



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0088

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50517601
Dated: 25 March 2014**

Appellant: John Walker

Respondent: The Information Commissioner

Heard on the papers: Fox Court London

Date of Hearing: 1 August 2014

Before

Chris Hughes

Judge

and

Rosalind Tatam and Pieter De Waal

Tribunal Members

Date of Decision: 7 September 2014

Date of Promulgation: 9 September 2014

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

Cases:

Information Commissioner -v- Devon County Council and Dransfield

Upper Tribunal Case No. GIA/3037/2011

Rosalind Jean Craven -v- The Information Commissioner and DECC

Upper Tribunal Case No. GIA/786/2012

REASONS FOR DECISION

Introduction

1. Mr Walker has for some years been concerned about the change of use of a retail unit near his home from a laundrette to a fish and chip shop and the nuisance which he claims this use causes. Ashford Borough Council (“the Council”) disputes that there is a continuing nuisance from the premises.
2. He complained to the Local Government Ombudsman (LGO) that he was not notified about the planning application. The LGO, by a decision dated 8 March 2011, concluded that there had been no fault on the Council’s part resulting in significant injustice to Mr Walker and that he would not pursue the matter further. He found that Mr Walker had known about the application, had commented on the application and the Council had considered the representations it had received (bundle pages 274-277).
3. He has made a series of requests for information from his local authority, the Council, about the premises. In the three years from November 2010 he sent 49 letters to the Council concerning the premises, 25 of them between January 2013 and 18 September 2013, his issues including the Health and Safety of the filter systems used, the perceived inaccuracy of information sent to him by the Council, the breach of a

Planning Condition regarding the limitation of opening hours, etc. Mr Walker made a series of six requests between June and August 2013 about issues relating to the monitoring of the alleged nuisance from the premises, the Council provided some answers; it confirmed that a formal environmental impact assessment had not been carried out, that advice had been sought on the extraction system used by the shop and such monitoring as had been carried out was done intermittently and not always recorded.

4. On 20 May 2013 the Council wrote to Mr Walker (bundle pages 216,7) and stated: *the Council has done all it can bearing in mind the circumstances. No further resources can be devoted to the investigation of your complaint or to the environmental impact assessment or compliance with the DEFRA guidance.* 24 July 2013 the Council in a letter set out its position on the underlying issues following a meeting between council officers and two ward members. It confirmed:-

“...Environmental Health remains firmly of the opinion that an odour nuisance has not arisen since the premises started trading as evidenced by several site visits

...There is no evidence to suggest that the extraction system isn't currently operating as designed and therefore there is no further action that the Council can take.

For a change of use application to a hot food takeaway it is not unusual for planning to require the submission of further technical information about the proposed extraction system and to attach a condition to this effect if consent is given. It is felt that further debate around the environmental assessment undertaken during and after the planning application process is equally unproductive and will have no material effect on the current situation.

...

We appreciate that you will not be happy with this response but there is no more that the Council can do. In the circumstances I regard the correspondence between us as concluded and all that remains is for me to respectfully direct you to the Local Government Ombudsman whose contact details you have been previously supplied...”

5. On 12 August 2013 he requested a copy of the “*environmental assessment undertaken during and after the planning application process*” which he stated “*obviously exist as they were discussed at a meeting*” on 17 August he requested details and the minutes of a meeting between Council Officers and Councillors.

6. On 27 August 2013 the Council concluded that the requests were vexatious under FOIA or manifestly unreasonable under the Environmental Information Regulations. It stated (bundle pages 284-286):-

“ I consider that your persistence in making frequent requests is unreasonable and that your requests are futile given the full investigation that the Council already conducted into the issues you have raised. The Council would have to make a disproportionate effort to deal with your requests given their lack of value or serious purpose. Relying on the exemption is therefore further justified in the public interest.”
7. In response to further correspondence the Council confirmed its position on 16 September. Mr Walker complained to the ICO who investigated whether the Council was entitled to rely on the vexatious/manifestly unreasonable exemptions to its duty to disclose the requested information. The Council told the ICO that Mr Walker was trying to stop occasional odour from the shop, had been told there was no statutory nuisance and while not rejecting what the Council had said *however he continues to attempt to achieve his objective by submitting requests for information*. The Council told the ICO that Mr W had not apparently taken two other avenues open to him [bundle page 326] - to complain to the LGO about the ongoing smell and his view that the Council had been remiss in its response here, or to apply for an abatement notice himself. In the light of the decisions of the Upper-tier Tribunal the ICO considered the issues of proportionality and justification and the purpose and value of the requests in the light of the history. .
8. The ICO noted the level of contact on the issue, the responses by the Council and was satisfied that the requests (DN para 48) *represent an attempt by the complainant to revisit issues that have already been reviewed and responded to on several occasions by the council officers and members and this is an improper use of the FOIA and the EIR*.
9. He noted that the issue had been thoroughly looked at by the planning and environmental health departments over three years who had concluded there was no actionable nuisance and the ICO concluded (DN para 51) *that the requests serve no serious purpose or value to a wider audience other than the complainant himself*.

10. He reviewed the amount of effort that the Council had devoted to dealing with Mr Walker's complaints about the fish and chip shop and found that (DN para 56) *responding to this request is likely to cause a disproportionate burden upon the Council.*
11. In respect of the 12 August request for monitoring information (which the ICO considered fell under EIR – the other request being FOIA) the ICO concluded that the public interest in disclosing the environmental information *is outweighed by the public interest in avoiding the resource costs in answering a manifestly unreasonable request.*

The appeal to the Tribunal

12. In his appeal Mr Walker explained that he suffered from chronic obstructive pulmonary disease and that he had been advised by his consultant to “*avoid dust/fumes/odours/smoke, and many materials which could irritate the lungs.*” He argued that the opening of the shop had been in breach of planning conditions and the council had been inactive in the face of his complaints. He argued that much of the correspondence had been instigated by the council asking him to send in nuisance odour reports. He had obtained useful information from his FOIA requests which was inconsistent with what he had been told in correspondence, that eight requests were not “numerous”. He argued that the Council should have communicated with him more, that public interest with respect to EIR was in disclosure “*I feel strongly that the public has a right to know that when, through the fault of a Council public authority that their personal health and that of the environment has been put at risk*”. In support of his appeal he supplied a copy of the report recommending the grant of planning permission.
13. In his reply the ICO considered the history of the issues between Mr Walker and the Council, noted that the Council had been engaging with him for three years and had concluded that it could do nothing about the odour issue and that there had been a rising trend of contact by Mr Walker. He noted that Mr Walker remained committed to achieving a reduction in odour, that while complying with the requests would not in themselves be excessively onerous such compliance would not satisfy Mr Walker. He re-affirmed the position he had taken in his decision notice.

14. In his further submissions Mr Walker criticised the council's handling of the problem about the extraction system at the shop and expressed the view that the system was still not functioning correctly. He said that his motive was "*simply driven by the need to know the truth, and concerns over my health, having already been exposed to 9-10 months of unfiltered fumes.* (this being the period during which Mr Walker believes the Council took no action on his initial complaint). He argued that there was a serious purpose in the request in establishing what monitoring had been done and that the council should serve the people and be transparent, the information he had been given by the council "*was simply wrong, misleading, or designed to confuse.*"
15. The issue for the Tribunal is very simple, whether the Commissioner was, in the light of the evidence and the case law, correct to find that the requests were manifestly/unreasonable/vexatious or whether, as Mr Walker has contended, his requests are from a proper motive and with a serious purpose or value.

Legal analysis

16. The two relevant statutory provisions (section 14(1) FOIA and regulation 12(4)(b) EIR) have been considered by the Upper Tribunal in the cases of *Dransfield* and *Craven* and the test is essentially the same – is the request a manifestly unjustified, inappropriate or improper use of the statutory right. Four broad themes may be helpful in considering this, the burden on the authority in the context of the history, the requester's motive, whether the request has a value or serious purpose and any harassment or distress caused to the council's staff.
17. The ICO correctly identified that the evidence clearly shows a considerable level of contact between the Council and Mr Walker in which the Council has tried to resolve his concerns about odour. The conclusion the Council came to which was clearly spelt out in the letter of 24 July 2013 was that nothing more can be done by the Council to resolve the issue. An examination of the eight requests for information shows that requests are overlapping and somewhat repetitious, even so there were several requests which came after a long period of increasingly intensive contact with the Council during which the Council has given considerable information to him and acted to investigate his concerns, but has concluded that there is no statutory nuisance on which it can act.

18. While Mr Walker has stated that he is concerned about his health there is no evidence before the Tribunal that his health has been put at risk. Furthermore the information sought (insofar as he does not already have it from previous requests which have been dealt with and letters sent to him from the Council) would be of no assistance with respect to any concerns he may have about his health – there is no serious purpose which would be served by complying with the requests.
19. In considering this appeal the Tribunal has reminded itself that the purpose of these two provisions is to protect the resources of public bodies from being squandered on disproportionate requests for information. In this case it is clear that no useful purpose can be served by going over the old ground which has already been covered between the Council and Mr Walker. He has already sought a resolution of his concerns about the grant of planning permission by an unsuccessful complaint to the LGO. The Council acted on his complaint about odour and have given him details of what the Council did. Mr Walker is trying to pursue his complaint about the fish and chip shop and the Council's whole handling of the planning and environmental health matter through another means. That is not an appropriate use of FOIA/EIR. The ICO in his decision notice correctly evaluated the evidence and applied the law correctly.

Conclusion

20. The Tribunal is satisfied the ICO's decision is correct in law and dismisses this appeal.
21. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 September 2014