



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

EA/2015/0113

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50568068
Dated: 21 April 2015**

**Appellant: PETER CAVANEY
Respondent: THE INFORMATION COMMISSIONER**

Date of hearing: 11 November 2015

Date of Decision: 1st December 2015

**Before
Suzanne Cosgrave
Narendra Makanji
Annabel Pilling (Judge)**

Subject matter:

FOIA – Absolute exemption – Vexatious request – section 14(1)
EIR – Regulation 12(4)(b) - manifestly unreasonable

Representation:

For the Appellant: Peter Cavaney
For the Respondent: Daisy Mackersie

Decision

For the reasons given below, the Tribunal refuses the appeal in respect of Request 1 and allows the Appeal in respect of Request 2 and issues a Substituted Decision Notice.

Substituted Decision Notice

Dated 1st December 2015

Public Authority:

Lancashire County Council

Address:

County Hall

Preston

Lancashire

PR1 8XJ

Lancashire County Council correctly refused Request 1 (alarm logs) under section 14(1) of the Freedom of Information Act 2000. It is entitled to refuse the Request on the ground that it is vexatious.

Lancashire County Council is not entitled to refuse Request 2 (contamination report) under section 14(1) of the Freedom of Information Act 2000. This is a request for environmental information and should be dealt with under the Environmental Information Regulations 2004. The request is not manifestly unreasonable and the exception in regulation 12(4)(b) is not engaged.

Lancashire County Council must now either disclose the information if held or issue an appropriate refusal notice under the Environmental Information Regulations 2004.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 21 April 2015.

2. The Decision Notice relates to two requests made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to Lancashire County Council ('the Council') for information relating to a children's nursery. The request was made in writing on 4 December 2014:

Request 1 – for alarm logs between 13 and 24 October 2014

“During October 2014 I became aware that the caretaker for Rockwood Nursery in Burnley was opening up the building, turning on the majority of the lights, leaving the main gate open and then leaving the site around 6.20am when plainly it's still dark and no-one about – staff do not arrive until approximately 7.10 meaning the site is unoccupied for almost an hour. As well as a blatant waste of energy, I consider this to be a careless and negligent compromise of security of both this facility and the neighbourhood.

I would like to establish whether the alarm system had been left unset during these periods and to this end I would like to request the alarm logs are made available – to explain, generally these alarm systems report setting/unsetting and of course alarm events to a central monitoring station, so these records should allow me to see if the building was left completely unprotected.

The dates I am interested in are between the 13th and the 24th of October 2014 inclusive.”

Request 2 - contamination site report

“In 2014 a planning application was made by Lancashire County Council; reference LCC/2014/0034 for works at Rockwood Nursery in Burnley. One consideration for this application was the potential for pollution at the proposed site because of the existing oil tank that had been located there for decades.

During the planning consultation, one the speakers [name redacted], the head teacher at Rockwood Nursery and a director of the Teddy's Playgroup, during her presentation to the development committee mentions that the site had been inspected and declared safe – I would like a copy of that report please

together with any associated results from sample testing or similar that may be available.”

3. The Commissioner investigated the way in which the requests had been dealt by the Council.
4. The Commissioner concluded that the Council had correctly applied section 14(1) to refuse both requests and that the requests were vexatious within the meaning of that provision.

The appeal to the Tribunal

5. All parties agreed that this was a matter that could be dealt with by way of a paper hearing.
6. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We cannot refer to every document and submission but have had regard to all the material when considering the issues before us.

The Issues for the Tribunal

7. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
8. Section 14(1) provides that a public authority is not obliged to comply with a request for information if the request is vexatious.
9. Although the Commissioner considered both requests for information under the FOIA regime, we are of the view that Request 2 should have been considered under the Environmental Information Regulations 2004 ('EIR').

10. A public authority that holds environmental information is required to make it available upon request (reg.5(1) EIR). "Environmental Information" is defined in reg.2(1) EIR as:

- 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 area, 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 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."*

11. Request 2 was for a report in respect of the inspection of the site and it being declared safe. The consideration was the potential for pollution due to an existing oil tank. We consider that this was a request for environmental information and that the Council and the Commissioner erred in treating as a request for information under FOIA.

12. Reg.12(EIR provides as follows

"(1) Subject to paragraphs (2), (3), and (9), a public authority may refuse to disclose environmental information requested if-

- (a) *an exception to disclosure applies under paragraphs (4) or (5);*
and
- (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure.

(3)...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(a)...

(b) the request for information is manifestly unreasonable.

13. Although there are some differences between the structure of reg,12(4)(b) EIR and s14(1) FOIA, it has been accepted by the Upper Tribunal and Court of Appeal that there is little difference in practice when considering whether a request is “vexatious” or “manifestly unreasonable”.
14. Neither term is further defined in the legislation. The Upper Tribunal¹ has considered the approach which should be taken when reaching “*what is ultimately a value judgment as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA*”.
15. It cautioned against a too rigid approach to deciding whether a request in “vexatious”; it is important to remember that Parliament expressly declined to define the term. It did not purport to lay down a formulaic checklist or identify all the relevant issues, but suggested four broad issues or themes as relevant to the determination of whether a request is “vexatious” or “manifestly unreasonable” - i) the burden on the public authority and its staff, ii) the motive of the requestor, iii) the value or serious purpose of the request and iv) any harassment or distress of or to staff.
16. The Appellant maintains that his requests are not vexatious, and is concerned that the Council has applied a “blanket ban” rather than considering his requests individually. He submits that his requests for information had serious

¹ Information Commissioner v Devon County Council and Alan Dransfield [2012] UKUT 440 (AAC) (‘Dransfield’)

purpose, namely to reveal wrongdoing of the Council in setting up the nursery and the extent to which “*they were prepared to lie and deceive to force through this dubious planning decision*”. We have read his submissions and comments with care, which set out in some detail his concerns about the decision to allow Teddy’s Playgroup to operate within a residential conservation area and the impact upon his use of his home, and why he submits that these grievances are legitimate.

17. It is clear from the papers that the Appellant has raised a series of concerns and complaints over many years. He is concerned with a range of issues relating to the nursery, including in respect of planning permission having been granted, risk from ground contamination, expenditure of public money, parking arrangements, and the effects of the nursery operating such as noise of the children, of deliveries, of contractors, and security issues.
18. In relation to Request 1, we are concerned solely with the issue of whether the Commissioner was correct to conclude that the Council was entitled to rely upon section 14(1) FOIA in refusing to comply with this request for information.
19. Request 1 was for alarm logs from the nursery for a twelve day period. The Appellant submits that he was concerned about security of the building and the neighbourhood.
20. In *Dransfield*, the Upper Tribunal emphasised the importance of viewing a request in its context which means assessing the context and history of the particular request in terms of previous dealings between the individual requester and the public authority. A number of his complaints to and about the nursery have been in respect of security. There is a gate situated on land leased by the Appellant which provides access to the nursery and the Appellant’s home. The Appellant has raised concerns over the arrangements for opening the gate and maintaining security over his property and that of the nursery.
21. Beyond the FOIA requests, the Appellant has been in contact with the nursery and head teacher since 2011 over a variety of issues. The police have been

involved on a number of occasions due to complaints made by the head teacher against the Appellant. The nursery has since introduced a single point of contact for the Appellant to prevent him from contacting the head teacher directly. The Appellant has contacted the Council on a number of occasions and through a variety of routes, including County Councillors, the Chief Executive, the Environmental Health Officer and the Education Board in relation to matters concerning the nursery. There have been eight previous requests for information under FOIA, including requests for information in respect of running costs, accounts, the number of children attending the nursery and CCTV. Since the requests which are the subject of the Appeal, the Appellant has made three further requests for information under FOIA which the Commissioner took into account in concluding that there was no serious purpose for the requests but serve rather to pursue the Appellant's personal grievances against the nursery and the Council.

22. From the material before us, we are aware that the Council has considered and acted upon similar complaints previously and we understand that alterations have been made to the arrangements in respect of the gate, noise and deliveries. After many years of dispute with the Appellant over a variety of issues, there has been such an adverse impact upon the nursery staff and the head teacher in particular, that the nursery has introduced a mechanism to prevent the Appellant from contacting the head teacher directly. It may be that the Appellant was unaware of the impact his behaviour would and did in fact have upon others. We have seen and given weight to a letter from a solicitor in the Social Care and Education department of the Council who refers to “[both] myself, the chair of governors, the head teacher and County Councillors have spent an inordinate amount of time trying to deal with your requests to date and I had hoped that we had now reached a mutually acceptable position on the issues you had presented at our meeting.”
23. The Commissioner was correct to conclude that when considered in the light of the Appellant's sustained course of enquiries and complaints about the nursery this request for information about alarm logs for a twelve day period in 2014 was vexatious. We agree with the Commissioner that there is limited

serious purpose and public value to this request. The Appellant has made it clear in his submissions that this is a continuation of his grievances against the nursery.

Request 2

24. We have considered whether this request was manifestly unreasonable and have taken into account the context and history of those requests as set out above.
25. The Appellant has informed us that this “contamination report” does not in fact exist and was wrongly referred to and, in his view, relied upon by the Council when dealing with a planning application in respect of the nursery.
26. We have seen a copy of the Application for Planning Permission submitted on behalf of the Council in January 2014. At section 14, “*Existing Use*”, the current use of the site is described as a “*nursery school*” and in respect of the questions about contamination, it is stated that the land is not known or suspected to be contaminated, and that the proposed use would not be particularly vulnerable to the presence of contamination. The Appellant submits that there was an old oil tank which contaminated the site when it leaked “*3 or 4 years ago*”. Photographs of the pipe to the tank are in the agreed hearing bundle. Fuel oil is listed as a hazardous substance by the EU and on the Government Planning Portal. The Appellant has raised concerns that the Council’s planning process was flawed because despite his drawing the presence of the oil tank and the contamination to the attention of the Planning Committee, it appears to have proceeded on the basis that there was no contamination issue to consider. The basis of this appears to be the assertion made, either in the Application referred to above, or by the head teacher for the nursery, that there was no contamination suspected. These facts have not been disputed by the Commissioner or the Council.
27. This issue has been raised in correspondence with a member of the legal team in the Social Care and Education department at the Council, who confirmed that the nursery’s position is that there is no concern with regards

to potential contamination but did concede that she was unable to speak on behalf of the Council.

28. We have not seen any information to suggest that the Council has considered the concerns which must surround the presence of this oil tank either on or adjacent to the site of a nursery. We have considered the burden to the Council but conclude that this request is not made for the purpose of pursuing the Appellant's myriad personal grievances against the nursery but that this request does have significant public value and a serious purpose. The Council was not entitled to refuse to disclose the environmental information requested on the basis that the request was manifestly unreasonable.
29. We therefore dismiss the appeal in part, allow the appeal in part and issue a substitute decision notice.

Annabel Pilling
Tribunal Judge

1st December 2015