



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2015/0111

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0555406

Dated: 11th. March, 2015

Appellant: Robert Latimer ("RL")

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

Second Respondent: The Department for Environment, Food and Rural Affairs ("DEFRA")

Before
David Farrer Q.C.
Judge

and

Jean Nelson
and
Paul Taylor
Tribunal Members

Date of Decision: 11th. October, 2015

Date of Promulgation: 30th. October, 2015

The Appellant appeared in person.

The ICO did not appear but made written submissions.

Robin Hopkins appeared for DEFRA

Subject matter:

EIR Reg. 12(4)(a)

Whether the public authority held the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that DEFRA did not hold that information. It therefore dismisses the appeal. DEFRA is not required to take any steps as a result of this appeal.

Dated this 11th. day of October, 2015

David Farrer Q.C.

Judge

[Signed on original]

Abbreviations

In addition to those indicated above, the following abbreviations are used in this ruling -

The EIR Environmental Information Regulations, 2004 (SI 2004/3391).

The EC The European Commission

The ECJ The European Court of Justice.

The EA The Environment Agency

The DN The Decision Notice of the ICO

REASONS FOR DECISION

The Background

1. For many years the beaches on the Northumberland Coast at Whitburn and Roker have been subject to deposits of urban waste in unfavourable weather conditions resulting from overflow discharges from the disposal system. RL has been tireless in his attempts to secure improvements, attending a public inquiry, corresponding ceaselessly with DEFRA, its predecessor, the EA and the EC and seeking information through EIR requests which have led to a series of decisions of the ICO and appeals to the Tribunal.
2. Reports to the EC regarding the state of the beaches led to an EC Complaint in 2000, to consequent negotiations between the EC and the UK for several years and to a finding by the European Court of Justice in 2012 that the UK was in breach of a relevant European Directive on urban waste water.
3. All RL's EIR requests and the consequent tribunal proceedings have arisen from closely related aspects of this continuing environmental issue and RL, not unnaturally, relates this appeal and the other appeal, EA/2015/0112, which we heard immediately after this, to such earlier requests and appeals and to each other. However, the Tribunal emphasises that, save possibly where it is alleged that a particular request is vexatious, which is not this case, each appeal relates to the specific request which gives rise to it and must be considered independently of any other.

The Request

4. In a letter to the EC Director General Environment dated 23rd. January, 2001, the UK Permanent Representative to the EU provided detailed information as to the performance and capacity of the interceptor tunnel installed in 1995 to store excess flows of storm sewage. He quoted figures of 5.9 for Roker and 6.8 for Whitburn as representing the volumes of flow measured as multiples of DWF (Dry weather flow) which the tunnel could receive and an operational storage capacity for the tunnel of 1550m³. At the date of the letter the government department responsible for water quality was the Department for Environment, Transport and Regions. DEFRA was formed in June, 2001. In re-

sponding to a reasoned opinion of the Advocate General in June 2003 DEFRA quoted the same flow figures.

5. We were told by RL that a figure of 4.5 DWF had been given to a public inquiry in 2001. In a letter dated 16th. April, 2012, DEFRA's Head of Water Quality confirmed that the original system had apparently been designed to pass forward around 4.5 DWF before overflow discharge and it was clear that these different DWF multiples were quoted by public authorities on different occasions. Over a number of years RL made a series of requests under the EIR to DEFRA, the Environment Agency and the Northumbrian Water Authority, which sought information, in various forms, relating to these figures and the explanation for such inconsistency. It is apparent that he deduced, rightly or wrongly, that the EC and the public were being misled.

6. On 27th. January, 2014 RL addressed the following request to DEFRA -

"I enclose a page from a letter from the EC to my MEP . . . I refer to item 6 where it states, I quote:-"The UK authorities explained that each pumping station is capable of pumping forward 6 x DWF". Under the EIR please would you provide a copy of this correspondence showing when and where the UK authorities supplied this information to the EC?

I also would like to refer to item 12 where it states: - According to the UK authorities, the operational storage capacity of the storm sewage interceptor tunnel is set at 155M3 (of a total capacity of 14000M3) - under the EIR please could you supply a copy of the correspondence showing when and where the UK authorities informed the EC of this?"

7. DEFRA responded on 24th. February, 2014, stating that the requested information was contained in the letter quoted in paragraph 4 above, that RL already had that letter (he had appended it to an Email to DEFRA of 13th. February, 2014) and that it did not hold any other responsive information. It therefore relied on the exception to the duty to provide requested environmental information provided by EIR Reg.12(4)(a).

8. That response was clearly correct in every respect and appeared to the Tribunal, on first reading, to dispose of the appeal.

9. However, as was very properly conceded by Mr. Hopkins on behalf of DEFRA, it had become apparent to DEFRA when RL, on 25th. February, 2014 requested an internal review of that refusal, that the real target of the request was the source documents (“the background material”) which underpinned the figures quoted in the letter of 23rd. January, 2001, that is to say, records of calculations, briefings and discussions as to such calculations which were performed or took place before 23rd. January, 2001. This was made clear in RL’s request for an internal review of 25th. February, 2014 and in an earlier Email dated 13th. February which constituted a fresh EIR request. We were told that, for the purposes of its internal review, DEFRA had treated the original request as embracing such further and distinct information and such an approach is apparent from the terms of its refusal of an internal review dated 5th. August, 2014.

10. It is most important that requesters under FOIA or the EIR specify precisely what information they are seeking. The Tribunal will not generally entertain on appeal significant enlargements of the scope of the request as considered by the public authority and the ICO. However, whilst, in a perfect world, DEFRA would have required an amended request from RL when it appreciated the greater breadth of his inquiry, its eventual response at the stage of internal review was provided with full knowledge of what he wanted and following searches for that wider range of information. It would be unjust for the Tribunal to approach his appeal on a narrower basis than the authority to which the request was addressed.

The Complaint to the ICO

11. RL complained to the ICO on 17th. September, 2014.

12. The DN does not expressly refer to any extension of the scope of the request but introduces references to the background material in paragraphs 19, 25 and 26 which seem to imply that the ICO interpreted the original request in the enlarged sense referred to above. Where any issue arises as to the construction of the request, it is helpful for the DN to indicate clearly the scope which the ICO attributes to it.

13. The DN reviewed the history of the matter, DEFRA’s role in the presentation of the UK case to the EC and then the ECJ and RL’s arguments as to it holding the background

material in January, 2014. He concluded that thorough searches had been conducted, that DEFRA destroyed significant volumes of Whitburn records in accordance with its predecessor's 10 year retention policy and that it was probable that it did not hold the background material in January, 2014. RL appealed.

The Appeal

RL's case

14. RL, as with other appeals, devoted a great deal of hard work and his very detailed knowledge to the presentation of his case. Nevertheless, that presentation was somewhat diffuse and the relevance of some of the extensive documentation confronting the Tribunal was unclear.

15. In essence, his case is that the figures quoted in his request were presented to the EC in 2001, then again in June 2003 when DEFRA was responsible for water quality, in response to an additional reasoned opinion of the Advocate General. Furthermore, the Advocate' General's opinion issued in 2010 refers to a study conducted in 2010, which, RL contends, must have involved a review of the background material. DEFRA must have held it therefore in January, 2014.

16. DEFRA argues that

- a thorough search of its files relating to Roker and Whitburn revealed no such background material as to either flow rated at 5.9 or 6.8 DWF or any other figure or tunnel capacity;
- it is likely that the Environment Agency would hold it, if it was still extant;
- its creation must have preceded the establishment of DEFRA in 2001;
- if it was ever held by DEFRA, it would probably have been destroyed in or about 2011 in accordance with retention policy;
- it was of no real significance, hence not fit for retention, because DWF was not the measure used to assess flow for the purposes of any breach of the directive;
- the ruling of the ECJ was quite unrelated to any issue of inconsistent DWF figures or the storage capacity of the interceptor tunnel.

The reasons for our decision

17. The tribunal can see no basis for the suggestion that an apparent discrepancy between quoted rates of flow has a bearing on the probability that DEFRA held the background material in early 2014.
18. It is likely that DEFRA never held such material since it had not been responsible for its creation or the original presentation of the results that it produced.
19. DWF calculations ceased to be relevant to proceedings before the ECJ or negotiations with the EC long before 2014.
20. If DEFRA ever held the background material it is probable that it would have been deleted before 2014.
21. There is no reason to doubt that DEFRA conducted thorough searches when the real target of RL's request was appreciated. It had no reason to conceal such material, if retrieved.
22. The evidence strongly indicates that DEFRA made every effort to accommodate RL's investigations.
23. The Tribunal concludes that it is highly probable that DEFRA did not hold the background information, when requested.
24. As to EIR Reg. 12(1)(b), it cannot be in the public interest to require a public authority to provide information which it very probably did not hold at the date of the request and does not hold now.
25. For these reasons the Tribunal dismisses this appeal.

26. This is a unanimous decision.

27. We add by way of postscript a recommendation which, we believe, is applicable to the preparation of all appeals to the Tribunal, namely that the communication containing the request should always be exhibited in full so that the scope and meaning of the request are as clear as possible.

David Farrer Q.C.

Tribunal Judge

11th. October, 2015