Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0001**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0547247
Dated: 16 December 2014

Appellant: **David Leslie Charles Wraige**

Respondent: **The Information Commissioner**

Heard at: Tunbridge Wells

Date of Hearing: **20 May 2015**

Before

Chris Hughes

Judge

and

Narendra Makanji and **Dave Sivers**

Tribunal Members

Date of Decision: **1 June 2015**

Attendances:
For the Appellant: in person

For the Respondent: Rupert Paines

Subject matter:

Environmental Information Regulations 2004 regulation 12(4)(b)

Cases:

Dransfield v Information Commissioner and Devon County Council, Craven v Information Commissioner and Department for Energy and Climate Change DECC; Case Court of Appeal -No: C3/2013/1855 & C3/2013/1901
Upper Tribunal - [2012] UKUT 440 (AAC), [2012] UKUT 442 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 December and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. In 2009 the owners of the neighbouring property to Mr Wraige's received planning permission, granted by a Planning Inspector, for an extension to their property. The extension was completed towards the end of 2012.

2. On 7 April 2014 the Appellant in these proceedings, Mr Wraige, wrote to his local council (Tunbridge Wells District Council, "the Council"), asking for information about a neighbouring property:_

   "First, please could you let me have copies of all drawings submitted in connection with the application by the architect Joyce & Partners?

   Second, please could you provide me with an explanation as to how Part B1 Section 2 of the Building Regulations is complied with in the rear bedroom in the extension at the Pump House? This part of The Building Regulations is concerned with fire safety and I am particularly interested in what provision for escape has been made from this bedroom. One possible means of escape is through a window; if that is how compliance has been achieved, please identify the relevant window and the height at which the bottom of its openable area lies above the floor."

3. The council replied on 8 May claiming that the first part of the request was for personal data and was withheld under regulation 13 and that the second part was not a properly constituted request under FOIA.

4. On 6 June the Council sent the result of its internal review maintaining its position under regulation 13, that the information was private and personal to the property owner who lived in the building and would not expect that the information should be placed in the public domain. There was no public interest in disclosing the details of the building control process which was well-established and of itself provided reassurance to the public. With respect to the second part of the request the reply stated that such information was not held "I can find no information of the description requested".

5. During the course of the course of the Commissioner's subsequent investigation the Council provided Mr Wraige with an explanation of why the information the subject of the second part of the request would not be held (dn paragraph 8) – Mr Wraige accepted this explanation. During the investigation the Council also placed reliance of regulations 12(4)(b) that the request was manifestly unreasonable and 12(5)(f) that the disclosure would cause an adverse effect on the person supplying the information.

6. In considering Mr Wraige's complaint the Commissioner considered whether in the light of the decision of the Upper Tribunal in *Dransfield* the request was a *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. He concluded that Mr Wraige's purpose was to carry forward his dispute with his neighbour using IER. Despite extensive use of the Council's complaints and other procedures that there had not been breaches of control with respect to the erection of the extension he had continued with his efforts. He concluded that the refusal of the information under 12(4)(b) was justified.

7. In his appeal Mr Wraige disputed factual issues in the decision notice. He emphasised that his concern was a roof-light in his neighbour's house which he claimed did not have planning permission or comply with permitted development arrangements. He alleged that he had been provided with incorrect information from the Council, that he had not discussed the issue with his neighbours and had only raised it with the Council as the planning authority. He argued it was conceivable that the Council had made a mistake "which would cause the public interest in favour of

disclosure to outweigh that in favour of withholding the information even if the request was considered manifestly unreasonable." He argued that 12(4)(b) did not apply and that even if it did the balance of public interest lay in disclosure.

8. In responding to the appeal the Commissioner maintained his position that 12(4)(b) was engaged and that the request had to be seen in its context, and that he was justified in considering the Council's complaints procedure even though it had not at that time of the request been concluded (relying on the Upper Tribunal decision in *Dransfield*). In submitting that the public interest balance favoured non-disclosure he argued that the interest in disclosure of the information was purely a private interest of Mr Wraige and there was no wider interest in the disclosure.

9. In his oral submissions Mr Wraige made it clear to the tribunal that the focus of his concern was the height of the window "I do not wish the window to be used to monitor our activities and to take photographs of our garden". He did not accept that the position with respect to the window was as explained by the Council or the Planning Inspectorate. He did not accept that the extension as built was lawful, the drawing which had been supplied to him by the council "*does not show what they say it shows*". He denied that the letters sent to him by the council were coherent or accurate. He acknowledged that he had complained to the Local Government Ombudsman about the council's handling of the complaint however the Ombudsman had accepted the council's position and had closed the file. He did not accept that the neighbour could have an opinion on the impact on the council of dealing with the complaint. He confirmed that he had complained to the Council about a newly constructed waterfall in his neighbour's garden and the council had agreed to install equipment to monitor the noise.

10. He argued that there was "a pressing social need" to disclose the information – the prevention of clandestine photography. He explicitly denied that there was a dispute with his neighbour "*to be in dispute you have to be in contact*". He had not communicated with them and had not tried to cause distress. He confirmed that he had called the police in connection with the photography incident. He felt that there was a strong public interest in disclosure since "*the public would wish to know that the fire safety issue was addressed*". As for the information itself "*I would seek to use it but only if legitimate to get change to the window*", he was "*interested in seeing if anything ..about the legality of the roof light in terms of planning*".

<u>The questions for the Tribunal</u>

11. The issues before the tribunal were:-

    - whether the request was manifestly unreasonable within 12(4)(b) of EIR and if so where the balance of public interest lay between disclosure and non-disclosure.
    - if the request was not manifestly unreasonable, whether the material requested was personal data of the neighbours and if so whether the data protection principles would be contravened EIR 13(1) and (2)(a)

12. The tribunal noted that, dispute Mr Wraige's asseverations to the contrary, the request for the information had arisen out of a dispute with his neighbour which had taken a variety of forms and passed through various stages. In addition to the issue of photography, overlooking and the location of the roof-light, there had been issues about the replacement of a fence and damage to a gate, the raising of the height of part of the land, noise from an artificial waterfall.

13. Mr Wraige had taken various steps with public authorities in relation to this dispute. He had called the police in connection with photographs submitted to the council by the neighbour in relation to a planning issue, he had complained through each step of the council's procedure, he had complained to the Local Government Ombudsman and he had sought to involve the planning inspector. Despite he attempts to present the issue to the contrary, the Planning Inspectorate had not given him any support with his concerns and nor had the Ombudsman supported his complaint about the Council's handling of the issue.

14. Although Mr Wraige both denied any intent to harass his neighbour (which was not suggested by the Commissioner) he also denied that any distress would be caused to the neighbour while asserting considerable distress on his part. It was pellucidly clear to the tribunal that there was distress on both sides of the fence arising out of the dispute and that the continuation of the dispute by seeking further information about their house in an attempt to force a change to it could only be a matter of significant distress to the neighbours.

15. In considering Mr Wraige's position the tribunal noted the course of the complaint pursued through the Council's complaints procedure. This had led the council's staff

to repeatedly examine his neighbour's property. The Council has repeatedly confirmed that the extension to the neighbouring property is in general conformity to the plans submitted. By a letter dated 28 July 2013 the Council confirmed (bundle pages 54-56): "That the plans are not consistent is an issue that should have been identified at the application and appeal stage and I can understand that this has led to confusion. However, the extension does accord overall with approved plans and furthermore the Planning Inspector did not support the Council's reason for refusal in relation to the overall size. There are therefore no grounds on which to enforce compliance…… The roof ridge height is different to that shown on the approved plans. It is in fact lower at 5.5metres as opposed to the approved 5.7 metres. The eaves sit marginally lower than shown on the plans being 3.45m rather than 3.5m. The impact is therefore less than as approved". The letter also addressed the issues of the roof-light commenting that the Council did not consider that there was harmful overlooking.

16. In the response to the stage 1 complaint (bundle pages 60 -64 at page 62) the Council on 4 February 2014 commented:- "*When assessing the proposal for the Pump House neither the case officer nor the Planning Inspector was concerned that unacceptable overlooking would arise from the siting of a roof-light in the roof slope overlooking your property…. With regards to the internal cill height of windows and the Building Regulations, the 1.1m height you refer to relates only to windows that function as a means of escape. This is not the case for the roof-lights within the extension*". It addressed a complaint about works to a watercourse at the Pump House and found that planning permission had not been required.

17. In the second stage response on 6 March 2014 (bundle pages 65-68 at 67) The Council stated:- *"As the window was allowed as part of the planning permission and has not been inserted under permitted development rights it is not subject to the condition requiring it to be non-opening and obscure glazed below 1.7m"*. The third stage response of 9 June 2014 (at bundle pages 69-72) issued after the request for the disputed information again addressed in detail the issues of the approved drawings, the roof-light and the water course; it signposted him to the Local Government Ombudsman if he remained dissatisfied. The Local Government Ombudsman, when approached, did not take conclude that the issue merited his investigation.

18. In a response to a query from Mr Wraige the planning inspectorate confirmed to him that "*it seems that overlooking was not raised as an issue by the Council or objectors or [the inspector] would have addressed it*".

Legal submissions and analysis

19. In considering this case the tribunal had the advantage of the guidance given not simply by the UT but also by the Court of Appeal in the conjoined proceedings of *Dransfield* In the Court of Appeal Lady Arden (who gave the decision of the court) stated in considering the meaning of "vexatious" in FOIA:-

68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.

20. She continued by finding that:-

78. That leads to the question whether there is any difference between "vexatious" (section 14 FOIA) and "manifestly unreasonable" (regulation 12 (4)(b) EIR). The expression "manifestly unreasonable" has to be interpreted so as to give effect to the objectives of Directive 2003/4. It differs on its face from "vexatious" since it clearly imposes an objective test and appears alongside a requirement in regulation 12(1)(b) (see Annex to this judgment) for the authority to be satisfied as to the public interest in the disclosure. Leaving the word "manifestly" to one side for a moment, if I am right that the approach to section 14 should primarily be objective and should take as its starting point the approach that "vexatious" means without any reasonable foundation for thinking that the information sought would be of value to the requester

or the public or any section of the public, then the difference between the two phrases is vanishingly small.

21. The starting point for its consideration of whether the request is manifestly unreasonable is therefore to consider whether there are any reasonable grounds for thinking that the information sought would be of value to the requester, the public or any section of the public.

22. From the considerable evidence of correspondence it was clear that every issue that Mr Wraige had raised had been addressed by the Council through its complaint procedure and neither the Local Government Ombudsman nor the Planning Inspectorate had been able to assist him. The material sought can be of no reasonable use to anyone; and there is very clearly no public interest which is served by disclosure. His explicit concern about fire safety has been fully and repeatedly answered. His actual concern, a desire to have the window removed cannot be progressed by using this information since the window is lawfully there. He has pursued a number of routes to achieve this end. The whole request is a futile misuse of the EIR. It is manifestly unreasonable and an abuse of the process in pursuit of a neighbour dispute. It is a simple waste of the resources of the Council and ultimately designed to inconvenience his neighbour.

Conclusion and remedy

23. The tribunal is therefore satisfied that the request for information, when seen in its context, is manifestly unreasonable.

24. The Commissioner advanced detailed arguments on the case law concerning section 13 in support of the proposition that publication of the plans of the house, in conjunction with other available information meant that the request included personal data and to that extent regulation 13 prohibited the disclosure. Mr Wraige submitted that, in his view, since the plan did not precisely accord with the structure as built, it could not amount to personal data. In the light of the decision with respect to regulation 12 the tribunal did not consider it necessary to come to a conclusion on this issue.

25. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 1 June 2015