IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0101**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0473714
Dated: 11/04/2013

Appellant:	**Robert Latimer**
Respondent:	**The Information Commissioner**
Heard at:	**HMCTS North Shields, Kings Court**
Date of Hearing:	**30 August 2013**

Before

Christopher Hughes

Judge

and

Jean Nelson and **Paul Taylor**

Tribunal Members

Date of Decision: **4th September 2013**

Attendances:

For the Appellant: in person

For the Respondent: no attendance

Subject matter:

Environmental Information Regulations 2004

Cases:

Information Commissioner v Devon County Council and Dransfield [2012] UKUT 440 (AAC)

Rosalind Jean Craven -v- The Information Commissioner and Department of Energy and Climate Change [2012] UKUT Upper Tribunal Case No. GIA/786/2012

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 11 April 2013 and dismisses the appeal.

Dated this 4th day of September

Judge Hughes
[Signed on original]

REASONS FOR DECISION

Introduction

1. Mr Latimer lives by the coast in Whitburn. He has long been concerned about the state of the beaches and has been in correspondence with the Environment Agency and others on the matter since 1992. He was informed that there was a plan to build a sewage works to protect the beaches. The new system was implemented in 1996 and since then in his view the beaches have become worse. He raised the matter with the water company responsible and the Environment Agency.

2. In January 2008 he made a request for information to the Environment Agency which the Agency refused under Regulation 12(4)(b) of EIR; that the request was manifestly unreasonable. He complained to the Information Commissioner who upheld the decision of the Environment Agency. He appealed against this decision notice. The position of the Information Commissioner in concluding that the Environment Agency was entitled to rely on this Regulation was upheld by the Tribunal (Latimer v Information Commissioner EA/2009/0018).

3. There has been concern at a European Union level as to whether or not the UK is in compliance with its obligations under the Directive 91/271/EEC relating to Urban Waste Water. In 2010 Infraction Proceedings were launched. Mr Latimer was aware of these proceedings.

4. On 14 February 2012 the Environment Agency wrote to Mr Latimer indicating that it would not be responding to any further correspondence relating to the Sunderland Sewage System as it considered such requests to be manifestly unreasonable under regulation 12(4)(b) of EIR.

The Request for Information

5. On 10 September 2012 Mr Latimer made a further request to the Environment Agency. The request takes up some 2.5 pages of an annex to the decision notice. The request is detailed. It enclosed correspondence that he had had with the environment agency over the years relating to “the dry weather flows and spill rates from the Whitburn system”. It explored issues relating to the underlying engineering

calculations relating to the sewage system and the consents under which it was allowed to discharge into the sea. The request stated:-

"…. Please would you provide under the EIR all information, calculations, reports, estimates, e-mails explaining how the spill rate of 129 l/s equates to 4.5XDWF and meets the terms of the conditions of the consent?

If you say DEFRA is right then would you please provide under the EIR all information, consents, calculations and reports that explains why the EA have lied to me and to the Public Inquiry?"

He named various individuals and said:-

"I find the honesty of these people is now called into question…"

"There has been talk that the Interceptor Tunnel capacity should be increased, I dispute this as further capacity has been added to the system. Under the EIR please would you provide and [sic] calculation, reports, correspondence etc, explaining and verifying the capacity of the holding tank that has been constructed at Seaburn Dene since the Public Inquiry was held?"

6. There were eight other specific requests contained within this document including requests for disclosure of discharges from specific locations over the preceding 12 month period.

7. On 16 October 2012 the Environment Agency provided a partial response with respect to the discharges (constituting three of the ten requests) saying that these were straightforward requests which did not take long to produce. With respect to the rest of the requests the Environment Agency referred to the letter sent to Mr Latimer on 14 February 2012.

8. On 18 October 2012 the European Court of Justice (First Chamber) found that the UK had failed to comply with its obligations under the directive with respect to urban waste water treatment at Whitburn. On 25 October 2012 the European Commission wrote to Mr Latimer:-

"I would like to inform you that the Court of Justice in Luxembourg has now given its judgement with regard to the failure by the UK authorities to ensure that the collection of urban waste waters in Whitburn comply with the requirements of

Directive 91/271/EEC concerning urban waste water treatment. A copy of the judgement Commission v United Kingdom case C-301/10 is attached.

We will be contacting the UK authorities and asking for details of how they intend to ensure compliance with the judgement."

9. On 6 November 2012 Mr Latimer complained to the Information Commissioner ("The Commissioner") about the Environment Agency's refusal of his request for information.

The Commissioner's Decision

10. In his decision notice issued in April 2013 the Commissioner analysed the request in the light of the decision in *Information Commissioner v Devon County Council and Dransfield.*

11. He noted that in his 2009 decision he had found that (DN paragraph 12):-

"…the Environment Agency had recorded 699 communications it had had with the complainant and others regarding the issues he raised in his requests. The complainant has been provided with a great deal of information regarding the issues raised in this request and has in the past visited the Environment Agency and met with members of its staff. The complainant's concerns were also considered at a public enquiry. Since 8 September 2009 up until the date of this request there have been a further 33 items of correspondence exchanged with the complainant related to issues raised in his request."

12. The Commissioner concluded that (DN paragraph 15):-

"Seen in the context of his previous involvement with the Environment Agency the request imposes a burden in time terms of time and resources and also serves to distract the public authority from its core functions. Given the complainant's history of making repeated requests, complying with this request is likely to lead to him making future requests for information."

13. The Commissioner was concerned as to Mr Latimer's motives (DN paragraph 17):-

"It appears to the Commissioner that the purpose of the request is to challenge the Environment Agency's policies or actions in relation to this particular part of the Sunderland sewerage system rather than an actual desire to obtain the information. The complainant would appear to be using the request as a means to further his

grievance or dispute as evidenced by the fact that parts of the request in his e-mail of 10 September 2012 is for information he has already received or repeats of previous requests where he has been told that the information does not exist."

14. He reviewed the history of the specific points being made in the request, did not consider that there was any particular value or serious purpose and concluded (DN paragraph 21):-

"the complainant's requests cover the same ground as previous correspondence with the Environment Agency and in the Commissioner's view there is little to be gained from disclosure given that the complainant's concerns have been discussed extensively. Disclosure would do little to inform debate on the issues raised in the request."

15. In considering whether objectively the request could be seen in the light of the history and correspondence from the complainant to be likely to cause harassment and distress the Commissioner noted (DN 23):-

"Whilst recognising the strong feelings the complainant has about the issues raised in his request the Commissioner also takes the view that a reasonable person would be likely to feel some distress or harassment at receiving a request like this, especially given the history of previous correspondence from the complainant."

16. The Commissioner concluded that the request was manifestly unreasonable. In weighing where the public interest lay he noted the significance of transparency and accountability and the presumption in favour of disclosure and the need to read exceptions to the principle of disclosure in restrictive fashion. However he agreed with the Environment Agency that (DN27):-

"disclosure of the requested information would not inform that debate in any meaningful way. The information would not contribute to the effective running of the public sector or sustainable development, rather the opposite as the Environment Agency has shown that corresponding to the complainant's requests over many years has been a distraction from its core functions. In the Commissioner's view the complainant's request is simply another means of pursuing his dispute with the Environment Agency and this amounts to an abuse of the EIR."

17. In reviewing the conduct of the Environment Agency in providing information and preparing rainfall data for Mr Latimer the Commissioner concluded (DN28):-

"this further demonstrates that the Environment Agency has taken a reasonable and proportionate approach to the request, only refusing to disclose requested information where the burden imposed is significantly great and where the requests are about matters that have already been debated with the complainant."

18. Accordingly the Commissioner found that the public interest in maintaining the exception to disclosure outweighed the public interest in disclosure.

The Appeal to the Tribunal

19. Mr Latimer's appeal was received by the Tribunal 9 May 2013. He argued:-

"My request was based on information supplied in evidence to the European Court of Judgement (sic)-Case C301/10.

On 26/1/12 the Advocate General's Opinion showed evidence from DEFRA (supplied by the EA). The figures were completely different from those supplied to me in many letters etc and from those supplied to the Public Inquiry 2001 and which formed part of the discharge consent. I ask the EA to explain how the figures (as supplied in evidence) had been calculated and why they were different. The EA refused.

The ICO judged on the quantity of information supplied over many years and did not consider the critical nature of the evidence supplied to the Court. The truth of the evidence supplied by the EA had to be that verified as it so contradicted all of the earlier figures. The figures in the evidence were new to me and I was justified in asking that I be shown the calculations and given an explanation."

20. In support of his appeal he attached:-

- The judgement of the ECJ,
- The detailed letter with attachments he had sent the Advocate General concerning the evidence,
- Samples of beach reports for March 2013 *"I enclose to show I am not being manifestly unreasonable to expect that after 10 years the EA is allowing this to happen and will not supply information so that the public can know why"*

21. In his reply to the appeal the Commissioner provided a history of Mr Latimer's dealings with the Environment Agency, the Infraction Proceedings and their context,

and correspondence between Mr Latimer and DEFRA from February and April 2012 explaining the issues he was concerned about.

22. In a letter dated 20th February 2012 (bundle p 49) DEFRA informed Mr Latimer:-

"… The figure of approximately 4.5 times dry weather flow is the average performance of the system and was clearly stated as such, at paragraph 10.2.1.5 of the inspectors report of the Public Inquiry published on 25 February 2002. I cannot explain why the Agency's letter in 1999 quoted six times dry weather flow. This illustrates the danger of talking in multiples of dry weather flow which is usually an approximation and is why discharge permits tend to be expressed in terms of absolute pass forward flows in litres per second. The average of 4.5 times dry weather flow is used to describe the performance of the system as there is likely to be a range of dry weather flow at different points in the system"

23. In a letter dated 16 April 2012 (bundle p.50) DEFRA stated:-

".. The Advocate General's Opinion does appear to confuse some of the figures which were put before the Court. Storage at Whitburn would have to be increased by 10,800 m³ rather than to 10,800 m³. The UK has written to the Court to draw attention to this: it is not attributable to any statements by the UK…"

24. The Commissioner set out information supplied to it by the Environment Agency in the course of his investigation as to the use of various terms in the discussion of waste water systems (bundle p 58):-

"… Exact date unknown but after March 2010, DEFRA forwarded to Mr Latimer a pass forward figure of 4.5 times DWF for the Whitburn system that was provided to them by {name redacted} of the EA on 2 March 2010. {name redacted } confirms this figure was for the whole of the Whitburn system not the individual combined sewer overflows (CSOs) referred to in the earlier letters. The 4.5XDWF figure is used in general terms to describe "modified formula A" which is a sewer flow calculation that was used to design the system. Modified formula A is nominally in the range of 3-6X DWF and 4.5XDWF was given as a midpoint in this range. Modified formula A was discussed extensively at the 2001 Public Inquiry that Mr Latimer attended. The 2001 Inquiry report, which Mr Latimer holds, updated and superseded any earlier knowledge of the system and any information provided in the 1998, 1999 and 2000 letters".

Mr Latimer's Evidence

25. In his written evidence before the Tribunal and in the documents he submitted he described himself as a successful engineer with a major manufacturing organisation. He emphasised the importance of the cleanliness of the sea for the people in the Whitburn area such as himself and his granddaughters. He felt that it was entirely appropriate to ask the Environment Agency about the ongoing solution. He stated:-

"There is every value in the request, as it concerns the truth of evidence given to the European Court of Justice and what will be the subsequent remedies (based on that evidence of sewage flows) required of the British government and that it is why it is being withheld."

26. He emphasised the importance of the findings of the 2001 Public Inquiry and the importance as he saw it of the dry weather flow calculations. His submissions were at times somewhat confusing:-

*"the question has to be asked therefore why has it been necessary to persistently deny further disclosure of information already in the public domain and legislated f*or."

27. He concluded his formal submissions by stating:-

"I ask the Tribunal to please assist in dispelling such disquiet, by re-examining the failed appeal request, for the "flow figure calculations" already available to the EA, the European Court of Justice and the UK Government."

28. In his oral evidence he confirmed his background and long-standing interests, discussed the dry weather flow calculations and indicated that the demand on the sewerage system had increased with expanding building in the area. He was unable to accept that the UK Government had given him the explanation of the figure of 10,800 m^3 and that the UK Government had notified the Court of the error in the Advocate General's Opinion. He accepted that the Court indeed had not accepted some of the evidence supplied by the UK Government in the litigation. He was unable to accept that models of physical systems were approximations and could be subject to refinement over time and different explanations.

29. He put forward a recent letter to him from the European Commission giving details of the various follow up actions which the Commission was pursuing with the UK Government to ensure compliance with the Directive. The letter stated:-

"I am aware that you have provided information by e-mail to my colleagues mainly in the format of photographs, but the most useful for us at this stage would be a summary of the spills incidents with beach reports where possible or otherwise simply a date and note of spill location/type noted in chronological form."

30. In his evidence he referred to the 2001 Public Inquiry and in particular to confusion recorded by the Inspector as to the source of a document which appears to have been available in different versions (one substituted for another). The Inspector had concluded with respect to this substitution that it: -*"remains a mystery and probably always will"*.

31. For Mr Latimer the issue was sewage on the beaches. He felt that the Environment Agency had not solved the problem. He considered that action by the European Commission would not solve the problem. He indicated that he thought that they would just fine in the UK Government and the problem would not be resolved. He clearly felt that he would be the person responsible for solving the problem on behalf of local people and he needed the information he had requested to do so.

32. In considering this matter the Tribunal revisited the analysis of the request by the Commissioner in the light of the evidence submitted by Mr Latimer and using the analytical framework set out in *Dransfield* and *Craven* for considering whether a request is manifestly unreasonable.

33. The Tribunal noted that responding to Mr Latimer's concerns had required the Environment Agency to expend an enormous amount of time over the years. The tone of his e-mails was disparaging; he accused civil servants of dishonesty and cover-up and would over a period of time have undoubtedly caused distress to individuals having to respond. While Mr Latimer undoubtedly had a very valid concern about sewage pollution on local beaches his focus had slipped. He was now pursuing an issue which was peripheral to the question of how in the future remedial works would protect the beaches. On his own account the issue was not whether there had been a deliberate and dishonest cover up of an inadequate design for the system implemented in the 1990s (although on the evidence it was clear that there had simply been

different ways of explaining the calculations rather than any inappropriate action) but what remedial steps would be taken in the future to stop pollution given the investigation by the European Commission and the decision of the European Court. However the core of this request was treading the old ground of calculations and explanations before a Public Inquiry 12 years ago. In any event he had received the full and proper explanations from DEFRA and others as to how the calculations had been performed, and he had received an assurance from the UK Government that the error the Advocate- General had made had been promptly corrected. He had not accepted it due to an unreasonably suspicious view of those with whom he was dealing. Although he believed that he would be the person who would solve the problem for the people of Whitburn; the clear reality is that changes to the sewerage system will come about through discussions between the European Commission and the UK Government in the light of the decision of the European Court. Any information the Commission needs from the UK Government will be supplied by the UK Government. Mr Latimer's multiple detailed requests will not facilitate this, they do not in any significant way improve public understanding and they are a severe distraction to the Environment Agency from its proper work. The Commissioner in his decision notice came to the only possible conclusion in this case. Accordingly this appeal is dismissed.

34. This decision is unanimous.

Judge Hughes
[Signed on original]

Date: 4 September 2013