THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/294/2012

PARTIES

Maurice Philip Anthony Ainslie (Appellant)

and

The Information Commissioner (First Respondent)

and

Dorset County Council (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 31 October 2011, following the paper hearing on 05 September 2011 under file reference EA/2011/0097, involves an error on a point of law. The appeal is therefore allowed. The First-tier Tribunal's decision is set aside and re-made in the following terms:

> *"The Tribunal allows the appeal and issues a substituted Decision Notice (FS50295366).*

SUBSTITUTED DECISION NOTICE

Date:	*28 January 2013*
Public authority:	*Dorset County Council*
Address of Public authority:	*County Hall, Dorchester, Dorset*
Name of Complainant:	*Mr M P A Ainslie*

The Substituted Decision

> *For the reasons set out below, and insofar as it has not already done so, Dorset CC is to disclose to the requester the information requested in the requests made on 20 November 2009 (request 1(ii)) and 26 November 2009 (request 2). Such disclosure is to take place within one month of the date the Upper Tribunal's decision is issued to the parties (namely the date on the clerk's covering letter, not the date at the end of the Upper Tribunal's reasons)."*

This decision is given under sections 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

The wider context of this appeal

1. Section 14(1) of the Freedom of Information Act 2000 (FOIA) allows a public authority to decline to make a substantive response " (other than by simply issuing a refusal notice under section 17) to an information request which is found to be "vexatious.

2. Regulation 12(4)(b) of the Environmental Information Regulations 2004 (SI 2004/3391) provides the public authority with a broadly equivalent "escape clause" where the request is "manifestly unreasonable".

3. This case is one of three appeals before the Upper Tribunal concerning the proper test to be applied in determining whether a request made under information rights legislation is "vexatious" or "manifestly unreasonable".

4. The present case concerns Mr Ainslie's appeal to the First-tier Tribunal (FTT) against the Information Commissioner's Decision Notice (FS50295366) in respect of his request for information made to Dorset County Council (*Ainslie v Information Commissioner and Dorset County Council* [2012] UKUT 441 (AAC) (also known as GIA/294/2012). The other two appeals were *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) (GIA/3037/2011) and *Craven v Information Commissioner and Department for Energy and Climate Change* [2012] UKUT 442 (AAC) (GIA/786/2012). For convenience, and with no disrespect intended to the individuals concerned, I simply refer to the three appeals by the name of the individual requester, irrespective of their status in the proceedings before either the FTT or the Upper Tribunal (hence *Ainslie*, *Dransfield* and *Craven*).

5. Each case, of course, has its own particular factual context (and indeed *Craven* raises an entirely separate issue concerning majority decisions in the FTT). However, the common legal issues around the meaning of section 14(1) and regulation 12(4)(b) made it desirable to hear the appeals together, or at least within a short timeframe. Listing problems meant that my original intention to hear all three appeals together foundered. However, I was able to hold an oral hearing of this appeal on 14 November 2012 at Victory House in London, on the same day as the separate appeal in *Dransfield* (*Craven* was then heard on 29 November 2012).

6. The Information Commissioner (IC), the First Respondent in this appeal, was represented by Mr Tom Cross of Counsel, as in both *Dransfield* and *Craven.* Dorset CC, the Second Respondent, was not formally represented at the hearing, although its Records, DPA & FOIA Manager, Mr Richard Kirby, was present with a watching brief. Mr Ainslie appeared in person. I am grateful to both Mr Ainslie and Mr Cross for their submissions. I have tried to make allowance for the fact that Mr Ainslie, whatever his expertise in other areas, is not a lawyer. I just make two further preliminary observations.

7. First, of this troika of appeals, I have treated *Dransfield* as the lead case, in part for the very simple reason that it was the first of the three appeals to be lodged with the Upper Tribunal. I have therefore considered the scope of section 14(1) of FOIA in some detail in that decision. My decisions in *Ainslie* and *Craven*, insofar as they concern the meaning of a "vexatious request" under FOIA, therefore need to be read in the light of my decision in *Dransfield* and in particular the passage at paragraphs 24-39. The question of whether an information request is "manifestly unreasonable" within the EIR was something of a side issue in both *Dransfield* and *Ainslie*, but came to the fore in *Craven* – I have therefore considered regulation 12(4)(b) in more detail in that last decision. To that extent the decision in the current appeal, *Ainslie*, very much turns on its own facts, but in the light of the principles considered in *Dransfield* and (to a lesser extent) in *Craven.* I should make it clear at this stage that, for the reasons explained in my decision in *Craven*, I see no material difference between the terms "vexatious" and "manifestly unreasonable".

8. The second point is this: I had the advantage of hearing in person from the requesters in each of the three appeals, albeit that each was in the rather uncomfortable and difficult position of being a lay person, trying to focus their arguments on legal rather than factual matters, and facing experienced counsel on the other side(s). Mr Dransfield also had an oral hearing of his appeal before the FTT. However, for entirely understandable reasons, both Mr Ainslie and Mrs Craven had each opted for paper hearings before the FTT. I return to the implications of this at paragraph 71 below.

An outline of the particular context of this appeal

9. There is a long, complex and in places contested historical context to this appeal. For present purposes it can be summarised as follows. Mr Ainslie, a retired businessman, made a series of six FOIA requests to Dorset CC (the County Council) in November and December 2009. At that time, and for some years previously, he was a resident (and, I think it is fair to say, a concerned resident) of Bradford Peverell (BP), a village in Dorset. The village and its inhabitants had suffered from serious flooding in December 2006. Mr Ainslie took the view that the underlying cause of that flooding was the County Council's failure to identify, clean and maintain the storm drain system in the village. He described the 2006 flood in these terms:

> "On 30.12.2006 a severe rain storm came through [several villages]; triggered a torrent of water and silt overwhelming the inadequate badly maintained storm drain system in BP; flooding the village centre, and putting property at risk. It placed severe physical strain on elderly villagers who, unaided by the Authorities, had to cope."

10. Mr Ainslie was asked by the Parish Council to take the matter up with the County Council, which in turn undertook a programme of remedial works between 2007 and 2010. He wrote letters; he had site meetings with highways engineering staff; he wrote a technical report for the County Council in 2008 on problems with the remedial programme. He lodged a complaint with the County Council in August 2008 about the management of the storm drain works at BP which led to a report by the Head of Internal Audit in January 2009, upholding some but not all of Mr Ainslie's points. The County Council instigated an Action Plan. By October 2009 Mr Ainslie took the view that the County Council's Highways Panel had not taken appropriate action. He then made a series of six FOIA requests in November and December 2009.

11. The first information request, made on 20 November 2009, fell into two parts. It is helpful to consider the information requests in tabular form (see Annex 1). In summary, the requests were for the following types of information:

Request 1(i)	Copies of invoices from external contractors for re-surfacing work in specified road on specified dates
Request 1(ii)	Copy of Dorset CC guidance on management of external contractors
Request 2	Copy of Dorset CC operating rules for use of disc cutters
Request 3	Copy of Dorset CC rules or guidelines for Auditor
Request 4	Copy of Appendix to Dorset CC 2004 Highways Policy Plan
Request 5	List of names of Dorset CC new cabinet members and roles
Request 6	Copies of organisational line charts for specified Dorset CC departments

12. On 21 December 2009 Mr Kirby of Dorset CC wrote to Mr Ainslie informing him that he had decided that all six requests should be treated as vexatious under section 14(1) of FOIA. He said that he took into account "the vast amount of correspondence that various officers in the authority have received from you (and continue to receive) all relating to the same subject area". He stated that it had taken "well over 100 hours" of staff time to deal with such correspondence, costing the County Council "many thousands of pounds". Having referred to the example of *Betts v Information Commissioner* (EA/2007/0109), he concluded that the six requests in question "appear to be obsessive and they are unreasonably burdensome to the authority. It is clear to me that any further requests on the subject lack any serious purpose or value."

The Information Commissioner's Decision Notice (FS50295366)

13. Mr Ainslie complained to the Information Commissioner, who issued a Decision Notice (FS50295366) on 24 February 2011. The Summary read as follows:

> "The complainant submitted six separate information requests to Dorset County Council over a period of three weeks. The Council refused the requests under section 14(1) of the Act because it considered the requests vexatious. The Commissioner finds that two of the requests were for environmental information and therefore should have been dealt with under the EIR. The Commissioner finds that the requests under the Act were vexatious. However, having examined the requests falling for consideration under the EIR, he has concluded that they were not manifestly unreasonable under regulation 12(4)(b) of the EIR. The Council breached regulation 14(3)(a) of the EIR by failing to issue a valid refusal notice in relation to regulation 12(4)(b) to the requests which fell under the EIR. The Commissioner requires the Council to disclose to the complainant that information which was incorrectly withheld under regulation 12(4)(b) or provide a further refusal notice relying upon another exception."

14. I should just interpose that there is no suggestion that the IC reached his conclusion on the two requests for environmental information (Requests 1(i) and 4) on the basis that there was any material difference in the respective tests for a "manifestly unreasonable" (EIR) as opposed to a "vexatious" (FOIA) request. On the contrary, the Decision Notice proceeded on the assumption that there was no real difference in law between the two terms (see paragraphs [60]-[62]). Rather, the IC concluded that there were important factual differences between the FOIA requests and the EIR requests, which meant that section 14(1) applied to the former but regulation 12(4)(b) did not apply to the latter (see paragraphs [63]-[67]) .

15. Mr Ainslie then lodged an appeal with the First-tier Tribunal. In his letter of appeal, he described himself as a "reluctant appellant having recently been asked by the new Dorset County Council Cabinet Member for Highways to assist him in a working party on a major re-organisation & am receiving continuing encouragement and support from my MP. Contradictorily, a Council FoIA Officer has recently refused all current requests under the FoIA to assist this process – justifying this by the ICO's decision."

The First-tier Tribunal's decision (EA/2011/0097)

16. The FTT considered the appeal on the papers on 5 September 2011. Its decision (EA/2011/0097) was to dismiss the appeal. The first seven paragraphs of the FTT's reasons set out the background to the dispute and summarised the parties' respective positions. Thus paragraph 4 included the following statement from the "timeplan summary" attached to Mr Ainslie's letter of appeal: "The writer has shown some patience over four years in trying in the public interest to remove flood risk, widespread fault and financial waste with the support of my MP and some councillors. Dorset County Council's right-hand appears disconnected from the left." Paragraph 7 included this statement by the County Council, made in correspondence with the ICO:

> "In conclusion we reiterate the statement that these requests, individually and in themselves, are not too onerous. It is in relation to Mr Ainslie's continued (and continuing) campaign against the authority that these requests have been consolidated and refused under section 14 of the Freedom of Information Act or the equivalent exception 12(4)(b) of the Environmental Information Regulations. Mr Ainslie comes from a private industry background with much experience of highways issues. He does not understand why the council operates its finances, health and safety etc in a different way to when he was in private business. We have tried to explain this to him at great length (over 150 hours of senior staff time), but without

> success. It was decided to refuse his requests as far too much senior officer time had been taken up already."

17. The heart of the FTT's decision was in the final two paragraphs (8 and 9) of its reasons. In paragraph 8 the FTT summarised its understanding of the relevant law thus:

> "8. The tribunal in considering this appeal has borne in mind that the word 'vexatious' is an ordinary English word in everyday usage. While the Information Commissioner may have developed his own guidance with respect to this matter; from the perspective of the tribunal the common sense application of the ordinary meaning of the word to the actual circumstances of an individual case must be the correct approach to adopt. The Oxford English dictionary provides useful guidance as to the meanings of vexatious and associated words. While this guidance extends over several columns it seems to the tribunal that a definition of 'tending to cause trouble or harassment by unjustified interference' fairly summarises the meaning.

18. In paragraph 9 the FTT explained its reasoning for coming to the conclusion that the requests in issue were indeed vexatious within section 14(1):

> "9. In considering this case it is necessary to look at the associated circumstances and in particular the history of the contact and its impact on the council. Mr Ainslie clearly had a justified concern arising out of the flooding in 2006. Since then however his concern has spread, he has raised numerous issues and he has repeatedly shown himself to be dissatisfied with the outcome that he has obtained. One notable example of this is that being dissatisfied with the outcome of an internal audit investigation he has raised the issue of the guidance under which the internal auditor works and also referred issues to the external auditor – this is but one example of how his concerns and questions have spread widely. As Dorset County Council have pointed out dealing with Mr Ainslie and responding to him has consumed an enormous amount of senior officer time, at the latest estimate in excess of 150 hours. On any reasonable interpretation this is disproportionate. It must be seen as causing trouble by unjustified interference in the working of the council – in essence Mr Ainslie is trying to substitute his individual scrutiny and opinions for the framework of scrutiny and control which exists within the council. His actions have significantly impaired the functioning of the council by requiring a grossly disproportionate amount of time to be expended in responding to his questions and it is entirely appropriate that, in the light of this history, the council has determined that these requests for information vexatious. Accordingly the tribunal finds that the Information Commissioner in his decision notice in concluding that certain of these requests were properly viewed as vexatious under section 14(1) of the Freedom of Information Act 2000 came to a determination which was in accordance with the law and therefore the tribunal rejects this appeal."

The parties' submissions

19. Mr Ainslie is an appellant who is admirably thorough and meticulous in the preparation of his paperwork. The FTT (at paragraph 5 of its reasons) cited the Information Commissioner's observation that the appellant had supplied "extensive and detailed documentation relating to his underlying dispute with the council", comprising "some 78 pages" in the FTT bundle. I do not read this as a compliment, other than of the backhanded variety; rather, I take it as an indication of the FTT's view that the appellant's conduct was obsessive. I must record that at the oral hearing before the Upper Tribunal Mr Ainslie could not have been more helpful. He had distilled his submissions on the appeal to a carefully-argued single sheet of A4.

20. In summary, Mr Ainslie's argument was that (i) the OED definition of "vexatious" applied; (ii) all the circumstances had to be taken into account, as required by the Information Commissioner's Guidance; (iii) the individual requests in

particular were acknowledged by the County Council to be neither complex nor burdensome; (iv) the finding of "interference" and "obsession" was undermined by the encouragement he had received from those elected to public office; (v) the requests had a serious purpose in that they were designed to identify problems with the failed remedial plans; and (vi) the FTT had failed to establish the facts, overlooked relevant evidence and given inadequate reasons for its decision. He referred with approval to the statement in the Information Commissioner's Guidance that "section 14 should not be used to avoid awkward questions that have not been resolved satisfactorily" (see *Dransfield* at paragraph 36).

21. Mr Cross, for the Information Commissioner, was erudite and equally focussed in his submissions. He argued that the FTT had explained adequately, in paragraph 9 of its reasons, why Mr Ainslie's appeal had failed. That reasoning comprised two essential points to justify the conclusion that the requests were vexatious. First, although Mr Ainslie had a justified concern in 2006, his concern had now spread to encompass other issues – for example, the request directed towards the role of the Auditor. This "spread" (or "drift", to use the term preferred in *Dransfield* at paragraph 37) was symptomatic of a vexatious request. Second, Mr Ainslie's dealings with the County Council had consumed an inordinate amount of time; thus there was a disproportionate burden, again pointing to a finding that the requests were vexatious. Mr Cross suggested that for the most part Mr Ainslie was taking issue with the County Council's evidence to both the IC and the FTT, rather than with the legal basis of the FTT's decision and reasoning. Furthermore, the FTT was not obliged to structure its reasoning around the "five factors" identified in the IC's Guidance (on which see *Dransfield* at paragraphs 12-14 and 40-45). The tribunal dealing with this appeal had adopted a "fair" definition of what constituted a vexatious request (see its reasons, paragraph 8) and had identified two key factors, supported by the evidence, which justified its overall conclusion.

22. Although not represented at the oral hearing before the Upper Tribunal (and I make no criticism of that, given the competing calls on its limited budget), the County Council made brief submissions on the appeal in writing. In short, the County Council drew on and supported the Information Commissioner's written submissions. It argued that the FTT had correctly applied the ordinary meaning of the word "vexatious" in the context of FOIA, and had justifiably reached the conclusion that the requests in question were caught by section 14(1), bearing in mind in particular that they posed a significant burden on the County Council and were part of a pattern of obsessive conduct amounting to a disproportionate and unjustified interference in the workings of the public authority.

The Upper Tribunal's analysis

The Upper Tribunal's jurisdiction

23. The right of appeal to the Upper Tribunal is limited to "any point of law arising from a decision made by the First-tier Tribunal" (Tribunals, Courts and Enforcement Act 2007, section 11(1)). If I conclude that the FTT's decision "involved the making of an error on a point of law" (section 12(1)), then as a matter of discretion I may (but need not) set the FTT's decision aside (section 12(2)(a)) but, if I do set it aside, I must either remit the case to the FTT or re-make the decision myself (section 12(2)(b)).

24. In the remainder of this decision I explain why I conclude that (i) the FTT's decision involved the making of an error on a point of law; (ii) its decision should be set aside; (iii) the case should not be remitted to the FTT; and (iv) the decision as re-made is that the requests in issue were not vexatious within section 14(1) of FOIA.

The reason why the FTT's decision involved an error of law

25. I must start by setting out how the FTT did *not* err in law. The FTT set out, in paragraph 8 of its reasons, its understanding of the proper test for determining whether a request is vexatious (see paragraph 17 above). None of the parties took issue with that exposition of the meaning of section 14(1); indeed, Mr Ainslie expressly agreed with the general approach taken by the FTT in paragraph 8. I am satisfied that the FTT's analysis involves no error of law in this respect. Indeed, the FTT is to be commended for explaining the test under section 14(1) in such a succinct, straightforward and user-friendly way. In particular I agree with the FTT that "the common sense application of the ordinary meaning of the word [vexatious] to the actual circumstances of an individual case must be the correct approach to adopt". The FTT further concluded that an ordinary dictionary "definition of 'tending to cause trouble or harassment by unjustified interference' fairly summarises the meaning". In *Dransfield* I suggested that the term "vexatious" connotes the "manifestly unjustified, inappropriate or improper use of a formal procedure" (*Dransfield* at paragraph 27, agreeing with the conclusion of the FTT in *Lee v Information Commissioner and King's College Cambridge* EA/2012/0015, 0049 and 0085 at [69]). I see no significant difference between these two approaches; they are simply different formulations of what is essentially the same underlying test.

26. So how did the FTT err in law in *Ainslie*? In short, my conclusion is that the FTT failed to find sufficient facts, and in particular to resolve certain important disputed issues on the evidence before it, and in doing so failed to provide adequate reasons for its decision. Although Mr Ainslie willingly accepted the gist of paragraph 8 of the FTT's reasons, he strongly objected to paragraph 9, in which the FTT had sought to apply the general principle set out in the previous paragraph to the particular circumstances of this case. For the reasons that follow, I am persuaded that this challenge demonstrates that the FTT's decision involves an error of law. In doing so it is important to analyse the two key factors that underpinned the FTT's decision and reasoning – the issues which may be summarised as (1) "drift" and (2) "disproportionate burden".

(1) Drift

27. The FTT's assessment of the context was clear. In its view, "Mr Ainslie clearly had a justified concern arising out of the flooding in 2006. Since then however his concern has spread, he has raised numerous issues and he has repeatedly shown himself to be dissatisfied with the outcome that he has obtained" (FTT reasons, paragraph 9). The inference from this passage is equally clear – the appellant was entitled to be concerned about flooding in 2006, but what had started then as a genuine concern about a single discrete issue had transmogrified over the intervening years into an unreasonable and unjustified campaign on several fronts against the public authority in the course of which his various complaints had not been vindicated.

28. To support this finding, the FTT relied on the example of the FOIA request relating to the role of the auditor: "One notable example of this is that being dissatisfied with the outcome of an internal audit investigation he has raised the issue of the guidance under which the internal auditor works and also referred issues to the external auditor – this is but one example of how his concerns and questions have spread widely." In short, the charge is one of obsessiveness.

29. Mr Ainslie's counter-argument, in summary, was plain from the papers before the FTT. In his grounds of appeal to the FTT, and in the course of challenging the findings in the IC's Decision Notice, he argued that his six requests "relate to on-going failure and do not as claimed *broaden* anything". Likewise, in a later written

submission to the FTT, Mr Ainslie argued that "there is no evidence of *'new requests or broadening issues'*. There is quite enough to worry about." In effect, Mr Ainslie was relying on the following passage in the IC's Guidance to public authorities (see *Dransfield* at paragraph 36):

> "a request will not automatically be vexatious simply because it is made in the context of a dispute or forms part of a series of requests. There may be genuine reasons for this. For example, a series of successive linked requests may be necessary where disclosures are unclear or raise further questions that the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the individual. You should not use section 14 as an excuse to avoid awkward questions that have not yet been resolved satisfactorily."

30. Mr Cross, however, argued that Mr Ainslie was simply criticising the FTT's evaluation of the evidence and its factual findings. Moreover, the tribunal was not obliged to refer to each and every piece of evidence it considered. Furthermore, the FTT's obligation in terms of the requirement to provide adequate reasons for its decision was to explain in broad terms why a party had won or lost and it was "tolerably clear" in this case why that was so (because of the "drift" and "disproportionate burden" points"). In other words, the FTT had reached a decision that was open to it on the evidence before it and had done enough to explain the basis of its decision.

31. In this context Mr Cross drew my attention in particular to paragraphs [49] and [50] of the IC's Decision Notice. This passage dealt with the public authority's assertion that Mr Ainslie was attempting to re-open issues that had already been considered, especially in relation to request 1(ii), i.e. the second half of the first request made on 20 November 2009 (for a copy of the Council's guidance on the management of external contractors). The IC noted that the underlying matters dated back to 2006 and had led to a complaint to the Local Government Ombudsman (LGO) in 2010 (paragraph [49]). The IC also recorded that the public authority had "already" produced 3 reports addressing these underlying issues (one in 2008 and two in 2009), and had promised Mr Ainslie a further report by the end of 2009 (paragraph [50]). The conclusion that the IC drew was as follows:

> "51. The Commissioner accepts that in this context, the continued pursuance of these underlying issues via the submission of the request of 20 November 2009, can fairly be characterised as obsessive or manifestly unreasonable behaviour. He considers that an appropriate course of action at this point would have been for the complainant to have either taken his concerns to the LGO (as he later did) or to await the report that had already been promised to him by the end of December 2009. In the Commissioner's view it should have been evident to the complainant by this point that little would be achieved by continuing to argue the merits of his underlying complaint directly with the Council when it had already investigated these matters three times, or whilst it was still in the process of preparing its final report."

32. I confess that initially I was attracted by Mr Cross's submissions on this point. Plainly the FTT is the judge of the facts. Certainly I cannot interfere with its decision on the facts unless there is an error of law. However, in my judgment, although it is undoubtedly "tolerably clear", to use Mr Cross's language, *what* the FTT decided (that the request of 20 November 2009, and each of the subsequent requests, was symptomatic of drift and so vexatious), it is not in my view clear *why* the FTT decided that rather than the opposite conclusion. The most that can be said is that the FTT accepted the argument by the IC and the public authority that there had been drift. However, Mr Ainslie had directly challenged that assertion – yet the FTT had not

engaged with his reasons for doing so or considered his version of events sufficiently to provide an explanation for its contrary conclusion. That, in my view, amounted to an error of law in terms both of a failure to find sufficient facts and/or a failure to give adequate reasons.

(2) Disproportionate burden

33. The second factor relied on by the FTT in deciding that the requests were vexatious was that Mr Ainslie was, in effect, "causing trouble by unjustified interference in the working of the council". The FTT also noted, and expressly approved, the public authority's argument that "dealing with Mr Ainslie and responding to him has consumed an enormous amount of senior officer time, at the latest estimate in excess of 150 hours. On any reasonable interpretation this is disproportionate" (FTT reasons, paragraph 9). It was therefore "entirely appropriate" that the Council had adjudged the requests in question to be vexatious within the meaning of section 14(1).

34. In my view, the FTT's decision on this second aspect of its reasoning suffers from the same weakness as the first. It is perfectly clear *what* the FTT decided; the tribunal could not have been any clearer or more categorical in its assessment on this issue. It is, however, unclear *why* the FTT decided that, beyond saying that, in effect, it agreed with the arguments advanced by the IC and the public authority. In doing so, however, the FTT had failed to engage with the arguments advanced by Mr Ainslie in this regard. Again, the tribunal had failed to find sufficient facts and/or failed to give adequate reasons for its decision. There are three particular factors which have led me to this conclusion.

35. First, subject to a passing reference in paragraph 4 of its reasons, the FTT ignored Mr Ainslie's argument that he had received support and encouragement in his efforts by elected representatives. In his original grounds of appeal, he referred to "strong support for the writer from senior elected representatives". He also argued that Councillor John Peake MBE, the then (but now retired) Chairman of the County Council, had in mid-2009 "publicly praised my actions and encouraged me to pursue them" (original emphasis). It is, of course, easy to make such claims, and an individual may misread public statements by elected representatives about their constituents. However, Mr Ainslie had not simply made bare assertions; he had provided supportive evidence. In particular, his submission to the FTT included a letter from his MP, the Rt Hon Oliver Letwin MP, dated 6 December 2010, referring to a pending major re-organisation of the public authority's roadworks operations. His MP added that "I get the strong impression that the line you have been pushing ... has had a strong influence. So I am optimistic that we will see something emerging that goes at least a long way towards solving the problem." On any reading the MP's letter gives no hint whatsoever either that the problems were confined to 2006 or that Mr Ainslie's conduct in seeking to hold the Council to account was unjustified. Indeed, quite the contrary. On that basis alone the FTT should have addressed Mr Ainslie's argument; its failure to take into account and address a material consideration was an error of law.

36. Second, there was a plain conflict on the evidence before the FTT as to the nature (if not the extent) of Mr Ainslie's involvement with the public authority. The County Council's case (although not put in quite such stark terms) was, in essence, that the appellant was an interfering busybody who pressed himself on senior officers and consumed an inordinate amount of their time (see e.g. paragraph 16 above). Mr Ainslie painted a very different picture, referring to four formal meetings initiated by the Council Chairman, not by himself, and perhaps five meetings between 2007 and 2010 with the Auditor and the Head of Highways. It is simply not clear from the FTT's

reasons why it preferred the former account to the latter. Mr Ainslie was entitled to an explanation on that point.

37. Third, the FTT undoubtedly took the view that the time and other public resource involved in dealing with Mr Ainslie's requests had become disproportionate and that he was "trying to substitute his individual scrutiny and opinions for the framework of scrutiny and control which exists within the council". There are obviously examples of cases which fit this description – on its particular facts, *Dransfield* is one such illustration. However, such a conclusion requires a firm evidential basis with sufficient findings of material facts. In my assessment the FTT in this case was far too quick to accept the case as put by the IC and the public authority, and failed to consider the background to the request of 20 November 2009 and the five following requests in sufficient detail. The further reasons for that evaluation will become evident below, where I explain why I reach the conclusion that the six requests were neither vexatious nor manifestly unreasonable.

The reason why the FTT's decision should be set aside

38. Having found that the FTT's decision involves an error of law, I have to consider as a matter of discretion whether it should be set aside. If I was confident that the FTT had, in any event, come to the right decision, namely that the requests in question were properly characterised as vexatious, then I would have had no hesitation in leaving its decision intact. For the reasons that are explained further below, I am certainly not confident on that score. The FTT's decision is accordingly set aside.

The reason why the case should not be remitted to the FTT

39. Mr Cross submitted that if I was not with him on the substantive issues in the appeal, then I should decide the matter myself rather than remit the case for re-hearing before a new FTT. He gave three reasons for making that suggestion. First, a section 14(1) case did not involve the types of issues which may require the specialist and broader expertise of the FTT. Second, there had been no oral hearing at FTT level with live witnesses as to the facts, and the Upper Tribunal was in just the same position. Third, there was a need for closure, and a remittal would simply drag the matter out further. I accept those points as well-made. I did not understand Mr Ainslie to dissent from that approach, and indeed I took him to agree wholeheartedly with Mr Cross's third point.

The Upper Tribunal's re-made decision

Introduction

40. In re-making the decision, the Upper Tribunal is in effect standing in the shoes of the First-tier Tribunal. I can make any decision that the FTT could have made. Despite the rather curious wording of section 58(1) of FOIA, the FTT's role is not limited to the approach undertaken by the High Court on an application for judicial review. Rather, the FTT's function is to undertake a full merits review of the IC's decision. The former Information Tribunal adopted that approach (see e.g. *Guardian Newspapers Ltd v Information Commissioner and the BBC* [2007] UKIT EA/2006/0013 at paragraph [14]). That analysis is also entirely consistent with the thrust of the reforms embodied in the Tribunals, Courts and Enforcement Act 2007.

41. The FTT held a paper hearing. It had extensive documentation before it. I had a copy of the FTT file. I also had the benefit of a further bundle of almost 250 pages for the purpose of the Upper Tribunal proceedings (although inevitably that involved some duplication of material in the FTT bundle). I understood that Mr Ainslie would have preferred me to have access to further material in the bundle. However, I have

formed the view that I do not need to do so in order to be able to make a decision. Mr Cross certainly did not suggest that I was missing any key documents.

42. The FTT documentation included extensive directions and what would be described in adversarial courts as pleadings. I have some doubt as to whether these were all either appropriate or strictly necessary. The central issue in the appeal is, and always was, obvious and quite simple – were the requests made by Mr Ainslie vexatious requests or not? Some of the procedures adopted before the FTT seemed designed to hide rather than highlight that key issue. To be more precise, by the time of the hearing only two requests were actually in issue – requests 1(ii) and 2. This was because the IC had concluded that requests 1(i) and 4 were covered by the EIR, were not manifestly unreasonable on their own facts (and the public authority had made no challenge to that assessment) and Mr Ainslie had dropped requests 3, 5 and 6 (see paragraph 69 below).

The relevant test to be applied under section 14

43. I adopt the reasoning in *Dransfield* at paragraphs 24-39. In summary, the issue I have to decide is whether the remaining requests were vexatious in the sense of demonstrating a "'manifestly unjustified, inappropriate or improper use" of the FOIA procedure.

44. In arriving at that decision I must take into account all the material circumstances of the case. I start with the context.

The context of the requests

45. I have already summarised the background to the requests (paragraphs 9 - 12 above. Parts of the South West are notoriously susceptible to flooding and the village in which Mr Ainslie used to live is no exception. The clear impression given by the IC's Decision Notice and the FTT's decision, now set aside, is that his justified concerns in 2006 had been addressed by 2009, when he made the requests in issue; *ergo*, he was being obsessive and his requests were vexatious.

46. I am not satisfied that the evidence actually supports that view. The flooding took place in December 2006. The County Council undertook various remedial works to the village's storm drain system over the following 18 months or more. Mr Ainslie was undoubtedly in frequent contact with the public authority over these issues. At this juncture I would point out that Mr Ainslie was in no way engaging in scaremongering about an issue which was at best hypothetical or speculative. The village had already been flooded, with the inevitably distressing consequences for its residents, and there was an obvious public interest in ensuring that the risk of that happening again was minimised, even if it could not be eliminated.

47. It is also clear that Mr Ainslie was not satisfied that the various remedial works had been properly carried out (whether he was right or wrong is not for me to say, nor do I have the expertise to say, which is why I declined to have further documentary evidence submitted in these proceedings). The fact is that Mr Ainslie remained concerned. In May 2008 he made his first FOIA request (not the subject of these proceedings) – the IC subsequently found that the public authority had not shown that the invoices in question had been provided and that accordingly request 1(i) of 20 November 2009 did not fall foul of regulation 12(4)(c) of the EIR. It was not manifestly unreasonable for Mr Ainslie to follow that request up with request 1(i). I adopt that same analysis.

48. Mr Ainslie made two further FOIA requests in May and June 2008, and wrote again in August 2008 arguing that his requests had not all been answered. The

public authority's response was to write to him stating that all the information held had been provided and that he should request an internal review if not satisfied. Mr Ainslie did not pursue that option, and of course was under no obligation to do so. Indeed, he appears not to have made any further FOIA requests until that of 20 November 2009. However, Mr Ainslie had certainly not given up.

49. Indeed, on 13 August 2008, rather than pursue the internal review route, he submitted a lengthy, detailed and in places technical report to the Council entitled *Report on DCC's Storm Drain Works at Bradford Peverell [BP]*, setting out various failings that he claimed to have identified (as regards highways maintenance, safety issues and financial controls). The Council treated that report as a complaint and an investigation was carried out by Mr Mark Taylor, the authority's Head of Internal Audit, Insurance and Risk Management, who published his report ("the Taylor Report") in January 2009.

50. The Taylor Report identified four broad areas of complaint: (1) Quality Assurance and Control, (2) Health & Safety, (3) Drainage Inspection and Inventories and (4) Accounting Procedures. The summary assessment provided for three possible outcomes; upheld, partially upheld and not upheld. Mr Ainslie's points under (1) were upheld, under (2) and (4) partially upheld and under (3) not upheld (Mr Ainslie argues that this last assessment was later changed to "partially upheld" in 2010, but I need not resolve that question for present purposes). On any view, therefore, the first impression is that Mr Ainslie's report was not wholly unfounded – an assessment, I note, as of the position in January 2009, just 9 months before the six requests, and not in 2006. I am also perplexed as to how the public authority, in correspondence with the IC, was subsequently able to describe the outcome of this as "the complaint was not found in his favour" (letter dated 30 July 2010). I can only think of two possible explanations. One is that the Council was referring solely to sub-complaint (3); if so, it is arguable it was being economical with the actualité. The other is that the public authority was referring to some quite different complaint, but that seems unlikely, given the context.

51. That first impression, namely that Mr Ainslie's points had some foundation, is confirmed when the detail of the report is studied. The Taylor Report upheld complaint (1), which it summarised as being to the effect that there was "experience of poor quality workmanship and the resultant requirement for remedial/corrective works. Concerns were expressed that, without adequate supervision/control, this may be commonplace across the County". The Taylor Report concluded that the Council's management information system was such that it "does not provide sufficient information to enable the Contract Monitoring Officer (CMO) to complete meaningful verification of the accuracy of the amounts charged" (p.4). It further concluded that the sampling undertaken did not "provide the necessary evidence and assurance that the required standard and quality of workmanship was being achieved" (p.4). Similarly, in relation to complaint (4), which was partially upheld, "there is a clear recognition and acknowledgement by all officers interviewed as part of the investigation that the works at Bradford Peverell did not go well" (p.8). Furthermore, rather belying his job title, the Highways "Service Improvement Manager ... does not receive any assurance that the works completed are completed to quality standards or that they have been completed at all, or on time" (p.8), leading to a recommendation for improved monitoring.

52. The Taylor Report included a detailed 8-page Action Plan. The Report and associated Action Plan were then, as bureaucrats say, "taken forward" through the Council's committee structure. There were elections in May 2009, from about which time onwards Mr Ainslie became concerned that the timetable for implementing the

required improvements in various areas was slipping. He submitted a further report to the Council's Highways Panel in July 2009 but was disappointed that the minutes of the Panel's October 2009 meeting indicated, in his view, that little if any progress had been made. It is also plain from the documentation before me that Mr Ainslie began exploring other ways of bringing pressure to bear on the Council to keep to the timetable.

53. Looking at the evidence in the round, it is clear to me that the decision by Mr Ainslie to make his further FOIA requests in November and December 2009 was triggered by two factors.

54. The first was that Mr Ainslie had been in contact with his MP. On the basis of those discussions, he decided to take the matter to the LGO. As he said in his original complaint to the IC, "I was seeking to sweep up important matters which had escaped the Audit and needed remedy and prepare for a meeting with Mr Letwin [MP] in February [2010]". The referral to the LGO seems to have taken place in November 2009.

55. At this point I have to say that the LGO's involvement sheds little light on the issue before me. The public authority cite this referral as an example of what they say is Mr Ainslie's obsessive conduct – "he subsequently appealed to the LGO who also found against [him]" (letter to ICO dated 30 July 2010). In his Decision Notice, however, the IC seemed to think that Mr Ainslie should have taken his concerns to the LGO immediately, rather than lodge the FOIA requests in issue (at paragraph [51]). Mr Ainslie, on the other hand, argues that the issues were found to be outside the LGO's remit (if so, it may not be strictly correct to suggest that the LGO "found against" him, given that implies some consideration by the LGO of the merits of the issue). I have not seen (nor asked to see) the correspondence with the LGO, but on balance I accept Mr Ainslie's explanation. I say this as section 26(7) of the Local Government Act 1974 expressly states that "A Local Commissioner shall not conduct an investigation in respect of any action which in his opinion affects all or most of the inhabitants of ...the area of the authority concerned".

56. The second trigger factor was that in November 2009, almost three years after the 2006 flood, Mr Ainslie records that "in jetting instigated by the writer, a DWO team found two Collection Chambers and a 30 metre section of our storm drains, in the centre of the village, unmapped in three DEC post flood surveys choked with the debris of the 2006 flood". In his view this demonstrated "the negligence of this Council and the necessity of securing conviction that procedures have been corrected". I stress that it is not my role to adjudicate on the significance of the November 2009 incident. However, it raises at the very least a reasonable doubt over the suggestion that 'there was a problem in 2006 but it was all sorted by 2009'.

57. I reiterate that I make no finding that Mr Ainslie's criticisms of the public authority's actions (or inactions) were all well-founded. However, what is clear from this review is that the public authority's own Taylor Report in January 2009, two years after the flooding, found that at least some were well-made and that there was a need for remedial action. The nature and pace of any such programme of change in a period of increasing financial austerity in the public sector is, of course, of matter of political judgment. Mr Ainslie was making representations on those issues using well-established mechanisms in a democratic society. It is against that background that the six requests have to be considered.

The six requests of November and December 2009

58. I make the following specific findings about the six requests. Given that they were all made within a fairly short period of time, I do not think it unreasonable to consider them together, rather than take the IC's purist approach of examining the 20 November 2009 request in isolation first.

59. First, I find no real evidence of "drift" in the six requests. They all stem from the original concerns about the 2006 flood and the public authority's response to that event. All the requests can be seen as related to issues raised in Mr Ainslie's report of August 2008 and in the recommendations and Action Plan of the subsequent Taylor Report in 2009. Indeed, two of the requests (requests 1(i) and 3), those which the IC found not to be manifestly unreasonable under the EIR, were simply following up omissions in the public authority's handling of the earlier FOIA requests in the summer of 2008.

60. Second, in the light of the context described above, I do not find that any of the requests of November and December 2009, whether taken individually or collectively, were in themselves disproportionately burdensome. There is no doubt that a considerable amount of time had been spent dealing with Mr Ainslie, and more so in the context of his discussions with the Council over the storm drain remedial works and the subsequent Taylor Report than on the relatively few FOIA requests he had made. Clearly those FOIA requests must be seen against the background of that wider course of dealings. However, this was not a case of an individual making repeated and unwarranted FOIA requests to pursue some private grievance to unreasonable extremes.

61. Third, it is only right and proper to note that the County Council has consistently conceded throughout that, taken individually, each of these six requests "would not in themselves impose a significant burden in terms of expense and distraction", that there was no evidence that they were "designed to cause disruption or annoyance" and that each request was "not vexatious in isolation" (internal review letter, 28 January 2010). I would add that Mr Ainslie's use of language has been temperate, even if occasional flashes of frustration have emerged as the FOIA process has remorselessly ground on. There have certainly not been repeated and outrageous allegations of criminal misbehaviour on the part of the Council or its officers.

62. Fourth, I am entirely satisfied that Mr Ainslie has been acting in the public interest. At the oral hearing before me, he admitted to "a reputation for persistence". That much is clear from his comprehensive paperwork in the documentation. I referred earlier to the letter from his MP which was before the FTT. I have the advantage of seeing two further letters from Mr Letwin, dated 14 November 2011 and May 2012. They do, of course, post-date the period of the requests, but I am satisfied that they refer back to the period in question and so can be properly considered.

63. In the first such letter, Mr Letwin confirms that both he and Cllr Peake had encouraged Mr Ainslie to present his findings to the public authority "because I think that Mr Ainslie did identify considerable shortcomings in the process of the Highways Department in relation to road repairs". The MP added that "I believe that the contribution he has made may well have played some part in persuading the Council to adopt improvements in the systems and structures of the Highways Department". He concluded "Mr Ainslie has certainly been persistent – but I am very convinced that his aim throughout has been to improve outcomes for Dorset taxpayers and has been in no way 'vexatious'".

64. In the second letter, Mr Letwin concedes that while "it would certainly be fair top say that Mr Ainslie is a persistent correspondent, it was also my experience that the issues to which he was drawing attention were of real significance, and that he was motivated throughout, not by any pursuit of personal gain but by a public spirited desire to bring about an improvement in the way that road works were conducted".

65. I simply record that this is, on my reading of the evidence as a whole, a fair assessment. There is sometimes a thin line between persistence and obsessiveness, and between public spiritedness and busybody interference. However thin that line may be, a line there is, and I take the view that Mr Ainslie falls on the public-spirited side of that line. His motivation is plainly relevant to the issue of whether the individual requests are vexatious.

The Upper Tribunal's conclusion

66. My conclusion is that all six requests in issue were neither vexatious within section 14(1) of FOIA nor manifestly unreasonable within regulation 12(4)(c) of the EIR. In reaching that conclusion I have in particular had regard to the considerations discussed at paragraphs 59-65 above and the context and background to these requests (at paragraphs 42-57). It is the context and background above all which, in my assessment, distinguishes this case from *Dransfield*, as in both cases the requests, taken alone, were entirely unremarkable and benign. The matters discussed at paragraphs 59-65 all go the question of the burden on the public authority, the requester's motive, the value or serious purpose of the request and whether there was any harassment or distress involved.

67. On that last point, a starting point is the IC's Guidance to public authorities (see *Dransfield* at paragraph 13), which is to the effect that, in deciding whether a request falls foul of section 14(1), "the key question is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause" (at p.3). I doubt very much whether any of Mr Ainslie's six requests were likely to cause distress to any member of the County Council's staff. I suspect that the amount of disruption involved, given the well-focussed nature of each request, was likely to be minimal. I think it very likely that the requests caused considerable irritation in some quarters at Dorset CC, but that is hardly decisive (see *Dransfield* at paragraph 26). However, my overall assessment, for the reasons outlined above, is that Mr Ainslie had a proper or justified cause and above all was acting proportionately, not disproportionately.

The re-made decision

68. Time has inevitably marched on and the requests in question are no longer all live. I would add that it is symptomatic of Mr Ainslie's approach to these proceedings in both the FTT and the Upper Tribunal that, unlike Mr Dransfield, he has sought to narrow rather than broaden the issues in dispute (so much for 'drift'). The current position as regards each of the requests appears to be as follows:

Request	Current status
Request 1(i)	IC found request not manifestly unreasonable under EIR
Request 1(ii)	In dispute on appeal
Request 2	In dispute on appeal
Request 3	Withdrawn: not in dispute on appeal
Request 4	IC found request not manifestly unreasonable under EIR
Request 5	Withdrawn: not in dispute on appeal
Request 6	Withdrawn: not in dispute on appeal

69. So far as requests 4-6 inclusive were concerned, Mr Ainslie had very reasonably agreed at the FTT pre-hearing telephone conference held on 17 June 2011 that these requests were not to form part of the subject matter of the appeal. There were, therefore, only two outstanding requests still in dispute – requests 1(ii) (copy of Dorset CC guidance on management of external contractors) and 2 (copy of Dorset CC operating rules for use of disc cutters).

70. It follows that the Upper Tribunal re-makes the decision under appeal in the following terms. The decision that the First-tier Tribunal should have made in appeal EA/2011/0097 is as follows:

> *"The Tribunal allows the appeal and issues a substituted Decision Notice (FS50295366).*
>
> *SUBSTITUTED DECISION NOTICE*
>
> | | |
> |---|---|
> | *Date:* | *04 January 2013* |
> | *Public authority:* | *Dorset County Council* |
> | *Address of Public authority:* | *County Hall, Dorchester, Dorset* |
> | *Name of Complainant:* | *Mr M P A Ainslie* |
>
> *The Substituted Decision*
>
> *For the reasons set out below, and insofar as it has not already done so, Dorset CC is to disclose to the requester the information requested in the requests made on 20 November 2009 (request 1(ii)) and 26 November 2009 (request 2). Such disclosure is to take place within one month of the date the Upper Tribunal's decision is issued to the parties (namely the date on the clerk's covering letter, not the date at the end of the Upper Tribunal's reasons)."*

One final observation

71. This was a case where the appellant had asked for a paper hearing of his appeal, for personal reasons that were entirely understandable. Under its procedural rules, the FTT "must hold a hearing before making a decision which disposes of proceedings unless—(a) each party has consented to the matter being determined without a hearing; and (b) the Tribunal is satisfied that it can properly determine the issues without a hearing" (Tribunal Procedure (General Regulatory Chamber) Rules 2010 (SI 2009/1976), rule 32(1)). The FTT directed a hearing on the papers with the agreement of all parties so it can be assumed that the tribunal took the view that rule 32 was satisfied.

72. I simply observe that it may be that tribunals need to be more imaginative about how they can ensure, in accordance with the overriding objective in rule 2(2)(c) to deal with cases fairly and justly, that "so far as practicable, that the parties are able to participate fully in the proceedings". A hearing is further defined by rule 1(3) as meaning "an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication." It is not clear to me whether the possibility of an oral hearing at a venue closer to the appellant's home was explored (which would also, of course, have been more convenient for the public authority). It is also noticeable that the FTT had no problem apparently in arranging a telephone conference for a directions hearing. Tribunals also regularly use video-conferencing facilities, even if the equipment does not always perform flawlessly.

73. The very nature of the issues involved in appeals concerning requests which have been found to be either vexatious or manifestly unreasonable is such that every effort should be made to ensure that the parties can participate in an oral hearing. This allows the relevant issues to be properly explored in a way that is simply not always possible on the papers.

Conclusion

74. I therefore allow Mr Ainslie's appeal, set aside the Fist-tier Tribunal's decision and remake the decision on his appeal against the Information Commissioner's Decision Notice in the terms set out above.

Signed on the original
on 28 January 2013

Nicholas Wikeley
Judge of the Upper Tribunal

Annex 1

Request	Date	Subject matter of request	DCC decision 21 12 2009	ICO Decision Notice 24 02 2011	FTT decision 31 10 2011
1	20 11 2009	(i) copies of invoices from external contractors for 2 attempts to resurface defined road in village on specified dates (ii) copies of DCC Guidance for management of external contractors used by DWO (the DCC highways arm, Dorset Works Organisation)	(i) & (ii) Vexatious request within meaning of FOIA 2000, section 14(1), applying Information Commissioner's Guidance and *Betts v Information Commissioner* (EA/2007/0109)	(i) Request not manifestly unreasonable within meaning of EIR 2004, regulation 12(4)(b); (ii) Vexatious request within meaning of FOIA 2000, section 14(1).	ICO Decision Notice upheld.
2	26 11 2009	DWO operating rules for use of disc cutters	As above	Vexatious request within meaning of FOIA 2000, section 14(1).	As above.
3	02 12 2009	Guidelines or rules for DCC Auditor	As above	As above.	As above (withdrawn at telecom before).
4	08 12 2009	Appendices to DCC 2004 Highways Policy not previously included with response to earlier FOIA request	As above	Request not manifestly unreasonable within meaning of EIR 2004, regulation 12(4)(b).	As above.
5	10 12 2009	List of new DCC Cabinet members and their responsibilities	As above	Vexatious request within meaning of FOIA 2000, section 14(1).	As above (withdrawn at telecom before).
6	15 12 2009	Organisational line charts of relevant DDC departments	As above	As above.	As above (withdrawn at telecom before).