Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0018
Information Commissioner's Ref: FER0232659

Decided on the papers

Decision Promulgated
3 August 2009

BEFORE

DEPUTY CHAIRMAN

ROBIN CALLENDER SMITH

and

SUZANNE COSGRAVE

DAVE SIVERS

Between

ROBERT LATIMER

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

ENVIRONMENT AGENCY

Additional Party

Subject matter:

Environmental Information Regulations 2004

Exceptions, Regs 12 (4) and (5)

- Request manifestly unreasonable 4 (b)

Cases:

Vaithilingam Ahilathirunayagam v IC and London Metropolitan University EA/2006/0070; *Carpenter v IC and Stevenage Borough Council EA/2008/0046.*

Representation:

For the Appellant: Mr Robert Latimer
For the Respondent: Mr Richard Bailey (Solicitor)
For the Additional Party: Ms Gisele Bakkenist (Solicitor)

Decision

The Tribunal upholds the decision notice dated 17 February 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. Mr Robert Latimer (the Appellant) wrote to the Environment Agency (EA) to request information regarding the Hendon Sewage Treatment Works. The EA refused the request under section 14 of the Freedom of Information Act 2000 (FOIA) on the grounds that it was vexatious.

2. The Appellant subsequently complained to the Information Commissioner who found that the request was about environmental information and should therefore have been administered under the Environmental Information Regulations 2004 (EIR).

3. The Information Commissioner investigated the complaint and found that the EA was not obliged to comply with the request as it was manifestly unreasonable under regulation 12 (4) (b).

4. By failing to deal with the request under the EIR, the EA had breached regulations 14 (2) and 14 (3) but the Information Commissioner required no steps to be taken in respect of that breach.

5. In considering this appeal the Tribunal -- as well as considering the various comments, replies and skeleton arguments of the parties -- has considered documentation running to 849 pages and a closed bundle of evidence provided by the EA.

The request for information

6. On 23 November 2007 the Appellant wrote to the EA requesting information under FOIA regarding sewage flows at the Hendon Sewage Works which is operated by Northumberland Water Ltd. The request read:

"*I would like to request, under the FOI Act, all correspondence, e-mails, reports, notes, memos and faxes that the EA hold confirming the flows entering [Appellant's*

emphasis] Hendon Sewage Treatment Works were measured as the Inspector recommended in his report and were sent to Ofwat, allowing them to inform [name redacted] that all the Inspector's recommendations had been carried out? I would also like to request under the FOI Act that the EA also provide all correspondence relating to my 6 questions that I asked Ofwat?"

7. On 14 December 2007 the EA wrote to the Appellant to say that his correspondence raised issues which it had already responded to in full. It said that it had already informed him that it would not deal with matters that had been previously addressed and would only consider genuinely new points he raised and that, therefore, it could not help him further.

8. 9 January 2008 the EA contacted the Appellant to say that it was now in a position to issue the correct form of refusal notice. It said that, under section 14 of the Act, it would not enter into further correspondence with the Appellant because it believed his request was vexatious and said it was not obliged to respond to requests that were substantially similar. It explained to the Appellant that it had already provided him with an exhaustive amount of information on the issues of his request and had no further information to provide him with.

9. On 10 January 2008 the Appellant asked the public authority to carry out an internal review of its handling of his request. In doing so the Appellant explained that he was requesting specific information that had not previously been provided to him. In particular the Appellant said that he wanted to see the records of flows entering the Hendon Sewage Treatment Works being measured or else the EA should confirm that no such records were held.

10. The EA presented its findings of an internal review on 11 January 2008. At this point it confirmed its initial view that it had provided the Appellant with an exhaustive amount of information on the subject of his request and no further purpose would be served by continuing to correspond with him on this matter.

<u>The complaint to the Information Commissioner</u>

11. On 14 January 2008 the Appellant contacted the Information Commissioner to complain about the way his request for information had been handled. The

Appellant specifically asked the Information Commissioner to consider the EA's decision to refuse to disclose the information he had requested.

12. On 5 November 2008 the Information Commissioner contacted the EA with details of the complaint and noted that the requested information, were it held, would fall within the definition of environmental information under regulation 2 (1) of the EIR. The Information Commissioner explained that there was no exception under EIR for vexatious requests but that the request could be refused if it was manifestly unreasonable. The EA responded to the Information Commissioner on 1 December 2008 agreeing it was a request for environmental information but that it considered the request manifestly unreasonable.

13. The EA explained that it had spent considerable time and resources dealing with requests from the Appellant and also similar requests from a local campaign group of which the EA said the Appellant was a member.

14. It stated it had provided the Appellant with all of the information it had on the subject (the issue of the Hendon Sewage Treatment Works and the Appellant's wider concerns regarding the Sunderland Sewage system) and had no further information. The EA stated that its belief was that the intent of the request was to harass the EA and added that dealing with the Appellant had caused significant stress for its staff on a matter that dated back to 1992.

15. The Information Commissioner wrote to the EA on 7 January 2009 to ask it to elaborate on some points raised in its letter. The Information Commissioner asked for further details of the investigation by the Parliamentary Ombudsman referred to by the EA in its history of the complaints.

16. The EA responded on 19 January 2009, providing the Information Commissioner with further information regarding the Ombudsman's investigation and a copy of the ruling. The EA explained it had provided the Appellant with all of the environmental information it held in response to his requests until such time as it took the decision to cease corresponding with him. It added that the information was provided to the Appellant free of charge and was often accompanied by detailed explanations of how the information related to the operation and regulation of the Sunderland Sewage System. It said that, when it did not hold requested information, it made

this clear to the Appellant and - when relevant - told him which other body held the information.

17. In respect of the specific information requested by the Appellant the EA said it had provided the Appellant with flow information relating to the flow monitoring exercise at Hendon in 2003 on several occasions.

18. It said there was no further flow information because there was no monitoring point for flows entering the Hendon Sewage Treatment Works due to engineering constraints. The EA stated that the Appellant did not seem to accept this and had continued to ask for what it described as "non-existent monitoring information".

19. The EA provided a record of 699 communications. These included internal communications between the EA staff and also communications between the EA and third parties regarding the Appellant and issues he raised regarding the Sunderland sewage system. The bulk of the records on the list, however, were direct communications between the EA and the Appellant.

The appeal to the Tribunal

20. The Appellant appealed to the Tribunal on 9 March 2009. The grounds of appeal in summary are:

    (1) That the Information Commissioner erred in concluding that, in all the circumstances of the case, the exception under regulation 12 (4) (b) of the EIR is engaged.

    (2) That the Information Commissioner erred in his finding that - under regulation 12 (1) (b) - in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosing the information.

21. The Appellant explained in his letter of appeal that he lived on a site adjoining the beach in question (Sunderland North and South, and Whitburn). A Storm Water pumping Station was sited closed by and he could see the end of the discharge pipe in the sea.

22. "When this was built we naturally attempted to understand the use of the station (although our premises were omitted from the EIA). There is substantial pollution of the sea and beach as confirmed by personal observation (daily,) by Sunderland Council Beach Reports, by Surfers Against Sewage, by local fishermen and their association, by our fish shop customers and staff…. The pollution is caused by discharges from the sewage system operated by Northumbrian Water. The Environment Agency are the regulatory authority, therefore it is they who should be enforcing the terms of the Consents they issued and which were detailed and directed by the Secretary of State following the Public Enquiry.

23. " My correspondence is aimed at ensuring that the EA:

    1) Are aware of the terms and conditions contained in the Consent

    2) Are aware of the pollution of the sea and beach.

    3) Will enforce the terms of the Consents so that the pollution will cease

    4) Will enforce any action is required to ensure the NWL provided a more adequate sewage system for our area.

24. ".... The reason for my continued correspondence is 'manifestly' in the public interest -- the sea and beach must be made safe for the many hundreds of beach users. I have no interest in stressing or harassing EA staff except to try to ensure that they do the job we, the public, are paying for. It would clearly be more efficient, less time-consuming and more sensible to actually enforce the terms of the Consent with NWL than to have to try to deal with me, and yet, they do not -- the real question is -- Why Not?"

25. The four-page letter setting out the reasons for the appeal also stated:

    "It is clear to us that 'all the circumstances of the case' have not been taken into account so that the qualified exemption in this case does not apply, the EA's use of 'vexatious' and 'manifestly unreasonable' in this case are solely being used to cover up their incompetence rather than acting in the public interest. Are you really saying that this fails the Public Interest Test when such a shameful situation exists....".

The questions for the Tribunal

26. The Tribunal has to determine that the relevant legislation to this particular appeal is the Environmental Information Regulations 2004 (EIR).

27. If the Tribunal accepts the evidence from the EA that it does not hold the information requested then the exception under Regulation 3 (2) EIR is engaged and no public interest balancing test can be applied.

28. The Tribunal has to determine whether the Appellant had indeed been provided with all the relevant information that was held by the EA, that his further requests within the terms of this appeal were requests for "non-existent information" and that his conduct in pursuing such requests was manifestly unreasonable within the terms of Regulation 12 (4) (b) EIR.

Evidence

29. The Tribunal considered an open bundle of evidence concerning 849 pages, a close bundle of evidence from the EA (that was not disclosed to the Appellant) running to 61 pages and further evidence by way of reports and press cuttings submitted by the Appellant just before the appeal was heard.

30. The EA had included in the open bundle a record of communications with or concerning the Appellant. This record began on 19 June 1992 and ran through to 12 November 2008. It lists 699 contacts.

31. The Tribunal considered all the evidence but does not intend to set it out further given the issues that have already been summarised.

Legal submissions and analysis

32. Both the Information Commissioner and the EA contend that the legislation relevant to this particular appeal is the Environmental Information Regulations 2004 (EIR). In ***Carpenter v Information Commissioner and Stevenage Borough Council EA/2008 0046*** the Tribunal concluded that a request would be manifestly unreasonable under the EIA if it were vexatious under FOIA.

Conclusion and remedy

33. The Tribunal has considered the volume of the communications between the Appellant and the EA, the volume of communications since the Appellant made his request, the previous behaviour of the Appellant and the fact that the Appellant has already received a great deal of information on the subject of his request and also visited the EA to view the information there. The principles the Tribunal set out in *Carpenter v IC and Stevenage Borough Council* apply directly to the conduct in this case and the Tribunal has also considered the analogous case – which does not relate to EIR - of *Vaithilingam Ahilathirunayagam v IC and London Metropolitan University EA/2006/0070.*

34. The Tribunal is satisfied that the volume of communications recorded in the bundle clearly placed a significant burden on the EA. The Appellant made overlapping requests by writing to the EA about the same issues while making new requests of the EA before responses to preceding requests were received.

35. There is evidence that a number of communications are focused on particular individuals within the EA and that the Appellant demanded that certain members of staff within the EA resign. Various charges were levelled against the EA including those of gross incompetence, lying and collusion. The Tribunal has seen no evidence that those accusations have any foundation at all.

36. What did strike the Tribunal was the inordinate patience shown by the EA over a number of years towards a series of requests for information that had either been provided or was not held. Objectively the EA could have drawn a line at a much earlier stage -- and saved considerable management time -- in relation to all these enquiries.

37. The Tribunal sympathises -- to degree -- with the Appellant's situation. He lives on a site adjoining the beach where the storm water pumping station is situated and where he has observed discharges of sewage into the sea. This affects not only the local community but also local businesses such as his own.

38. The Tribunal notes the Appellant's concern in his e-mail dated 2 July 2009 on the edge of the Appeal expressed as follows: "My serious concern about the possible

result of the Tribunal is that whilst the EA may be arguing that they did not have the information I asked for, or that the information should not be released in the public interest, the wider intention is that they will not answer any questions from me or my associates, or even other concerned members of the public, about the Sunderland Sewage System in the future."

39. The Tribunal wishes to emphasise that – in dismissing this appeal on the grounds it has – this decision does not give the EA a licence to ignore future requests from the Appellant in relation to ***new*** information (as opposed to repetitious requests in relation to the information covered in this appeal).

40. The Tribunal is satisfied that the relevant legislation in this particular appeal is the Environmental Information Regulations 2004 (EIR).

41. The Tribunal accepts the evidence from the EA that it does not hold the information requested – given that the Tribunal has had the benefit of seeing the closed documentation as well as the open documentation – and that, as a result, the exception under Regulation 3 (2) EIR is engaged and no public interest balancing test can be applied.

42. The Tribunal finds that the Appellant had indeed been provided with all the relevant information that was held by the EA, that his further requests within the terms of this appeal were requests for "non-existent information" and that his conduct in pursuing such requests was manifestly unreasonable within the terms of Regulation 12 (4) (b) EIR

43. Our decision is unanimous.

44. There is no order as to costs.

Deputy Chairman
20 July 2009