IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0182**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0469276
Dated: 31 July 2013

Appellant: **Jeremy Shiers**

Respondent: **The Information Commissioner**

2nd Respondent: **The Environment Agency**

Heard at: **Ipswich Magistrates Court**

Date of Hearing: **5 February 2014**

Before

Chris Hughes

Judge

and

Marion Saunders and Paul Taylor

Tribunal Members

Date of Decision: **5 March 2014**

Promulgated: **6 March 2014**

Attendances:

For the Appellant:	in person
For the Respondent:	did not attend
For the 2nd Respondent:	no appearance; (an observer - Hayley Shaw attended)

Subject matter:

Environmental Information Regulations 2004

Cases:

ICO v Devon County Council and Alan Dransfield [2012] UKUT 440 (AAC)
Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 31 July 2013 and dismisses the appeal.

Dated this 5th day of March 2014

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Dr Shiers, who lives near the sea, has long been concerned about the Environment Agency's (EA) approach to coastal flood defences in Essex – its Shoreline Management Plans (SMP).

2. On 8 April 2012 he wrote to the EA asking:-

   "by whom and when was DEFRA and EA given the authority to fully accept IPCC projections?

   By whom and when were you given the authority to issue guidance and choose the frequency that you did so? (request 1)

3. On 15 July he wrote again asking for information:-

   "I make a FOI/EIR request for all sites listed for managed realignment in Essex and South Suffolk SMP for each site please either:

   a) confirm you have evidence that sites chosen were vulnerable to erosion/coastal processes

      AND SUPPLY A COPY OF THE EVIDENCE YOU HOLD WHICH LEAD YOU TO MAKE THIS CLAIM

   b) deny you hold evidence that sites chosen were vulnerable to erosion/coastal processes

      In which case will you explain why you made this claim." (request 2)

4. On 15 July he wrote to the Chief Executive of the EA. The letter was 35 pages long (bundle pages 685-719). It was expressed to be a formal complaint against a named member of the EA staff. It continued:- *"As my communication with* named member of staff *involves SMP, IROPIs, Coastal Squeeze and ultimately climate change I shall talk about these things too, which will make the letter rather long. There are a number of FOI/EIR requests throughout the letter"*. It accused the staff member of providing answers which were "*cryptic, incomplete, evasive, or wrong*" (page 685), his responses "*sophistry*" and "*silly, rude unnecessary and a waste of time*" (page 687). *"The following table lists the sequence of events. I've included it to show the*

frustrating pointless waste of time and money that was incurred by named member of EA staff ... " (page 695). The letter continues with a mixture of arguments challenging the validity of policy decisions and requests for information.

5. The letter was copied to the Prime Minister and the Chancellor of the Exchequer in addition to the Secretary of State and his local MP. It attacked the scientific base of anthropogenic climate change and the scientific basis for SMP. The EA replied to the first request on 10 July 2012 providing information. On 3 September 2012 it wrote to Dr Shiers offering a meeting and followed up this offer with an e-mail dated 19 September offering dates for a meeting to *"discuss any outstanding information requests that we have not been able to provide you with answers for."* This communication specifically addressed the fact that Dr Shiers had recently made a formal complaint to the Chief Executive of the EA about what Dr Shiers saw as an inadequate response to earlier information requests. It did not specifically mention request 2 (bundle pages277-281). He did not take up the offer and complained to the Commissioner on 19 October.

6. On 20 February 2013 the EA apologised for the delay in dealing with the first request and confirmed that the information sought by request 2 would not be supplied as under the Environmental Information Regulations Regulation 12(4)(b) *"the request for information is manifestly unreasonable"*.

7. The letter went on to explain that the information used to assess the vulnerabilities of coastal sites was held in various places and systems. *"All of these are relevant to our decision-making when determining appropriate plans for coastal management. In addition to interrogating these datasets for each of the many different sites, we would need to refer to information held in our Systems Asset Management Plans. Much of this data is not in a format which can be easily extracted or explained other than by staff who are familiar with the terminology."* The EA noted that the appropriate limit for the costs of a FOIA request (which they treated as equivalent) was £450- which amounted to 18 hours worked by EA staff. Their estimate was that for in excess of 30 sites the time taken to extract the information would be *"in excess of 75 hours."*

8. The response also considered the extent to which the disclosure would produce public benefit. It acknowledged that *"the release of environmental information can promote accountability and transparency in the spending of public money and bringing to light issues affecting public health and safety. However, we believe that, due to the huge*

volume of data regarding this issue, the time and effort involved in finding, collating and giving necessary explanations would be disproportionate to any benefit in providing the information."

9. On 28 February 2013 Dr Shiers complained to the Information Commissioner. The Commissioner noted that there was no statutory "appropriate limit" in EIR. He considered the proportionality of the burden on the EA of complying with the request, the presumption in favour of disclosure, the need to interpret exceptions to disclosure restrictively, the individual circumstances of the case and the balance of public interest.

10. The EA provided further information as to the time it would take to process the request; having carried out a similar exercise with respect to one site it estimated that it would take one staff member 14 hours per site. The Commissioner, in his DN (para 14):- *"having taken into account the estimated time taken to comply with the request, considers that, given the hours taken and resources which would be required to fulfil the request, not only is it unreasonable to expect the Environment Agency to comply with the request, it is manifestly unreasonable*." He then considered the arguments with respect to the public interest, enabling public participation in debate on issues of the day and allowing individuals to "*understand decisions made by authorities which affect their lives, and in some cases assisting individuals in challenging those decisions*." He noted however the enormous resources the EA would need to deploy to "*locate, retrieve and assess the documents concerned prior to any release. It believes that to fulfil the complainant's request would take up valuable technical resource that is needed to protect the environment, which would not be in the public interest. The Commissioner accepts that these are strong public interest factors in favour of non-disclosure*."

11. The Commissioner concluded:-"*despite the fact that the requested information may be of benefit to the wider public, it would be unfair to expect the Environment Agency to comply with the request because of the substantial demands it would place on the Environment Agency's resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest argument favours maintaining the exception*." Having come to this conclusion with

respect to the first substantive request within the letter, he did not find it necessary to consider the other requests.

<u>The appeal to the Tribunal</u>

12. In his notice of appeal Dr Shiers raised arguments as to the validity of projections with respect to sea-level rise and estimates of the erosion of salt marshes. He denied that he had been offered a meeting and referred to an EA official's "*contemptuous refusal to answer FOI/EIR questions*". He argued that the time estimate must be wrong because EA had spent 10 years preparing SMPs and he quoted minutes of a meeting of councillors which showed that something had been presented to them (bundle page 15-16):-

"

"11.9 .....Officers advised that the policies would not be changed as they had been agreed by the Elected Members Forum on the basis of the vulnerability of the defences. Officers advised that they would revise the Statement of Case elements of the SMP."

This strongly suggests EA had produced some reports of the sites to be managed realigned

What was presented to the elected representatives to agree on?

If they had a report did they throw it away, or is it that they don't actually have the evidence they claim to?

In addition I have been passed EA's response to another overlapping FOI/EIR request by someone who at this stage wishes to remain anonymous..

This response makes explicit that reports are collate [sic] before being presented to local stakeholder groups, thus EA's claim of searching multiple databases must be untrue."

13. In his response (bundle pages 102-147) the Commissioner pointed out that (paragraphs 31,32):-

"31 In so far as the Commissioner understands, the Appellant's substantive point is that because the EA has briefed other bodies or individuals on its thinking on coastal erosion, his request cannot be manifestly unreasonable. This is so, he says, because

for those briefings to have taken place, some sort of report must have been compiled. Consequently he asserts that the evidence he seeks must either exist in readily accessible form or not exist at all. This argument is a non sequitur.

32 The Appellant's information request was not the copies of any reports which the EA may have prepared in relation to coastal erosion, but for all of the evidence in respect of thirty specific sites, upon which the EA has based its thinking. Clearly, this is a much broader request. The EA has confirmed that such evidence is held but that it was not in a readily accessible format. It has explained why that is so…"

14. The Commissioner argued that he was correct to conclude that the evidence was not held in a readily accessible form and he maintained the conclusion he had come to in his decision notice. With respect to the further requests set out in the 15 July 2012 letter :- *"It was the Commissioner's view that the first of the Appellant's request encompassed the remaining requests, arising as those questions did, from the core subject matter of the Appellant's 35 page letter of 15 July 2012."* He went on to note:- *"…the EA had provided the Appellant with advice and assistance in relation to his requests and had offered a meeting as a response to the request.* He *"accepted that a meeting was the most reasonable manner in which this matter could have been resolved satisfactorily."* He considered that *"in the context of this particular request, the EA's repeated offer of a meeting represented a satisfactory handling of matters, apart from the procedural shortcomings referred to in the DN."*

15. In its Reply the EA outlined that it received over 43,000 requests for information each year, complied with the 20 day deadline in approximately 90% of cases and refused between 0.2% and 0.3% of requests. It confirmed that the total number of sites affected by the request was 36 and revised its estimate of the time required to well in excess of the 75 hours and probably less than the 420 hours previously suggested. In supporting the Information Commissioner's reasoning the EA provided details of the history of contact with Dr Shiers. This included correspondence running to 241 pages, and a number of requests for information. It considered the requests in the

light of the guidance provided by the Upper Tribunal in the cases of *Dransfield* and *Craven*.

16. In this analysis Judge Wikeley commented that section 14 FOIA (the equivalent provision to this regulation) protects *"the resources (in the broadest sense of the word) of the public authority from being squandered on disproportionate use of FOIA.....*

    The question ultimately is this – is the request vexatious in the sense of being manifestly unjustified, inappropriate or improper use of FOIA.."

17. The EA argued that while it did not contend that this was a campaign of deliberate harassment it was clear that Dr Shiers disagreed with the evidence about sea level rise upon which policy was founded:- *"previously agency officers have simply said that they will have to agree to disagree. He appears at times to want to find evidence of incompetence on the part of officers or lack of agreement with Defra.... The agency does not consider that it is a valid use of our resources to continue to debate the document when at the time that any action is being considered in the future there will be evidence to assess the consequences of sea level rise, coastal squeeze and pressure on defences etc"*

18. The EA did not agree with the Commissioner that there was a serious purpose or value in the requests-subjectively it was so; however the EA had provided *"all the information and more explanation and advice than the public can reasonably require on this subject. The SMP is a policy document that informs future action only in the light of evidence which arises in the future when plans for action are being considered"*. It also drew attention to recent flooding noting that *"for example one of the vulnerable sites highlighted in SMP8 for managed realignment within the next few years has suffered major damage during the recent coastal surge and is in imminent danger breaching and failure resulting in unmanaged realignment. In other sites in East Anglia, under other SMP's, sites identified for future managed realignment have had their defences largely obliterated by the recent coastal surge and the area behind them is now flooded.*

19. The EA confirmed that the effect of correspondence from Dr Shiers had been to cause officers to feel harassed since they were continually responding to the same questions put very assertively and prevented from carrying out their main duties.

20. With respect to the public interest test it contended *it does not consider that this specific information would contribute to the effective running of the public sector nor to sustainable development, quite the opposite, as the burden of responding to correspondence from Dr Shiers since 2011 has distracted and removed specialist officers from being able to carry out their important core roles and duties…. To continue to respond to Dr Shiers' scrutiny and opinions about SMP8 would be wholly disproportionate and manifestly unreasonable*.

The questions for the Tribunal

21. The legal question the tribunal has to determine is whether or not the Information Commissioner is correct in concluding that the request is manifestly unreasonable. Issues such as the basis upon which policy is formulated and where the balance of scientific evidence lies on questions affecting policy are not ones which fall within the jurisdiction of this Tribunal.

22. The question may be conveniently divided into two sections reflecting the test which needs to be carried out. The first part, in essence, is the actual burden placed on the EA by requiring it to search out and hand over information requested and whether that is unduly onerous. The second part is where does the balance of public interest lie between that burden and the public benefits from the disclosure of the information.

23. The Upper Tribunal has given guidance on how the Tribunal should approach this question and has confirmed that the test to be applied is the same as that applied in determining whether requests are vexatious under FOIA (*Craven v IC and DECC 2012).*

The Evidence

24. Mr Mark Johnson, the Area Coastal Manager for East Area of the Anglian Region of the EA provided a witness statement. This explained the background to the SMP8 policy and provided information with respect to the other questions in the letter of request. It confirmed the truth of the statement as to the impact of the request, the burden it would impose and the limited resources available to answer the requests which would be diverted away from other work:- *"when we are prevented from carrying out the serious and important work in Flood risk management because we are being required again to debate an issue that has been developed into an SMP*

following considerable consultation and public involvement, this has a negative effect on morale. There is already a huge amount of information available to the public, not least in the SMP8 document itself.

25. Since the EA was not attending the hearing the Registrar suggested to Dr Shiers *"it would be appropriate for you to write to the Environment Agency …. provide in writing any questions you would have put to [Mr Johnson] in cross-examination if he did attend the hearing. The Environment Agency would be able to address those issues in written submissions or ask that Mr Johnson provides a supplemental statement dealing with those issues"*

26. He submitted 91 written questions. The questions show a sustained and marked hostility. The first question was:-*you have 2 degrees in scientific subjects have you ever conducted experiments or research and written up the results?* The questions canvassed issues such as the scientific methodology, issues in epistemology, questions going to the quality of data relied on in formulating policy, specific issues about different possible places for managed realignment, disparaging comments as to the technical competence of EA officials to carry out an assessment of damage; at question 39…*" This is just another example of you and EA making misleading and/or incorrect statements?"* At question 64:- *"… Are you not ashamed to admit this?.*

27. In his evidence and submissions before the tribunal Dr Shiers focused on individual coastal sites, the condition of their flood defences, and the status of any salt marshes at that location. He continued to argue as to the scientific basis for the formulation of policy. He was profoundly distrustful of EA and with respect to the issue of the storage and accessing of records and the time it would take to comply with this request he commented "*if they are telling the truth there is something drastically wrong"*. He made it quite clear that one of the purposes of the letter was to argue that there is something wrong with policy which is why he had copied it to the Secretary of State. He confirmed that in his dealings with the EA *"the whole point is to get attributable statements."* His suspicion was:- "*they don't have evidence and are using a veneer of science to push through a political agenda based on science which is wrong. I don't expect there to be evidence. I would have liked a response to the arguments"*. He accused the EA of groupthink. At the conclusion of the hearing Dr Shears confirmed that he felt that he had learnt and gained from the hearing and that whatever the outcome he felt he had made progress.

Conclusion and remedy

28. Dr Shiers is potentially significantly affected by the policy set out in SMP8. He has over a sustained period of time pursued a range of arguments with the EA around the validity of the underlying evidence and scientific theory. As part of this argument he has sought information on a range of topics related to this policy. The EA has cooperated with him, provided him with information, corresponded with him, offered meetings to explain issues. He remains deeply suspicious of the EA, suspects its good faith and challenges the competence of its staff. The purpose of EIR is to provide information. It is not a statutory right to have an argument with a public authority. The Upper Tribunal has provided guidance on how to approach cases such as this and the EA in its reply has addressed the guidance.

29. The EA and the Commissioner have concluded that this particular request is manifestly unreasonable under EIR. Although Dr Shiers has doubted the validity of the evidence as to the time it would take to comply with his request the Tribunal is entirely satisfied that given the nature of his request compliance with it would be a complex and involved process and the EA has submitted ample evidence as to the actual time it has taken to comply with a small fraction of such a request. The simple time spent in dealing with this request would impose a very substantial burden on the public body.

30. Furthermore the Tribunal noted that SMP8 was not a decision binding the future actions of the EA but rather was far more a framework which could be used to inform decisions albeit where actual developments on the ground over time would be determinative. The value of the exercise which Dr Shiers appears to be pursuing was therefore limited and his "serious purpose" significantly overvalued.

31. The Tribunal was satisfied that the effect of Dr Shier's requests over time would leave any reasonable person having to deal with them feeling harassed. The requests are intimately tied up with his policy arguments and he seems incapable of disentangling his frustration with the policy argument from his requests. These requests are repetitious and often couched in ways which a reasonable person would view as offensive. The comments made in his letter of the 15 July 2012 with respect to a named individual are very much mirrored in the contemptuous and demeaning way in which he phrased many of his 91 written questions to the EA witness. The evidence

is very clear that given the pattern of communication over a significant period of time leading up to 15 July 2012 it would be entirely appropriate for EA staff to feel harassed.

32. In reviewing this request in the light of the approach laid out in *Dransfield* the Tribunal was satisfied that there was a disproportionate burden on the public authority, there was little or serious purpose in the request and it was in part at least polluted by the way the requests were set out and repeated in conjunction with offensive comments which would cause harassment.

33. The Tribunal noted the mass of relevant information which is available from the EA. The provision of additional highly detailed site specific information would not support public understanding of the issues and would have no discernible public benefit. The resources which the EA would need to devote to collecting this information would be grossly disproportionate.

34. The Tribunal was therefore satisfied that the conclusion which the Commissioner reach that the request was manifestly unreasonable was the only conclusion which it was possible to reach. The Tribunal was satisfied that this request was an abuse and a clear misuse of a statutory right.

35. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 5 March 2014