



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**EA/2018/0109**

**MARGARET VESCO**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: Judge Brian Kennedy  
Alison Lowton  
Andrew Whetnall**

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**DECISION**

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**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) and Regulation 18 of the Environmental Information Regulations (“EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 3 May 2018 (reference FER0664897) which is a matter of public record.

**[2]** The Tribunal Judge and lay members sat to consider this case on 24 September 2018.

## **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, Ms Vesco's request for information and the Commissioner's DN are not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Government Legal Department ("GLD") was correct to characterise Ms Vesco's request as vexatious.

### **CHRONOLOGY**

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|--------------|---|
| Nov 1998     | Appellant raises concerns with Midlothian Council re neighbour's gas flue   |
| Nov 2011     | Appellant raises same complaint with Health and Safety Executive (HSE)  |
| 2 Dec 2011   | HM Principal Inspector of HSE responds explaining limits of statutory powers  |
| 17 Jan 2012  | HSE regional director explains limits of enforcement powers without risk to health  |
| 23 May 2013  | Appellant's request to HSE regarding risk measurement and enforcement procedures, which was deemed vexatious                                |
| 3 Feb 2014   | Commissioner's decision upholding HSE's refusal, citing vexatiousness   |
| 3 Oct 2014   | FTT upholds HSE's refusal, citing vexatiousness   |
| 22 Oct 2016  | Subject request for details of enforcement authority for 1999 Gas Safety Regulations and enforceability of British Standards flue emissions |
| 26 Oct 2016  | GLD informs Appellant it is looking for right organisation to reply to query  |
| 24 Jan 2017  | Appellant contacts Commissioner, complaining of lack of substantive response  |
| 2 Feb 2017   | Refusal, as relates to concluded correspondence with HSE  |
| 7 Feb 2017   | Appellant poses series of questions to GLD's Health and Safety Advisory team on same topic  |
| 15 Feb 2017  | GLD repeats position as of 2 February   |
| 20 Feb 2017  | Appellant writes to GLD's complaints group, saying the GLD " <i>needs serious investigation</i> "   |
| 8 March 2017 | GLD wrote to Appellant citing history and stating that neither HSE nor GLD were prepared to correspond further on the matter                |

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|---------------|--|
| 12 April 2017 | Formal refusal, citing reg.12(4)(b)  |
| 2 May 2017    | Appellant requests internal review   |
| 9 May 2017    | GLD acknowledges request and promises response within 40 days  |
| 12 May 2017   | Appellant requests information about the internal review   |
| 16 May 2017   | GLD provides information re nature and purpose of internal review  |
| 20 May 2017   | Appellant asks further questions of review, highlighting that it is a criminal offence to change or delete information following a request |
| 2 June 2017   | Internal review upholds refusal under reg.12(4)(b)   |
| 5 July 2017   | Complaint to the Commissioner  |
| 3 May 2018    | DN upholding the refusal   |

### **RELEVANT LEGISLATION:**

#### **Environmental Information Regulations 2004**

##### ***Regulation 2***

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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;

##### ***Regulation 5 - Duty to make available environmental information on request***

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 12 - Exceptions to the duty to disclose environmental information**

(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) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person—
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

### **COMMISSIONER'S DECISION NOTICE:**

[4] The unhappy history of the Appellant's requests for information from public authorities arising from a dispute over her neighbour's flue was previously the subject of adjudication by the Commissioner (DN FER0519055). In that case, given the background and nature of the communications, the Commissioner decided that the HSE had correctly applied reg.12 (4)(b), and was not obliged to correspond substantively with the Appellant any further on the issues she had raised. This decision was upheld by the First Tier Tribunal (EA/2014/0065)

[5] The present case is unusual, insofar as a public authority (i.e. the GLD) is relying to a large extent on the Appellant's contact and behaviour with another public authority (i.e. the HSE) on a singular issue. The information requested from the GLD is almost identical to that requested from the HSE previously. The request itself, on its face, is not without merit, and there is a public interest in clarifying the enforcement of a regulation relating to public safety. However, the Commissioner was of the opinion that the Appellant was in reality pursuing an issue that had been addressed in direct correspondence with her by relevant bodies over a period of prolonged interaction with the HSE, and as such the request is manifestly unreasonable.

### **GROUND OF APPEAL:**

[6] The Appellant headed her Grounds of Appeal with an emphasis on the necessity of the independence of tribunals. She claimed that the Commissioner had focused unduly on her identity, which she argued was irrelevant, whilst ignoring the importance of the Regulations and compliance with them. The Appellant provided information about the lengths she had gone to since 1998 seeking information from various public bodies on this issue. She denied that it was manifestly unreasonable to want to protect the public from dangerous emissions or to expect public authorities to carry out their enforcement duties accordingly. The Appellant denied that her case was comparable to the *Dransfield* decision, as she was seeking information on a single issue. She also emphasised the importance of access to environmental information as highlighted in the Aarhus convention.

## **COMMISSIONER'S RESPONSE:**

[7] As the basis of the Commissioner's decision was the Appellant's dealings with a different statutory body than the recipient of the present request, she set out the relationship between the GLD and HSE. GLD is a non-ministerial governmental department, which acts as the government's principal legal advisors. HSE is a client of GLD in both a general sense as an executive non-departmental public body sponsored by the Department of Work and Pensions, and in the sense the GLD has been advising HSE on the issues regarding the Appellant's requests. Given that the requests are on the same subject, and GLD has been involved throughout the process of the previous determination of vexatiousness, it appeared apposite to the Commissioner to consider the previous context as relevant. She cited Carpenter v ICO [2010] RVR 195, which confirmed that the history and context of requests could give apparently reasonable requests the quality of vexatiousness. A holistic approach is required to discover whether, when there is a previous course of dealings, there is "a lack of proportionality that typically characterises vexatious requests".

[8] In this case, the Appellant felt that the HSE had not dealt adequately with her requests. As she was now prohibited by virtue of the previous findings of the Commissioner and Tribunal from pursuing the HSE, the Commissioner states that the Appellant is now attempting to circumvent the prohibition by requesting that the GLD ignore the approach taken by its client, HSE. Her queries have been addressed at length over a substantial period of time by relevant public bodies, and attempts to re-open issues that had already been disputed numerous times can be vexatious: Fortune v IC and National Patient Safety Agency, IT, 16 April 2008.

[9] The public interest, in the view of the Commissioner, lay in maintaining the exemption. While there is a presumption of disclosure, there is an interest in ensuring that the Regulations function effectively, with integrity, and are not abused. The Appellant's interests relate solely to her neighbour's flue and not to wider gas safety. HSE provided substantive answers to her early questions about gas safety, and continued to correspond with her until such a point was reached that continuing correspondence was unhelpful and unnecessary. Her approach has already been characterised as manifestly unreasonable, and it is argued that it is not in the public interest to facilitate the exposure of a related public body to this behaviour.

## **TRIBUNAL FINDINGS:**

**[10]** Prior to the commencement of the hearing, the panel took time to explain to the Appellant that panel members were independent of government and were acting as members of the judiciary independent of the executive. The Appellant accepted this and agreed to proceed with her appeal before the panel.

**[11]** It is common case that there has been a very long and protracted correspondence between the Appellant and various public authorities on this subject, dating back to 1998. The Appellant herself details this previous correspondence, and sees it as a relevant consideration as it highlights the importance to her of the issues at hand.

**[12]** Nevertheless, it is this long history of correspondence that has, in the view of this Tribunal, rendered her requests vexatious. She had already identified that the HSE was the body responsible for providing her with the information she sought, and this is and has been a clear attempt to circumvent the rulings of the Commissioner and the Tribunal in 2004. This appeal amounts in essence to being a repeat performance before a different Public Authority. While we are sympathetic with her plight in her difficulty in getting satisfaction or action about her concern, we accept, and adopt the Commissioner's reasoning that it is another vexatious request. We took time at the hearing to explain in detail the position to the Appellant and suggested that there may be other legal remedies against her neighbour or means of redress but it is not within the remit of this Tribunal to find her a solution to her dilemma.

**[13]** Accordingly we do not find that the Commissioner has erred either in fact or in Law and we dismiss this appeal and make no further order.

Signed: Brian Kennedy QC

Date: 19 October 2018

Promulgation date: 29 October 2018