IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0096**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0347432
Dated: 15 March 2011

Appellant: **Mr & Mrs Walker**

Respondent: **Information Commissioner**

Date of oral hearing: **4 October 2011**

Before
Melanie Carter
(Judge)

and

Richard Enderby
Jacqueline Blake

Subject:

Regulation 12(4)(b) Environmental Information Regulations – request manifestly unreasonable

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the Decision Notice

REASONS FOR DECISION

Introduction.

1. This appeal arises from a letter of request from the Appellants, Mr & Mrs Walker, under the Environmental Information Regulations 1998 to the Environment Agency ("EA"). The letter of request dated 12 April 2010 asked for a list of information concerning a watercourse in Derbyshire and the EA's involvement in alleged damage to and flood risks arising from the watercourse. From the list of information sought, the only points outstanding and which form the basis of this appeal are the following:

   "(6) Taking into account the information provided in our letter [the one dated 27 July 2005]... A further letter of 22.8.2005 to [Individual E redacted] provided more specific information. What is the recognised procedure to be carried out by an officer when notified an existing culverted watercourse has been removed without consent from the Agency under the Land Drainage Act 1991?

   (7) What is the Agency's policy relating to Critical Watercourses? At what point does an ordinary watercourse become critical? For example how many homes have to be at risk of flooding, and for how long?

   (8) What is the Agency's policy on accepting photographic evidence to support a situation [sic] has taken place?"

2. On 30 April 2010 the EA issued a refusal notice, stating that the requested information was held but that the exception under regulation 12(4)(b) applied on the basis that the request was "manifestly unreasonable".

3. The complainant complained to the Commissioner on 5 May 2010 challenging the decision to withhold the information requested. The Commissioner issued a Decision Notice dated 15 March 2011 stating, inter alia, that there had been procedural breaches but that the EA had been entitled to rely upon the "manifestly

unreasonable" exception in relation to items (6)-(8) of the letter of request. This view was formed on the basis that "*the request is obsessive and that complying with it would cause a significant burden to, and have the effect of harassing, the EA"*.

4. Mr & Mrs Walker have appealed the Decision Notice to this Tribunal.

The appeal

5. Mr & Mrs Walker have argued in their Notice of Appeal that the Commissioner erred in law in concluding that the EA was entitled to refuse their request under the EIR on the grounds that the exception at regulation 12(4)(b) applied; they sought to correct a number of perceived factual errors in the Decision Notice.

The Mode of Hearing

6. The Appellant requested an oral hearing, although the Information Commissioner asserted that the matter was suitable for determination on the papers. The Tribunal notes that under rule 32 of The First-Tier Tribunal (General Regulatory Chamber) Rules, the Tribunal must hold a hearing (by which it is meant an oral hearing) unless each party has consented to the matter being determined without a hearing and the Tribunal is satisfied that it can properly determine the issues without a hearing. Accordingly, the Tribunal had no discretion to order a paper hearing unless all the parties agree to it and, conversely, if only one party requires an oral hearing the Tribunal has no option but to arrange one.

7. In this case, the Tribunal directed that the Information Commissioner need not attend the oral hearing as it was satisfied that it had sufficient by way of submissions in order to determine the appeal without his attendance.

The Law

8. The Tribunal's jurisdiction on appeal is governed by section 58 of the Freedom of Information Act 2000. As it applies to this matter it entitles the Tribunal to allow

the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the Commissioner ought to have exercised his discretion differently.

9. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

10. Regulation 12(1) EIR provides that a public authority may refuse to disclose requested environmental information if:

"(a) an exception to disclosure applies under paragraphs (4) or (5);

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".

11. Regulation 12(2) provides that *"A public authority shall apply a presumption in favour of disclosure"*.

12. Regulation 12(4)(b) provides that an authority may refuse to disclose information *"to the extent that…. the request for information is manifestly unreasonable"*.

Evidence and relevant background

13. Section 193 of the Water Resources Act 1991 requires the EA to keep maps showing those watercourses which have been designated as "main rivers". Watercourses which do not appear on the map are regarded as "ordinary watercourses".

14. The EA has permissive powers to undertake flood defence works (such as capital schemes and maintenance) on main rivers. On ordinary watercourses these

powers reside with local authorities or, where they exist, with internal drainage boards.

15. All flood and coastal defence legislation is *permissive,* ie there are no obligations to provide defences, either to a given standard or at all. Within this overarching principle, there are *powers* for the EA to undertake flood defence measures on main rivers while on ordinary watercourses such powers reside with local authorities and internal drainage boards (IDBs).

16. The Tribunal understands that further to the EA's flood defence supervisory duty, the Agency has been working with IDBs and local authorities in identifying "critical ordinary watercourses" ie ordinary watercourses which have the potential to put at risk from flooding significant numbers of people and property.

17. The Tribunal was provided with a bundle of documents including colour photographs of the land in question. Included within the bundle were witness statements from Mr & Mrs Walker, Mrs Walker's brother (a previous owner of the land now owned by Mr and Mrs Walker) and a neighbour, Mrs Grimsley.

18. The Tribunal took into account a chronology of events and correspondence produced by the EA and which the Walkers did not dispute. This showed that there had been a significant amount of correspondence to and from the Walkers since 2005.

19. In early 2009 the Walkers had raised with the EA their concerns as to the silting up of a pond on their land and pollution caused, they said, by actions taken by the neighbouring landowner in relation to a watercourse that drained down his land into theirs. There had been enforcement action taken by the Amber Valley District Council ("the Council") in 2005 which had not resulted in an outcome satisfactory to the Walkers. The note of a site visit by an officer of the EA on 2 February 2009 stated that "*I explained our Incident Classification scheme plus our risk based approach to dealing with incidents. I confirmed we would not be taking any further action in relation to the silt and cattle excreta pollution they believe has occurred as there was no evidence at the time of our visits to the site.*"

20. On 3 April 2009, the Walkers made their first request for information under the Freedom of Information Act 2000. The EA wrote to the Walkers on 1 May 2009 stating "*The majority of the letter relates to issues which we have already responded to in full in our previous letter to you. In my letter to you of 23 February 2009 I informed you that we will not deal with matters that have previously been addressed and only consider genuinely new points raised.*"

21. The site visit notes prepared by the Council included a comment that *"Conversation then followed about the definition of a [Critical Ordinary Watercourse – COW]. TMCM and SF confirmed that this watercourse wasn't identified as a COW".*

22. Mrs Walker's statement with regard to this was that "*At last, we manage to ask what defined a 'Critical Watercourse' how many houses had to be affected? [TCM] thought 6. My husband (M Walker) instantly responded by saying there was more than six houses that the uncontrolled water could reach [TCM] sat back in his chair, placed his hands on the back of his head, commented 'he was unsure, he did not have the figures in front of him' (Hence our request to have the question answered under FOI).*"

23. On 11 February 2010 the EA wrote to the Chief Executive of the Council, reporting back on a meeting on 1 February on site, copied to the Walkers, which noted:

- "*water flowing over the field towards their property and also the concerns of some of neighbours that during heavy rainfall this water could flood their property;*
- *the impact on the function of the remaining pipes due to silt entering them;*
- *water pollution caused by cattle drinking from, and grazing around, the water flowing on the surface due to the exposure of the pipes.*

At the end of the visit, I shared my concerns with Mr and Mrs Walker.

On their land drainage concerns, I confirmed that this does not fall within the remit of the [EA]. I explained that the watercourse created by the breaking of the pipe is not a Main River; instead it is a minor watercourse and so falls with the remit of [the Council]. …I explained that the opening of the pipes would not be subject to our land drainage consenting procedure as a land drainage consent is normally required for a structure that would obstruct a watercourse".

24. The evidence of the Walkers was to the effect that the damage to the watercourse had created significant problems for their land including the silting up of their previously large pond, waterlogging of their land and pollution from cattle. They asserted that there had been significant flooding of neighbouring land, but that residents would be chary of coming forward given the potential implication of land being designated as being at risk of flooding. The Tribunal noted that the statement from their neighbour Mrs Grimsley supported the assertion that there had been flooding locally and mentioned her own and neighbouring properties.

25. The EA wrote to the IC to explain that *"the requests do indeed have an harassing effect on members of staff, especially when Mr & Mrs Walker telephone the office. The telephone calls were upsetting and were perceived by the members of the External Relations team to be, on occasion, abusive and aggressive. Several telephone conversations lasted for over 30 minutes. ….A number of the letters received have made comments about, or have complained about, specific members of staff. To comply with our own procedures, the complaints have been thoroughly investigated, and whilst the members of staff have been exonerated, the process has had an unsettling and deeply upsetting effect on those members of staff and on morale in general……It is also recognised in the Area, that any response sent to Mr and Mrs Walker is highly likely to generate further requests for information and additional complaints. There is therefore reluctance on the part of some officers to become involved in the responses."*

26. The EA stated that it had provided all the information it had in relation to the particular complaints and issues raised by the Walkers; that it has already expended time and effort in relation to the complaints made; that it estimated 100 hours had already been spent by the EA in managing the Walker's previous information requests (not including time spent on the complaints); and that it was

the EA's view that the Walkers were likely to remain unsatisfied whatever information was provided. The Decision Notice records that the letter of request was the 25th communication over the last 5 years, the EA had answered 6 information requests, all requests generally related to the watercourse issue.

27. In essence the EA have taken the line that it is "manifestly unreasonable to continue to correspond with Mr & Mrs Walker about an issue over which we do not have responsibility nor remit to resolve". The EA has explained that the watercourse not being a main river for the purposes of the Water Resources Act 1991, the issue did not give rise to any duties on their part. The view was taken that it was not appropriate for the EA to exercise any of its relevant discretions, namely section 25 of the Land Drainage Act 1991 whereby the EA and or the local authority may take action where the proper flow of the water in an ordinary watercourse is impeded. The EA will usually only act in default of action by the local authority, and then only where the breach causes or is likely to cause a major environmental impact. The EA explained that it takes such action in accordance with its enforcement and prosecution policy.

Consideration

28. The Tribunal indicated to the Walkers at the hearing, that its jurisdiction did not include making any findings in relation to the underlying issues in connection with flooding, drainage, pollution or neighbourhood disputes, and in particular whether or not the EA should have taken any action in relation to the watercourse. Its concern was solely in relation to the letter of request of 12 April 2010 and whether the EA had been entitled to refuse to make disclosure and the IC in turn to uphold that decision.

29. Analysing the three items in the letter of request, the Tribunal asked itself whether there was anything intrinsic to those items which bore on whether the request was "manifestly unreasonable". It noted that item (6) related to matters which had ostensibly been dealt with in 2005 and appeared to be being reopened by the Walkers. Item (8), policies regarding the use of photographs, was divorced from

the underlying issue and appeared to the Tribunal to be part of a potential further complaint as to the EA's handling of these matters.

30. The Tribunal took considerable time considering whether item (7) related to something which the Walkers might reasonably have been seeking given the way in which the EA had responded to the issues to date. The Tribunal accepted that the EA had no legal duties in relation to the watercourse, it not being designated as a Main River. The Tribunal bore in mind however that if, as a matter of policy, the EA agreed with a local authority that a watercourse was a "critical watercourse" it could consider exercising its general flood maintenance functions to carry out works or enforce these upon others. The Tribunal was satisfied that the Walkers had been told by the EA officer who attended the site visit on 1 February 2010 that the watercourse was not considered a "critical watercourse" for these purposes. Whilst there was some disagreement over what had happened at this site visit, the Tribunal took into account the consistent line taken by the EA over the years that there was not an appreciable risk of flooding as a result of the damage to the watercourse. In these circumstances the Tribunal took the view that the Walkers, in seeking the policy underlying the view that the watercourse was not a "critical watercourse" were not seeking an answer to the question whether it was or was not so designated, but rather information with which to challenge the EA view.

31. As such, in the light of the substantive correspondence and requests to date, the Tribunal agreed with the IC that had the EA complied with the remaining items of the letter of request, this would have led to a significant burden on the public authority in terms of expense and distraction. It seemed inevitable that compliance with these would lead to further challenges or complaints or further requests for information.

32. The Tribunal was concerned that it had not had sight of any direct evidence substantiating that the request had the effect of harassing the authority or distressing the staff. This was rather an assertion contained in a letter from the information officer at the EA to the Information Commissioner. The Tribunal considered moreover that the tone of the communications with the Walkers,

although on occasion strident, were not offensive or distressing in themselves. That said, it accepted that the insistence with which the Walkers pursued the EA combined with the complaints against individuals were such that this might be received as harassing.

33. In light of these conclusions the Tribunal was satisfied that the exception at regulation 12(4)(b) was engaged. The next step was to consider whether it agreed with the IC that the public interest in maintaining the exception outweighed the public interest in disclosure.

34. In favour of disclosure the IC noted the general interest in the EA's actions and decisions being rendered transparent and accountable. The Tribunal agreed that this was important in this case particularly given the lack of reasons given for the view taken by the EA that the watercourse was not a "critical watercourse". The Tribunal did not have before it however any evidence of a widespread public interest. Clearly there was concern amongst neighbours to the property with the damaged watercourse, but there was nothing to indicate a wider interest in either the issues concerning watercourse designation and maintenance nationally or in relation to this particular set of issues, from the wider local community.

35. Against disclosure, the Tribunal noted that there was a public interest in public authorities with limited resources and weighty functions, as the EA, prioritising its actions. The EA had formed the consistent view that, albeit it recognised the difficulties and problems created by the damage to the watercourse, these were not significant enough in terms of properties affected or the extent of flooding to warrant any action.

36. The Tribunal was mindful that it was properly the District Council that had the power to remedy the Walker's substantive complaint in relation to the damage done to the watercourse. It did not consider therefore that disclosure by the EA would materially assist with any public interest in having these issues further investigated, and/or acted upon by the EA. Thus, whilst the Tribunal was aware that the Walkers felt under considerable pressure as a result of the enforcement

action requested not being taken, this was not a determinative matter for this appeal.

37. In light of the above reasoning, the Tribunal upholds the Commissioner's Decision albeit for reasons different to those set out in the Decision Notice.

38. Our decision is unanimous.

Signed

Melanie Carter

Judge Date 21 October 2011