



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

**Appeal Reference: EA/2019/0301V**

**Heard by CVP on 10 February 2021**

**Before**

**JUDGE ANTHONY SNELSON  
DR AIMÉE GASSTON  
MR MIKE JONES**

**Between**

**DR I H JONES**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION**

The unanimous decision of the Tribunal is that:

- (1) The Appellant's first and second requests for information (dated respectively 10 May and 22 July 2018) were manifestly unreasonable and, by virtue of the Environmental Information Regulations 2004 ('EIR'), reg 12(4)(b), the Neath Port Talbot County Borough Council ('the Council') was not obliged to comply with them.
- (2) The information sought by the Appellant's third request (dated 11 September 2018) was and is not held by the Council.
- (3) Accordingly, the appeal is dismissed.

## REASONS

### *Introduction*

1. The Appellant, Dr I H Jones, is a resident of Cwmavon within the area of the Neath Port Talbot County Borough Council ('the Council').
2. The case arises out of three requests for information directed by Dr Jones to the Council. By this appeal Dr Jones challenges the decision of the Respondent ('the Commissioner') dated 1 August 2019 that his first and second requests were vexatious and the information sought by the third was not held. The Commissioner stands by her decision and resists the appeal.

### *The procedural history*

3. The first request, was made on 10 May 2018. The material parts of it were in these terms (here and in further citations below we have silently corrected typographical and spelling errors):

**In the most recent communication I have received from the NPT Council it was claimed that the recordings that I requested in my first ever request to view a set of recordings made at my property did not exist at the time that I made that first request.**

**Do your records show that this claim is true?**

**To avoid any procrastination I have not made this information request before.**

**Secondly, ex-Cllr I.D. Williams informs me that he has handed over to you his entire list of files. In those files, there existed a number of completed complaint forms returned to ex-Councillor Williams by a number of his constituents which complained about, and confirmed the existence of, both a noise nuisance and a smell nuisance.**

**Do your records show the existence of these complaint forms?**

**Or have you again destroyed relevant but embarrassing evidence?**

**If these forms still exist how many complaint forms are there?**

4. The Council responded on 19 May 2018 referring him to previous correspondence, the most recent being its letter of 26 February 2018 advising him that the Council would no longer respond to correspondence from him about historic noise complaints.
5. The second request, made on 22 July 2018, read:

**To avoid any procrastination on the part of the NPT Council, I will preface my request by stating that I have not previously requested the information listed below.**

**Do your records show WHEN BOTH of the noise recordings were made at my premises?**

**Do your records show WHEN both sets of information were communicated to me?**

**Do your records show HOW both sets of information were communicated to me?**

**Do your records show if any other resident(s) made complaints about the noise emanating from the adjacent Riverside? I am NOT requesting the names or addresses of any complainant, if such a complainant exists.**

**If other complainants exist do your records show if any recordings were made at the complainants' addresses?**

**If any complainants exist, then how was the response of the Council communicated to these complainants?**

6. The third request, made on 11 September 2018, was framed as follows:

**Amongst other criteria, a development project cannot be considered to be an agricultural project if it is**

**Less than a hectare in area**

**Less than 30 m from a main road**

**Has no previous history of being an agricultural site**

**Since the land adjacent to my property at ... is less than the stipulated value (it is 30 yards x 10 yards = 300 sq yards which is considerably less than a hectare), is within 30 m of the main designated link road (at certain points it is actually touching), do your records show on what grounds these planning laws have been disregarded and why the proper planning laws have not been applied to this land?**

7. Following correspondence with the Commissioner, the Council wrote to Dr Jones on 29 January 2019 advising him that, in reliance on the Freedom of Information Act 2000 ('the Act'), s17(6), it would not be responding to the requests given its prior application of s14 of the Act (vexatious or repeated requests) to earlier requests raised by Dr Jones.

8. Dr Jones complained to the Commissioner about the way in which the Council had dealt with his requests. An investigation followed, in the course of which the Council agreed with the Commissioner that it had wrongly applied the Act and that the case fell within the scope of the Environmental Information Regulations 2004 ('EIR')<sup>1</sup>. Accordingly, the Council's revised position was that requests 1 and 2 were resisted under reg 12(4)(b) (manifestly unreasonable requests) and all three requests were resisted under reg 12(4)(a) (information not held at date of request).

9. By her Decision Notice dated 1 August 2019, the Commissioner determined that the Council had correctly applied reg 12(4)(b) to requests 1 and 2 and that

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<sup>1</sup> All regulation numbers below refer to EIR

it did not hold any information relating to request 3 and had correctly applied reg 12(4)(a) to that request.

10. By his notice of appeal dated 20 August 2019 Dr Jones challenges the Commissioner's decision, alleging that it was based on "discredited, inaccurate and largely irrelevant information" supplied by the Council. He acknowledged that he had made "numerous requests, in various forms, over a substantial period of time" but maintained that he had been driven to do so because he had been denied "any satisfaction" and that he had come to suspect that the "inaccurate information" submitted in response to his requests had not been the result of "genuine mistakes". He went on to detail his concerns about allegedly unanswered questions to do with alleged noise and smell nuisance, complaints records and a planning decision to designate neighbouring land as agricultural.
11. By her response dated 26 September 2019 the Commissioner resisted the appeal, essentially on the grounds set out in the Decision Notice.
12. The appeal came before us on 10 February in the form of a video hearing in which Dr Jones participated by telephone. The Commissioner elected not to attend, being content to rely on her written case. The parties had raised no objection to a 'remote' hearing, which was necessitated by the restrictions resulting from the Covid-19 pandemic.
13. The long delay in bringing the proceedings to a conclusion is explained in large part by the fact that an earlier, face-to-face hearing on 29 January 2020 before a differently-constituted Tribunal was adjourned on the application of Dr Jones. The further delay in producing this Decision, which is regretted, is largely attributable to the judge's current workload.

#### *The applicable law*

14. EIR, reg 5(1) enacts a general right of access to environmental information held by public authorities. By reg 12(4)(a) and (b) respectively, a public authority may refuse to disclose information to the extent that it does not hold it at the date of the request, or where the request is "manifestly unreasonable". 'Environmental information' is defined as information concerning a range of specified subject-matters "in written, visual, aural, electronic or other material form" (reg 2(1)).
15. A request for a public authority to generate an explanation or a commentary is not a request for information within the scope of the freedom of information legislation (*Betts v Information Commissioner* (EA/2007/0109), FTT 18 May 2018, paras 33, 68).

16. Any question as to whether requested information is 'held' is to be decided on a balance of probabilities (*Bromley v Information Commissioner and Environment Agency* EA/2006/0072).
17. In determining whether a request is 'manifestly unreasonable' under reg 12(4)(b), the Tribunal should have regard to the same types of considerations as arise where a request is refused under the Freedom of Information Act 2000 ('the Act'), s14 as 'vexatious'. The tests are essentially the same (*Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC)).
18. In *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 (AAC), the Act, s14 was directly in point. The Upper Tribunal (Judge Nicholas 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.**

19. The appeal is brought pursuant to FOIA, 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 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.**
  - (2) **On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

*The background facts*

20. On the material presented to us, we record the following brief facts.
21. Request 1 divides into two parts. The first concerns noise recordings made at Dr Jones's property in May 2012. He has requested copies of the recordings

and has been told that the Council does not hold them because they were deleted soon after being made, apparently because they were judged to be of no value owing to sound interference in the form of a beeping noise believed to be associated with a smoke alarm. The issue of the recordings was the subject of protracted correspondence between Dr Jones and the Council, which seems to have extended over a continuous period of some four years up to the date of the first request.<sup>2</sup> In that correspondence, and throughout these proceedings, the Council's position has been consistent in repeating the fact that it does not hold the information requested and the reason for that state of affairs. We are satisfied that the Council has been entirely truthful and accurate in this regard.

22. The second part of the first request relates to "completed complaint forms" filled in by residents and submitted to (then) Councillor Williams, relating to noise and smell nuisance. Again, the Council has been consistent in maintaining that it does not hold completed complaint forms, other than one presented by Dr Jones himself. We have been shown no evidence which calls into question the Council's position and again, we are satisfied that its account is true and accurate.
23. Request 2 is closely bound up with request 1. It relates to the recordings made at Dr Jones's property in 2011 and 2012, which have been the subject of greatly protracted correspondence, the earliest now some 10 years old. The request also asks for information about any complaints about noise nuisance made by other residents. As we have noted, the Council refused to engage with the requests on the ground that they were vexatious. We have, however, been shown correspondence which evidences patient and careful communication with Dr Jones, in which it has been explained to him that all relevant documents have been disclosed (see e.g. the letter of 9 September 2016 and the email of 10 November 2017). Again, we are satisfied that no material within the scope of the request has been withheld from Dr Jones by the Council.
24. Request 3 arises out of a long history of complaints directed by Dr Jones to the Council concerning the use of land adjoining his. Dr Jones has repeatedly argued that the use(s) is/are contrary to planning legislation. The Council has repeatedly explained in correspondence its view that they do not offend against such legislation and that in any event enforcement action is unwarranted. We have been referred in particular to letters sent to Dr Jones in January 2016 and August and December 2017, in which the Council's reasons are fully and carefully explained. We have seen no evidence to suggest that any further recorded information relevant to its decision-making has been withheld.

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<sup>2</sup> The earliest correspondence on the subject of noise recordings dates back to April 2011 if not before.

## Conclusions

25. Requests 1 and 2 were manifestly unreasonable. Dr Jones has pursued his (no doubt heartfelt) concerns over an unreasonably extended period. The Council has shown remarkable forbearance and, in our judgment, would have been entitled to call time some years ago. He has been told repeatedly that all the information which he has sought has been supplied to him. The Council has quite rightly told him that it will no longer engage with his correspondence. He now seeks to extend it further by treading well trodden ground and even asking whether answers to prior requests for information were true. Such behaviour is obviously unreasonable and, in our judgment, obviously vexatious.
26. But for their manifest unreasonableness, the appeal in respect of requests 1 and 2 would have been dismissed in any event. Despite Dr Jones's suspicions, we are satisfied that there is no rational basis for supposing that any hitherto undisclosed recorded information within the scope of requests 1 and 2 was (or is) held by the Council. The duty to disclose is confined to information 'held'. Our conclusion here rests on our factual findings in paras 21-23 above. The case on requests 1 and 2 fails straightforwardly for want of any duty of disclosure. (The defence under reg 12(4)(a) does not arise; that provision presupposes that relevant information *is* held and gives a defence where it was not held at the time of receipt of the request.)
27. Request 3 is arguably not a request for information at all. It has the look of an attempt to engage the Council in an inappropriate debate about planning law. If and in so far as it amounts to a request for the Council to generate an explanation, it falls outside the scope of the freedom of information legislation and consequently outside the jurisdiction of the Tribunal (see the *Betts* case cited above).
28. Despite our misgivings about the permissibility of request 3, we prefer to decide this part of the appeal on the simple ground that, in any event, the Council does not hold any hitherto undisclosed recorded information within the scope of the request even if, in favour of Dr Jones, it is read very widely as a request for any recorded information relevant to its decision-making arising out of his complaints of alleged planning infringements by the occupier of the land adjoining his. We rely on our findings in para 24 above, which are based on the documentary evidence before us.
29. We note that the Council does not press its original defence that request 3 was vexatious (or manifestly unreasonable). In those circumstances we will say no more on that subject other than to remark that we can well understand why it framed its initial response as it did.

*Outcome and postscript*

30. The appeal is dismissed.
31. We regret that this appeal, which has used up much public time and money, was ever brought. We hope that Dr Jones will think very carefully before submitting freedom of information requests again. He would do well to bear in mind that there are other means of holding public authorities to account.

(Signed) Anthony Snelson  
Judge of the First-tier Tribunal

Dated: 4 May 2021

Promulgated: 5 May 2021