First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2018/0051

Heard at Bristol Civil and Family Justice Centre
On 10 July 2018

Before

JUDGE HAZEL OLIVER
MRS SUZANNE COSGRAVE
MS ALISON LOWTON

Between

MR MICHAEL FEARON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

The Appellant – in person
The Information Commissioner did not attend

DECISION

The appeal is dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 14 February 2018. It concerns information sought from the Environment Agency ("EA") under the Environmental Information Regulations 2004 ("EIR") relating to the management of flood risk and water flow in the area where the appellant owns a property, Tickenham Mill.

2. Tickenham Mill is a watermill, which is served by Mill Leat. This is situated in the Land Yeo. The appellant uses the water flow in Mill Leat to generate electricity. The EA uses boards to control the flow of water in the Land Yeo watercourse, in order to manage flood risk and water levels. In the winter, the boards are raised in order to avoid flood risk. When the boards are raised and there is a low flow in the watercourse, this decreases the flow in the Mill Leat and can mean that the appellant's hydropower turbine cannot operate. The appellant is in dispute with the EA about the raising of the boards, including a potential claim for compensation.

3. There has been a significant amount of correspondence between the appellant and the EA about this issue, and a number of meetings have taken place. The appellant has made many requests for information, and the EA has provided a substantial amount of information in response to these requests. This included a monitoring report which was provided to the appellant on 10 August 2017 (the "Monitoring Report"). He was also sent a modelling report on 4 September, which was a report created for the appellant's locality based on a wider JBA report (the "Modelling Report").

4. The requests in issue in this appeal were sent between 8 and 24 August 2017, and requested the following information:

a. "Other instances where prosecutions have been commenced for offences relating to water abstraction, particularly in cases which have failed to secure a conviction, should the numbers be so large as to be unmanageable" (8 August 2017) – "**Prosecutions**".

b. A copy of the 2012 JBA report referred to in the monitoring report received 10 August 2017 (10 August 2017) – "**JBA Report**".

c. Photographs of the channel taken during significant rainfall (11 August 2017) – "**Photographs**".

d. "I have previously requested disclosure of the terms of reference for this [monitoring] report, and all correspondence related to it. You have not provided this, although the report is now finalised. I would remind you of that request and I would also like to see copies of the drafts which have been subsequently amended" (13 August 2017) – "**Monitoring Report Correspondence and Drafts**".

e. "Please add the following [to the email request of 13 August] all notes memoranda and other information related to this exercise, I want to ensure the request is comprehensive and covers all material related to the report" (15 August 2017) – "**Monitoring Report Other Information**".

f. "Please supply all information held by the Agency related to the designation of the Land Yeo as Main river. Also all information related to the designation of the "Short Mill Leat" (as you described it) at Tickenham Mill as Main river" (19 August 2017) – "**River Designation Information**".

g. With reference to the model from the JBA report, "If it is a separate exercise could I please have copies of the results and any associated correspondence or other material" (24 August 2017) – "**JBA Model Information**".

5. The EA responded to all of these requests on 30 August 2017. They declined to provide any of the requested information, relying on the exemption in regulation 12(4)(b) of the EIR which allows a public authority to refuse to disclose information to the extent that the request is manifestly unreasonable. The EA stated, "*This is because of the disproportionate burden placed on resources due to the number and frequency of requests for information from you relating to abstraction, penning and associated issues at Tickenham Mill. This includes, but is not limited to, receiving multiple questions or contacts in one day and further questions on each response we make to you, often within hours*".

6. The appellant requested an internal review on 30 and 31 August 2017. He referred a complaint to the Information Commissioner on 7 September 2017. The EA notified the appellant of its findings on the internal review on 27 October 2017, which upheld its original decision. This review did confirm that the Photographs as requested on 11 August 2017 were provided to the appellant on 18 September 2017. The appellant complained to the Commissioner about this response on 5 November 2017, and the Commissioner then carried out a full investigation.

7. The Commissioner issued her Decision Notice on 14 February 2018. The Commissioner decided that the section 12(4)(b) exemption was engaged. The EA has stated that it only keeps records of such requests for 12 months, so it was only possible to confirm that six previous requests had been made on this subject. However, the Commissioner also took into account the significant amount of correspondence between the appellant and the EA since 2015, including 60 separate emails from the appellant between 1 December 2016 and 31 July 2017 which required a response and often generated further questions. The seven requests in issue were made within days of each other, and the appellant also sent other chasing emails at the same time. The Commissioner noted that the EA had informed the appellant of its final position and had advised him to refer the matter to the Local Government Ombudsman. The Commissioner therefore considered that the requests were likely to cause a disproportionate or unjustified level of disruption to the EA. In relation to serious purpose and value, the Commissioner considered that the requests had limited value to the wider public, noting that the requests all stemmed from management of the boards near the appellant's property which affected his ability to generate electricity to sell.

8. In relation to the public interest test, the Commissioner considered that the public interest arguments in favour of disclosure were limited. The information was pursued for private commercial and personal reasons. In light of the time and resources already dedicated by the EA to the issues raised, the Commissioner did not consider it was in the public interest for the EA to continue responding to requests for information relating to the same topic. This would divert officers and public funds away from the EA's statutory functions and the protection of the environment.

The Appeal

9. The appellant appealed against the Commissioner's decision on 12 March 2018. The appeal is put under four main headings:

a. The context of historic communications between myself and the EA should lead to a conclusion that the requests were not vexatious.
b. The Commission has not properly recognised the Public Interest in Disclosure.

c. The Commission has incorrectly concluded that the EA's final decision was known at the time these requests were made, and that the correct route to redress was the Local Government Ombudsman.
d. The issue of Proportionality should take account of the costs in relation to my losses, and the EA's resources.

10. At the hearing, the appellant put his argument somewhat differently. His main argument was that he required this information in advance of a meeting with the EA on 19 September 2017, in order to be able to argue his case at that meeting. The appellant understood that the purpose of this meeting was to have a constructive discussion in order to reach an agreed position.

11. The appellant confirmed that the current position in relation to his various requests is as follows:

a. Prosecutions – this information is still sought by the appellant.
b. JBA Report – this was provided to the appellant in its entirety at a later date.
c. Photographs – these have since been provided to the appellant.
d. Monitoring Report Correspondence and Drafts – this information is still sought by the appellant.
e. Monitoring Report Other Information – this information is still sought by the appellant.
f. River Designation Information – this request has since been withdrawn.
g. JBA Model Information – this request has since been withdrawn.

We note that we are considering whether the requests were vexatious in their entirety at the time they were made, rather than the current position.

Applicable law

12. There are references in the documents to both EIR and Freedom of Information Regulations 2000 ("FOIA") requests. The Tribunal is satisfied that this matter engages the EIR only, and we have dealt with the case on that basis. "Environmental Information" is defined in Regulation 2(1) of the EIR - expressly covering the state of elements of the environment including water, and measures likely to affect these elements.

13. The relevant provisions of EIR are as follows.

5(1) …a public authority that holds environmental information shall make it available on request."

……

12(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.

12(2) A public authority shall apply a presumption in favour of disclosure.
…..

12(4) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that –

……

(b) the request for information is manifestly unreasonable;

14. There is no further guidance on the meaning of "manifestly unreasonable" in the legislation. The leading guidance on the meaning of the parallel term "vexatious" in FOIA is contained in the Upper Tribunal ("UT") decision in ***Information Commissioner v Dransfield*** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal ("CA") in ***Dransfield v Information Commissioner and another & Craven v Information Commissioner and another*** [2015] EWCA Civ 454 (CA). Arden LJ confirmed in the CA decision in ***Dransfield*** that to all intents and purposes "manifestly unreasonable" in the EIR means the same as "vexatious" in FOIA.

15. As noted by Arden LJ in ***Dransfield***, the hurdle of showing a request is vexatious is a high one: "…*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.*" (para 68).

16. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*." (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

17. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. *"…the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor*." (para 29).

b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority*." (para 34).

c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).

d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes side-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive*." (para 39).

18. Overall, the purpose of the exemption is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*." (UT para 10), subject always to the high standard of vexatiousness being met. This applies equally to the question of manifest unreasonableness under the EIR.

Evidence and submissions

19. We had an agreed bundle of open documents, which we read in advance of the hearing. We also heard oral submissions from the appellant in open session. We have taken all of this material into account in making our decision, and we set out the appellant's arguments in the discussion below.

Manifestly unreasonable

20. We start with considering the four broad issues set out by the UT in Dransfield.

21. **The burden imposed on the public authority by the request.** The appellant sent seven separate emailed requests between 8 and 24 August 2017. These were in addition to other emails sent around the same time chasing for answers in relation to other issues. The appellant explained that all of these requests were for the purpose of the upcoming meeting on 19 September. He also explained that many of them were in response to the Monitoring Report sent to him on 10 August. He acknowledges that in hindsight it may have been better to wait and put all of the requests into one document. He said that he was raising queries as they arose when he was reading the Monitoring Report, which he had to do quickly because it was provided to him later than promised.

22. Although the appellant says that the requests relate to his queries about the Monitoring Report, we note that he also provided a lengthy (four page) response to the Monitoring Report on 11 August 2017, which asks for comments under 15 numbered paragraphs.

23. The previous course of dealings between the parties are clearly relevant to this issue. There was a long-running dispute between the appellant and the EA about how the boards should be managed. Although information requests beyond 12 months were not available, we note the Commissioner's findings that there had been some 60 separate emails from the appellant between 1 December 2016 and 31 July 2017, which required response and often generated further correspondence. This was a very considerable volume of correspondence for the EA to deal with on a single issue. The history of the appellant's queries also indicates that a response to these requests was extremely likely to have generated further questions and requests for information, rather than concluding the matter.

24. The position at the time of the requests is also relevant. As recorded by the Commissioner, the EA says that a final decision had been made, and the appellant's next option was to refer the matter to the Local Government Ombudsman. The appellant disputes this. He says that

the final decision was not known to him, and he had expected the meeting of 19 September to be an opportunity to discuss and agree the way forward.

25. We have seen the correspondence relating to this meeting. The EA's letter of 12 July 2017 to the appellant records 41 email exchanges from January 2016, the majority of which have involved detailed and complex questions and answers, and a meeting is proposed as a better way to address these outstanding issues. The purpose of the meeting is stated as, *"…to directly address the issues in those General Enquiries that have not yet been resolved and your outstanding complaint Wessex/2796*". A follow-up letter from the EA of 4 October 2017 states that the meeting had been arranged, "*to provide you with an opportunity to speak to the relevant Environment Agency Officers regarding decisions on the operation of Tickenham Mill Boards in Somerset*". The letter records the EA's position at the meeting that they were not going to change the operation of the boards, and the appellant's opportunity to raise points "*to help you understand how we reached those decisions*". We find from this correspondence that the purpose of this meeting was to help the appellant understand how the EA had reached its decision. This decision had already been made. It was not a meeting at which the parties would discuss their positions and reach agreement on the way forward. We accept that the appellant may have misunderstood the purpose of the meeting, but we do not agree that the information requested was necessary in advance of the meeting for the purpose of preparing his position.

26. This correspondence also shows that the EA was trying to manage the volume of requests for information from the appellant by organising a meeting at which all his queries could be discussed. This was an attempt to draw a line under the matter and prevent further volumes of complex queries. It would be a significant burden on the EA to require them to respond to a further seven separate requests sent after this meeting had been arranged.

27. **The motive of the requester.** We accept that the appellant genuinely wanted this information for the purposes of his ongoing dispute with the EA, and the requests were not sent with a deliberately vexatious or otherwise improper motive. However, sending this number of separate requests was an unhelpful approach in circumstances where a meeting had been arranged to discuss all outstanding queries and limit the volume of ongoing correspondence.

28. **The value or serious purpose.** The appellant's main purpose in making these requests, as explained at the hearing, was to obtain more information to help him prepare for the meeting on 19 September. They all related to his personal disagreement with the EA about the management of the boards near his property. This disagreement clearly arises from the effect of the EA's policy on the appellant's own ability to generate and potentially sell electricity, rather than an issue of wider public interest. As explained above, we have found that the appellant misunderstood the purpose of this meeting, and he did not actually require this information to prepare his case because a final decision had already been made by the EA.

29. At the hearing, the appellant argued that at least some of his requests were directed at openness and transparency in how the EA had prepared the reports it relied on, which is an issue of public interest. In particular, his requests for drafts of the Monitoring Report and the JBA Report. The appellant referred to various emails which he said indicated the report had been written to justify the EA's position. He refers to the use of the phrases "*justification*" for winter penning levels. He also refers to emails about the draft report – "…*just let me know of any amendments that you would like to be made to the report, especially anything that you may feel makes things difficult for the EA*", and "*we also need to make sure that there is nothing in the report that could create problems later on*".

30. We accept that there may be a public interest in disclosure if there is a plausible suspicion of wrongdoing, and this would be the case if there was evidence that the EA had deliberately manipulated the results of an objective report in order to justify its position. However, we do not agree with the appellant that the emails referred to provide evidence of such wrongdoing. "Justification" is a common term and does not necessarily indicate manipulation of results, and the reference to not creating "problems later on" is an obvious consideration for a published report and could refer to many things. Similarly, amending anything that "makes things difficult for the EA" is not evidence of wrongdoing, and could refer to many types of difficulty – not necessarily a difficulty in contradicting the EA's previous position. We also note that these emails were in fact only seen by the appellant after his requests had been sent. In addition, we note that draft materials and internal communications would not normally be disclosable under the EIR in any event (Regulations 12(4)(d) and (e)).

31. The appellant also argued in his appeal document and final response that his requests relate to hydropower generation and flood prevention, which are both issues of wider public interest. We accept that these general issues are both of significant public interest. However, the appellant's requests were not directed at the EA's general policy on these issues – they were focussed on the appellant's personal dispute with the EA about his own property. Although this did relate to hydropower generation by the appellant himself, the appellant's main concern was the effect on his own water mill rather than wider issues concerning renewable energy and/or flood prevention.

32. **Any harassment of, or distress caused to, the public authority's staff.** The appellant has expressed himself appropriately in the correspondence we have seen. Although the volume of correspondence in this case may have been difficult for individuals at the EA to deal with, harassment of or distress to staff is not a significant factor in this case.

33. **Conclusions on manifestly unreasonable.** Taking all of the above matters into account, we agree with the Commissioner's position that these requests were manifestly unreasonable at the time when they were made. The EA had attempted to bring an end to the volume of complex correspondence by arranging a meeting to address the appellant's queries, and the appellant nevertheless sent seven further requests for information (in addition to a lengthy response to the Monitoring Report and correspondence following up on other matters). It would be a significant burden on the EA in the circumstances to require them to respond to these seven requests. The appellant's main purpose in making these requests was misguided as he had misunderstood the purpose of the meeting, and the public interest in the information was not significant. Looked at in the round, these requests were a disproportionate use of the EIR.

34. For completeness, we find that the issue of proportionality is not affected by the costs in relation to the appellant's losses, as argued in his appeal document.

Public interest balance

35. Under Regulation 12(1), even where a request is manifestly unreasonable, the information requested can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

36. The main public interest behind the exception is the protection of the public authority's resources, including time. Although public authorities are expected to spend time in responding

to requests for environmental information, there comes a point where this is disproportionate and so not in the public interest. All public authorities, including the EA, have limited resources which must be managed in the best way for the benefit of the public.

37. In this case, the public interest in maintaining the exception is significant. The appellant had already sent numerous queries about the same topic, and the EA had spent considerable time in dealing with complex requests for information. The EA had set up a meeting to address outstanding matters and limit the need for further correspondence, which was a proportionate way to deal with the appellant's concerns. It would clearly not be in the public interest to divert further resources in answering additional requests for information from the appellant in these circumstances. This is particularly the case as the EA had already reached a final decision, and the appellant had the option of referring the matter to the Local Government Ombudsman.

38. The public interest in maintaining the exemption does outweigh any public interest in disclosing the information. As discussed above, this was essentially a private dispute between the appellant and the EA about the effect of the EA's policy on his property. We have seen no evidence to indicate possible wrongdoing by the EA, which might make some of the appellant's requests in the public interest. Although both hydroelectric generation and flood management are issues of public interest, the requests here are focussed on the appellant's private dispute and were only indirectly related to these wider issues.

Conclusion

39. The requests for information were manifestly unreasonable and the public interest in maintaining the exception outweighs the public interest in disclosing the information. We uphold the decision of the Commissioner and dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 20 July 2018