



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference:EA/2017/0103

**Decided without a hearing
On 13th November 2017**

Before

**FIONA HENDERSON
JUDGE**

**ROGER CREEDON
ALISON LOWTON
TRIBUNAL MEMBERS**

Between

JOHN MCGOLDRICK (OBO MERSEY TUNNELS USERS ASSOCIATION)

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject: FOIA s 14(1) vexatious
EIRs r 12(4)(b) manifestly unreasonable

Case Law:

Dransfield v Information Commissioner and Devon County Council [2015] EWCA Civ 454
IC v Dransfield [2012] UKUT 440 (AAC)

DECISION AND REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50651262 dated 2nd May 2017 which held that Mersey tunnel had correctly applied s14(1) FOIA. The Commissioner required no further action to be taken. The Tribunal has allowed the appeal for the reasons set out below.

Background

2. The Mersey Tunnels are the only road link between the Wirral and the rest of the Liverpool City region. The tolls currently amount to £41 million a year. Since 2014 the authority responsible for the Mersey Tunnels has been Liverpool City Region Combined Authority set up pursuant to the Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral Combined Authority Order 2014. The Order specifically references that Mersey Tunnel is the Executive Body and an Officer of the Combined Authority¹. Consequently the Merseyside Integrated Transport Authority (MITA) was abolished and its powers duties, rights and obligations were subsumed into the combined authority, staff were transferred to Mersey Tunnel and Mersey Tunnel was charged with undertaking functions on behalf of the Combined Authority. Mersey Tunnel operates the Mersey Tunnels on behalf of the Combined Authority and it is responsible for finance and legal advice and internal audit functions. The Tribunal has been told that Mersey Tunnel hold the information and actions EIR and FOIA requests on behalf of the Combined authority.
3. The Mersey Tunnels Users Association was formed in 2003 and campaigns against tolls, toll increases and the use made of the tunnels' tolls for non tunnels' purposes. Their aims are that tunnels money should only be used for the tunnels and that tunnels should become part of the normal road network and the tolls removed.
4. The Appeal has been conducted on behalf of the association by the Secretary of the MTUA who made a formal objection to the authority's auditors about the published accounts of the Liverpool City Region Combined Authority for 2014-15 on 8th September 2015². The auditors investigated the complaint and decided the objection. Their view was that the item of account challenged in this objection is not contrary to law³. The Appellant was informed of his right to appeal within a prescribed timescale.

Information Request

5. In correspondence relating to this objection the auditors relied upon information which the Appellant maintained was inconsistent with information previously provided to MTUA and in consequence the information request which is the subject of this appeal was made on 27th June 2016 in the following terms:

1. The auditors have said... that the Tunnels losses of £28 m “were financed by loans taken out by Merseyside Integrated Transport Authority from the Public Works Loan Board”. I do not believe that there were any such loans but assuming that your auditor is correct and such loans do exist then can you supply us with whatever information you have on these loans.

2. The auditors in another letter say that it was arranged that the “debt” be repaid in instalments with interest and that this “arrangement was agreed with the Treasurers of the five District Councils”... and also say ... when referring to the changes in the “fixed” rate of interest to “the amount of interest agreed with the District Councils”. I do not believe that there were any arrangements agreed with the Treasurers of the five District Councils nor do I believe that the interest and the

¹ Ref p 178 Mersey Tunnel Constitution 2.1

² As an individual as objections cannot be made by organisations. The Appellant had made a previous objection to this debt in the 2003-4 Accounts.

³ P123 et seq

changes to it were agreed by the District Councils but assuming that your auditor is correct then can you supply us with whatever information you have on the agreement of the five Treasurers to the arrangement and on the agreement of the District Councils to the interest and the changes to the “fixed” interest rate.”

6. In their email of 26th July 2016 Mersey tunnel observed that the term “whatever information” is extremely broad and could capture a large volume of information. The Appellant was asked to “refocus” his request and be more specific about the recorded information he was asking for.
7. The Appellant’s response of 29th July 2016 stated that:
“It is clear that my request was not a wide one and that the authority must be aware of the information that it holds which it shared with the auditor”.
From this we are satisfied that the Appellant had clarified that his request was limited to the information that was held that had been provided to the Auditors on these topics.
8. That this was the Appellant’s intention was repeated in his request for an internal review dated 1st September 2016 where he reiterates that:
*“The purpose of my email was to seek information on two areas where you had apparently supplied the auditor with information...
What we asked for was clearly defined and it should require little time to provide to us wherever [sic] you had recently given to the auditor in relation to the two parts of our request.”⁴*
9. The internal review was refused by email dated 27th September 2016 which upheld the application of s14(1) FOIA.

Complaint to the Commissioner

10. The Appellant complained to the ICO on 18th October 2016. During the Commissioner’s investigation the authority added an additional ground for refusal relying on s14(2) FOIA (that the request repeated a request by the same party in 2005 for “*all reports, agendas and minutes relating to the loan*”). The decision notice FS50651262 dated 2nd May 2017 upheld the authority’s reliance on s14(1) FOIA but concluded that s14(2) FOIA had been incorrectly relied upon. She did not require any steps to be taken.

Appeal

11. The Appellant appealed by notice dated 16th May 2017. His grounds can be summarised as:
 - a. The request should have been considered under EIR not FOIA which would require the consideration of the public interest test under EIR r12(1)(b) and the presumption in favour of disclosure under r 12(2) EIR.
 - b. The Appellant disputes that the request was vexatious or manifestly unreasonable.
12. The Commissioner opposed the appeal relying upon the contents of her decision notice but addressing some of the specific points raised by the Appellant. She was open to the possibility that EIR was engaged but argued that the information would have been

⁴ P56 Bundle

properly refused pursuant to r12(4)(b) EIRs for the same reasons relied upon under FOIA.

13. Neither Mersey tunnel nor LCRCA applied to join the appeal. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) (*Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules)*), being in receipt of an open bundle of documents comprising some 235 pages and the written arguments advanced by the parties in the pleadings and the Appellant's final submission dated 4th September 2017. In proceeding without an oral hearing the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules and has had regard to costs, proportionality and the narrow issues in this case. The Tribunal has had regard to all the documentary evidence before it, even where not mentioned directly in this decision

Scope

14. The Appellant has made written submissions to counter the Public Authority's reliance on s14(2) FOIA however, the public authority have not appealed the Commissioner's decision that they could not rely upon s14(2) FOIA. We are therefore satisfied that it is not before us and there is no issue for us to determine in that regard.
15. The Tribunal repeats paragraphs 7 and 8 above relating to the focus of the clarified request. We note that Mersey tunnel in their letter to the Commissioner dated 17th March 2017 confirmed that some information is held that is captured by the scope of the request:
"With regard to Question 1, Mersey Tunnel holds the emails that provided background information to the external auditors, KPMG. Additional guidance was, however, proved to KPMG by the then Head of Finance... by phone, and no record has been found of what that consisted of. [The then Head of Finance] has since retired from Mersey Tunnel".
16. The Tribunal is satisfied that in assessing Question 1, the public authority understood the ambit of the request and that what was being asked for was the information that had been given to the auditors.
17. In relation to Question 2 :
"...regarding the historic agreement on the loan repayment arrangements with the five local authority district treasurers, Mersey Tunnel does hold some information. This would have been, however, provided to [the Appellant] as a result of Information Tribunal appeal EA/2007/0052."
18. The submissions made under s14(2)FOIA in the same letter identify the request as being for historic information from the 1990s "*which would not have been likely to change*". The Tribunal considers that this response misunderstands the ambit of the request. Whilst it may be the public authority's case that the information given to the auditor originated in the 1990s and was the same or overlapped with information already supplied to the Appellant, to answer the request the Appellant would need to be told which documents were supplied to the auditor. The emphasis not just being upon what information on a topic exists but what information on that topic was supplied to the auditor.

The Applicable Regime

19. The Commissioner in her reply indicates that “*there is no bright line between information that falls to be considered under EIR and under the FOIA. The Commissioner considers that the issue of the applicable regime is finely balanced*”⁵. In the case of *Dransfield v Information Commissioner and Devon County Council [2015] EWCA Civ 454*⁶ the Court considered whether there is any difference between "vexatious" (section 14(1) FOIA) and "manifestly unreasonable" (regulation 12 (4)(b) EIR) and concluded that if (as they did) they took the approach to section 14 that it “*...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*”.
20. Neither the Commissioner nor the Tribunal have viewed the information identified as in scope by the public authority. We are satisfied that there is no need to in order to determine this appeal. The Commissioner accepts that she cannot rule out the possibility that Mersey Tunnel hold some information within the scope of the request that is environmental for the purposes of EIR. The Commissioner’s argument is that to the extent that regulation 12(4)(b) EIR is applicable it is engaged as the Request is manifestly unreasonable for the same reasons that it is vexatious. She then goes on to consider the public interest test.
21. The Tribunal agrees that it is possible that all or some of the information in scope is environmental for the purposes of EIR and the Tribunal has adopted a similar approach to the Commissioner in that it has applied both s 14(1) FOIA and r 12(4)(b)EIRs in its consideration of this information request. In light of our findings below that neither exemption is engaged (regardless of the applicable regime) we are satisfied that it is not proportionate for us to seek further information to enable us to determine the definitive regime for any/all of the information in scope.

Vexatious Requests

22. S14(1) provides:
- (1)Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*
- Parliament has expressly declined to define the term "vexatious". The issue was considered in detail in *Dransfield v Information Commissioner and Devon County Council [2015] EWCA Civ 454* which quoted at length and with approval from the Upper Tribunal decision in the same case. The Upper Tribunal in *Dransfield* took as its starting point that a request was not vexatious simply because it was annoying and irritating. It had also to be without justification:
- "the key question is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause" provides a useful starting point, so long as the emphasis is on the issue of justification (or not).*"⁷ They analysed the definition of “vexatious” by reference to four broad issues:
- a) The present or future burden on the public authority,
 - b) The motive of the requestor

⁵ P39 bundle

⁶ Paragraph 78

⁷ Para 26 UT decision

- c) The value and serious purpose of the request.
- d) Whether the request caused harassment or distress to staff.

The Tribunal considers these factors to be a helpful framework to structure its consideration of whether the request was vexatious but has had regard to the fact that it is not intended to be an exhaustive definition or a checklist for determination of this issue.

23. The factors above are considered in the context that the Court of Appeal held 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”*.⁸

The present or future burden on the public authority

24. The Upper Tribunal in *Dransfield* considered the burden (on the public authority and its staff). Although the decision notice appeared to acknowledge that the request was confined to the information provided to the auditor, the Public authority’s assessment of question 2 suggests that they have not reduced the scope. It is notable that in her submissions the Commissioner also does not appear to have taken into account the clarification of the scope of the request and states: *“the Request is broadly worded and specifically seeks “whatever information“ Mersey Tunnel have on certain loans and agreements”*. Despite their view of the scope of the request Mersey Tunnel acknowledge that the request is *“if taken in isolation, a fairly routine one that would not be likely to cause any additional detrimental impact than any other enquiry Mersey Tunnel receives”*⁹. The Appellant argues that as the information was sent to the auditor it ought to be “to hand” and readily identifiable. As set out above the Tribunal is satisfied as to the narrow scope of the requests and we are satisfied that there would be no significant burden in responding to the scope of the request as it currently stands.
25. Assessment of the impact and administrative consequence of a request also requires consideration of the context of a request, the number, breadth, pattern and behaviour of previous requests¹⁰ in assessing distress, disruption and irritation. On the facts of *Dransfield* there was a considerable burden on the authority from past correspondence with the prospect of a future “barrage” of further correspondence. Mersey Tunnel’s submissions to the Commissioner in their letter of 17.3.17 included the following points:
- The Appellant has made requests under FOIA since the legislation came into force in January 2005 with the enquiry that resulted in EA/2007/0052 (the Tribunal observes that this was a request where the Tribunal ordered disclosure of information to the Appellant).
 - Since January 2013 he has submitted a total of 22 requests to Mersey Tunnel on the subject of the Mersey Tunnels; of these 14 either resulted in one or more follow up enquiries, while five resulted in a complaint to the information Commissioner.
 - They concluded that it was reasonable to expect that any response provided will simply lead to further requests and Mersey Tunnel is entitled to consider the totality of the burden when considering how to respond appropriately.

⁸ Paragraph 68 C of A decision

⁹ P89 bundle

¹⁰ Para 28 UT

26. In taking this evidence into account, the Commissioner appears to have relied upon the quantity of correspondence without having regard to its content and in particular whether any requests were reasonable, the nature of any follow up and their outcome. The mere fact of multiple requests and follow up requests in our judgment is not enough and we would ordinarily expect a summary or log of the correspondence to demonstrate the way in which it was burdensome and beyond the realms of the reasonable scrutiny that can be expected. We note that beyond the statistics as set out above, Mersey tunnel's direct evidence on the point was dated and incomplete. Mersey tunnel also rely upon other correspondence and contact that the Appellant has had over many years in support of their assertion of the burden associated with dealing with the request. There is no dispute that in addition to information requests the Appellant has sought to engage with the public authority over issues relating to the Mersey Tunnels including face to face meetings, challenges to accounts, and correspondence with Councillors.
27. In assessing the weight to be given to Mersey tunnel's evidence we take into account that:
- i. The Appellant acts on behalf of a pressure group representing the users of the tunnels,
 - ii. Use of FOIA is an important statutory right and an appropriate channel to seek information from a public authority, the mere fact of its use without more cannot be sufficient to make a request vexatious.
 - iii. In assessing the number of requests and the forums of challenge and types of correspondence the Tribunal takes into account the levels of scrutiny that an organisation can reasonably expect. In this case large sums of money are involved, a large number of people use the tunnel and the tunnels have been operating over many decades in support of its conclusion that it is reasonable that there are likely to be multiple issues of interest that arise of relevance to the work of the MTUA and their members and that a large number of requests on its own does not necessarily indicate that the requests are unreasonable or burdensome.
 - iv. It is to be expected that requests handled by Mersey Tunnel in light of their remit would have the broad subject of Mersey Tunnels as their focus.
28. Mersey Tunnel have provided a letter dated 17th April 2014¹¹ which provides some detail of six information requests that were in play at that time. The Tribunal notes that these cover diverse topics including: requests for copies of accounts, information about the applicability of RIPA powers by Mersey Tunnel and an understanding of the makeup of published figures. Even on a statistical analysis more than 1/3 of the requests relied upon by the Commissioner did not lead to any follow up requests. Although there are examples of some follow up requests in the letter these can often be categorised as clarification of what is held, or whether the figures are final. The Appellant's reasons for seeking the clarification are apparent from the context (e.g. an updated figure has been provided indicating that the original figure was not final, or the format has changed reducing the amount of information provided) and do not in our judgment show a lack of focus or the request becoming increasingly distant from the requester's starting point.¹²

¹¹ P96 bundle

¹² which UT Judge Edwards had called "vexatiousness by drift" *Wise v Information Commissioner and Dorset County Council* GIA/1871/2011

29. Whilst it is true that when a request has been answered the Appellant often concludes by sending his comments on the information received, in our judgment that is not enough to make the request itself burdensome and is part of the wider dialogue to be expected between a public authority and a user group seeking to hold them to account. We note that Mersey Tunnel have incorporated the Nolan principles into its constitution with the consequential obligations of accountability and openness. There is no evidence from Mersey Tunnel to suggest that the Appellant's conduct has altered and indeed the Appellant has given some detail¹³ of the nature of the information requests that he has been involved in since 2003 to date. Whilst this is not complete, in that it does not log the extent of any follow up correspondence, the Tribunal notes that it is consistent with the Tribunal's analysis of the 2014 letter in relation to the diverse subject matter, and reasons for follow up requests when they occur.¹⁴

The motive of the requestor and the value and serious purpose of the request

30. Pursuant to *Dransfield* the Tribunal has had regard to the motive (of the requester), the value and serious purpose and the underlying rationale or justification for the request. In this case there is such an overlap between these factors that we have dealt with them together. Before the Commissioner Mersey Tunnel argued that:

- i. The need for accountability had been satisfied by the findings of the external auditors through the proper process.
- ii. The Appellant was attempting to audit the work of the auditor (and since they are required to carry out their work with integrity, objectivity etc. this displays unreasonable intransigence),
- iii. The proper avenue for pursuing concerns about the loan and repayment levy is through the Courts.
- iv. Mersey tunnel assert that some of the information requested "*would have been, however, provided to [the Appellant] as a result of Information Tribunal appeal EA/2007/0052*". This is inconsistent with their assertion in the internal review that "*Mersey Tunnel is not stating that you are already in possession of the requested information*"¹⁵. This amounts to a bare assertion and no assistance can be found in the Tribunal decision which does not mention either PWLB or an agreement with the district Councils. The Tribunal takes into account the unsatisfactory evidence relating to information the Appellant has previously been provided with which amounts to the recollection of what a current member of staff (who had not been present at and was not aware of the contents of any meetings or conversations) had been told by a former member of staff¹⁶ and on balance prefers the Appellant's evidence on this point.

31. The Commissioner concluded that this request represented a continuation of the Appellant's previous correspondence with the auditors about his objections to the statement of accounts for 2014/15. She took into consideration that the Appellant had made a statutory objection the auditors having then published updated findings and a decision in May 2016. The Appellant had the opportunity to appeal but did not. The Commissioner considered this an attempt to reopen an issue that has been the subject

¹³ P 23 and p 27-8 bundle

¹⁴ P 23 bundle

¹⁵ P63

¹⁶ P60

of independent scrutiny and that therefore the persistence can be reasonably described as obsessive¹⁷.

32. The Commissioner stated:

“Despite the information provided [he] remains entrenched in his view that the current tolling arrangements¹⁸ are illegal and tolls should be removed altogether”. Although he has been provided with the legal advice received by Mersey Tunnel previously we observe that this has not been tested in a Court of law, is not therefore definitive and the Appellant and those he represents are entitled to disagree. Equally, we would not expect a pressure group that has been set up to challenge an approach to an issue to be dissuaded from that view based upon the receipt of financial and other factual information supplied under FOIA by the public authority that takes the opposing view and do not consider this to meet the threshold for concluding that a request is motivated by obsession. In reaching this conclusion we also take into consideration the time that has elapsed between requests directly related to this topic and note that the issue has remained live throughout that period due to the timetabling of the repayments.

33. The Appellant argues that it would have been apparent that the purpose of the request was not to reopen a matter already decided, as the possibility of pursuing the objection lapsed near the end of June 2016 a day or two after the request was made and it was virtually impossible that a substantive answer would be received in time to affect a decision to appeal¹⁹. The deadline for appeal had expired by the date of the clarification of the scope of the request. In the internal review Mersey Tunnel acknowledged that the official objection process was concluded but argued that the Appellant was attempting to revisit the issues that were thoroughly investigated by the auditor.

34. The Appellant disputes this and we accept his evidence and arguments on this point. He relies upon the role and purpose of the MTUA to challenge the contention that the requested information would be of little wider benefit to the public. His evidence is that the MTUA has a website that publishes news, it issues press releases and the MTUA gives local radio and TV interviews. The Tribunal understands the Appellant’s argument to be that in light of this role there is a value and a seriousness in the MTUA correcting anything they may have misunderstood and ensuring that the information they provide and the arguments they mount are factually sound. In his submissions the Appellant acknowledges that:

- It is possible that his previous information and understanding was wrong.
- The request arose because letters to MTUA from the auditors indicated that there might be information that the MTUA were not otherwise aware of.

Whether the request caused harassment or distress to staff

35. The Tribunal has also considered whether the request constitutes harassment or causes distress (of and to staff) through intemperate language, or makes unsubstantiated allegations or contains abuse. We note that in *Dransfield* previous requests had been *“belligerent and unreasonable.”* Mersey Tunnel takes exception to the Appellant’s assertion that *“I do not believe that there were any such loans...”* the Appellant has

¹⁷ Para 46 DN

¹⁸ The Appellant’s case is that he challenges the legality of the levy repayments rather than the legality of tolls.

¹⁹ Request for internal review 01.09.2016 p55

explained in his submissions that it is the identity of the lender which has taken him by surprise and that he is not aware from previous disclosures that a loan has been taken out from the Public Works Board. As set out above that is his current understanding but he is prepared to acknowledge that he might be wrong and writes on the assumption that the auditors are right. In our judgment this does not meet the threshold.

36. Taking our analysis as above into account we do not agree with the Commissioner's conclusion that the value and purpose is outweighed by the burden associated with dealing with the request and associated correspondence.²⁰ We are satisfied therefore that the request does not fall within s14(1) FOIA.

EIR

37. We have gone on to consider whether the request would fall within Regulation 12(4) EIRs which provides that a public authority may refuse to disclose information to the extent that— ...

(b) the request for information is manifestly unreasonable;

We are satisfied that the request was not manifestly unreasonable for the same reasons that we have concluded that it was not vexatious. In light of our determination that r12(4)(b) EIR is not engaged we have not gone on to consider the balance of public interest.

Conclusion

38. The Appeal is allowed and Mersey Tunnel are directed to disclose the information or provide a refusal notice under s17 FOIA/r14 EIRs within 35 days. This decision is unanimous

Dated this 20th day of November 2017

Signed

Fiona Henderson

First Tier Tribunal Judge

²⁰ Para44 Reply