IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2014/0065

BETWEEN:

MARGARET VESCO

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 1 October 2014

Before M Hake, N Makanji and Judge Taylor.

Date of promulgation: 6 October 2014

Decision

The appeal is unanimously dismissed.

Background

1. The Appellant states her concern that her neighbours' gas flue is directly opposite her
windows, such that flue emissions discharge into her bathroom and upstairs windows. The flue was installed in 1998, and she has complained continuously since then to various authorities. She believes that the authorities are not carrying out duties to enforce relevant regulations in this regard. In 1998, she complained to Midlothian Council who suggested testing the emissions to assess for safety. She has stated that she refused the test as it seemed 'suspiciously invented'.

2. In 2011, the Appellant complained to The Health and Safety Executive ("HSE") about the distance of her neighbour's flue terminal to the boundary of her property. She was concerned with the location of the installation and argued that the responsible authorities had failed to carry out their duties and enforce the statutory regulations.

3. HSE explained that it enforces the Gas Safety (Installation and Use) Regulations 1998 (the "regulations") but that Gas Safe Register ('GSR') has a responsibility to ensure that installers registered with them operate safely and therefore concerns on competency of installations are for their attention.

4. The Appellant argued her complaint was not with the installers but about the enforcement of the regulations. She believed the installers to be fully competent, but that the issue was with the siting of flue terminal not the competency of installations. She wrote to the GSR who confirmed to the Appellant that the responsibility for enforcing the regulations was that of the HSE. The Appellant believed that HSE repeatedly confused issues of competency with location and that she had absolutely no concerns about the competency of the installer.

5. The Appellant asked the HSE whether there were any required measurements for the distance of terminals to boundaries under the regulations. HSE replied that the regulations did not cover specifics of installation as these would be covered in manufacturer's instruction on installation, and that it was the duty of the gas safe registered installer to ensure compliance. They directed her to the installer for space measurements.

6. A summary of some of the correspondence is set out in the Commissioner's Decision Notice (Ref. FER0519055) at paragraphs 4 to 12 and also in the Appellant's submissions in this appeal.

7. On 23 May 2013, the Appellant requested from HSE the following in relation to regulation 27(5) of the regulations, which prohibits the installation of a flue other than in a safe position, and HSE's Approved Code of Practice **('**ACOP**')**[1]:

   "Please give the following information.

   1. *How many times has the above ACOP regulation been enforced?*
   2. *As HSE claim they have no measurements of risk, what conditions must exist before the above statutory regulation is enforced?*

1. According to the HSE website, ACOP gives practical advice for all those involved in construction work.

2.

3. *What is the purpose of Health and Safety Executive / Local Authorities Enforcement Liaison Committee with regard to enforcement of the above Regulation.*

4. *Discretionary Powers*
Where does it state within your framework of policies and procedures that HSE can ignore clear legal advice and use their "discretionary powers"?

5. *What duties do HSE Inspectors have with regard to ACoP?*

6. *With regard to flue terminals, please provide evidence that HSE are taking ACoP guidance into account."*

7. On 31 July 2013, HSE responded refusing the request on the basis of regulation 12(4)(b) of the EIR, as it considered the request to be 'manifestly unreasonable' and that the public interest balance weighed against disclosure. On 17 October 2013, HSE upheld its original position after having conducted an internal review.

8. On 16 December 2013, the Commissioner issued a decision notice concluding that HSE had correctly relied on regulation 12(4)(b) EIR 2004.

9. The Appellant has appealed to this Tribunal.

The Law

10. Under regulation 5(1) of the Environmental Information Regulations 2004 (EIR), a public authority that holds environmental information is required to make it available on request, subject to exceptions.

11. "Environmental information" is defined in regulation, as:

> '*any information in written, visual, aural, electronic or any other material form on—(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
>
> *(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
>
> *(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.'*

12. The Commissioner identified in his Decision Notice that the requested information fell within Regulation 2(1)(c), which we accept, given that it relates to measures for installing a gas flue, where gas would seem to fall within regulation 2(1)(a) or (b).

13. The exceptions referred to in paragraph 10 above include regulation 12(4), which states: *'(4) … a public authority may refuse to disclose information to the extent that… (b) the request for information is manifestly unreasonable*'.

14. The exception is subject to the assessment of the public interest set out in Regulation 12(1):

> *'1)…a public authority may refuse to disclose environmental information requested if (a) an exception to disclosure applies … and (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'* (*'the public interest test*.')

15. In *Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC),* The Upper Tribunal has guided us that:

> *"… in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" within FOIA… information, it therefore follows that the meaning of the expression "manifestly unreasonable" is essentially the same as "vexatious" (on which see Dransfield at paragraphs 24-39)."*
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> *(See para. 30 of the Craven Decision)*
>
> *"I do not believe that the existence of the explicit public interest test in the EIR and the statutory presumption of a restrictive interpretation of regulation 12(4)(b) should mean that, even at the margins, it is in some way "easier" to get a request accepted under the EIR than under FOIA…"*
>
> *(See para. 22 of the Craven Decision).*

16. The Upper Tribunal in *Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC) states:*

> *"It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious"."*
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> *(See para. 28 of the Dransfield Decision)*
>
> *"The common theme underpinning section 14(1), at least insofar as it applies on the basis of a past course of dealings between the public authority and a particular requester, has been identified by Judge Jacobs as being a lack of proportionality."*
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> *(See para. 27 of the Dransfield Decision)*
>
> *"… the importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."*
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> *(See para. 45 of the Dransfield Decision)*

The Task of the Tribunal

17. The task of the Tribunal is to consider whether the decision made by the ICO is in accordance with the law or whether any discretion it exercised should have been exercised differently.

18. On this basis, the issues for the Tribunal to consider in this appeal as the Appellant's grounds, might best be summarised as (a) her request does not fall within the exception of being manifestly unreasonable, and (b) even if it does, the public interest in maintaining this exception does not outweigh that in disclosure.

19. We note for the benefit of the Appellant, that our task is limited to considering whether the material requested by the Appellant should have been disclosed to her. Other issues relating to the Appellant's concerns about her neighbour's gas flue, or how the HSE has handled these concerns, are beyond our remit, unless they help to inform whether the request itself was or was not manifestly unreasonable, or informs the public interest test.

20. We have received a Decision Notice, the Appellant's grounds of appeal and responses, and the ICO's response as well as a bundle of documents. We have reviewed all these documents, even if not specifically referred to below.

Our Findings

Ground A: Manifestly unreasonable

21. Whilst the majority of Appellant's arguments explore in detail her concerns about the gas flue, subsequent complaints and difficulties with achieving the result she is looking for, few of her arguments are fashioned to deal with whether her request itself is manifestly unreasonable. She has stated that:

    1. '*The claim that it is manifestly unreasonable to request information regarding enforcement of legal requirements is challenged. These legal requirements are in the Public Interest*.'

    2. *'The volume of correspondence is entirely due to HSE's inability to provide accurate information in the first place.'*

    3. *'The claim that HSE have provided a voluminous amount information does not refer to the veracity of this information.'*

22. The Commissioner's arguments in relation to this are set out in paragraphs 28 to 38 of the decision notice and paragraphs 35 to 39 of their Response dated 1 May 2014.

23. We adopt the Commissioner's reasoning in its entirety, and find the Appellant's arguments unfounded.

24. Whilst we are not clear that we have in the bundle all the correspondence, or a clear chronology, it is evident from the Appellant's own summary and description of contact with HSE, as set out in her documents entitled 'Grounds of Appeal' and Response of 12 May 2014, that her correspondence with the HSE has been of a somewhat incessant nature, and disproportionate given that the HSE have made clear their limits. HSE has clearly spent some time assisting the Appellant, and amongst other things, informing her that although it was the enforcing authority with respect to the regulations, it did not always act solely in relation to an apparent technical breach of recognised standards (e.g. proximity of flues). HSE provided the Appellant with a link

to HSE's policy on enforcement practices and referred her to the GSR. In this context, we accept that the request that is the subject of this appeal is manifestly unreasonable.

25. Having regard to the cases of Craven and Dransfield referred to in paragraphs 15 and 16 above, it is clear that the Appellant's request is disproportionate, illogical as on basis of the correspondence and that it does not seem to make sense to persistently seek a remedy from the body that cannot provide it, serves no purpose or value, and dealing with the request was becoming a burdensome disruptive, albeit that we have no reason to believe the Appellant intended to be causing such distress. Furthermore, it is clear from her appeal papers (for instance, page 14 of the bundle), that the Appellant's ultimate interest in pursuing the request is for her neighbour's flue to be removed, and this cannot be achieved from the request being met.

Ground B: Public Interest

26. In relation to this ground, the Appellant states:

    1. *'It is perfectly reasonable for the public to expect accurate information…The reason I asked for references is to ensure the validity of the information given by HSE…*All Regulations passed by Parliament are in the Public Interest.'

    2. *'It is in the Public Interest that information from public services is accurate and according to the law*.'

    3. '*It is in the Public Interest that our local authorities have integrity. Public Interest favours accountability and good administration and will place an obligation on authorities for decisions taken by them and to provide reasoned explanations for decisions made. This will improve the quality of decisions and administration*.'

    4. *Public authorities remain accountable to the public and disclosure would contribute to the administration of justice and enforcement of the law.*

    5. *'..disclosure would contribute to ensuring that public authorities with regulatory responsibilities adequately discharge their function.'*

    6. *'HSE have consistently made misleading statements regarding information requested re. the enforcement of the Regulation in question. To supply the information requested would further transparency and accountability.'*

    7. *'By disclosing this information, the public can understand the reasons for decisions made by public authorities. The disclosure of this information will bring to Sight information affecting public health and safety.'*

    8. *'A reason for withholding this information could be that HSE's and other public authorities I have dealt with have their private interests in withholding information which would reveal incompetence on the part of public authorities and this would probably cause embarrassment.'*

27. The Commissioner's arguments in relation to this are set out in paragraphs 39 to 42 of the decision notice and 40 to 43 of their Response of 1 May 2014, and we accept these in their entirety, noting in particular its paragraph 33(1).

28. We consider the request 'manifestly' unreasonable, and the weight of this is far greater than any generic public interest (such as those set out in sub-paragraphs 26(1) to (5) and (7) in disclosure. We have not found that the HSE has been misleading, and on the contrary they seem to have given a great deal of attention and support to the Appellant. We find no basis for the Appellant's claims in sub-paragraphs 26(6) and 23(8) – instead, it seems to us that she has received a series of responses and decisions, which she does not accept. We can find no public interest in the request itself within the context of this appeal, and/or in the authority spending more time and expense in disclosing the information.

29. Our decision is unanimous.

Judge Taylor

3 October 2014