA made or are likely to have made or received from another body, presumably the EA, calculations as to how many DWF equate to 129 l/s at or fairly close to the time when the request was made.

22. It seems from the documents that references to 4.5 x DWF, whatever they referred to, originated in the EA which passed it to DEFRA and to those preparing the UK case for hearing at the ECJ. Those references, according to the EA and to the UK Defence, were, as mentioned above, to a median figure for flows throughout the Sunderland system. If that is right, it appears to be entirely unrelated to a pass forward or flow rate at Whitburn required to trigger discharge into the interceptor tunnel.

23. If any public authority held calculations leading to the critical equation – and, as indicated above, it is far from clear that any did – that authority would be the EA.

24. DEFRA has repeatedly stated that it holds no such calculations. That seems to us inherently probable, given the more direct involvement of the EA in this issue and the fact that DEFRA has not argued that 4.5 x DWF = 129l /s. We have no hesitation in concluding, on a balance of probabilities, that its denial is well – founded.

25. Questions of the public interest, briefly referred to in the Decision Notice, do not arise therefore.

26. For these reasons we dismiss this appeal.

27. Our decision is unanimous.

28. We wish to add, however, that RL`s tireless battle to staunch the stench from these discharges, whether or not always judiciously waged, is wholly understandable. Such a nuisance can blight the life of a community, whether or not any particular authority is to blame. His problem is that information requests of this kind are unlikely to lead to a solution. Perhaps the simple fact of the discharge, rather than the calculations underpinning it, lies at the heart of his grievance.

Signed

David Farrer Q.C.

Tribunal Judge

4th. April, 2014