IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0129**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50358047
Dated: 24 May 2011

Appellant:	**ROSALIND CRAVEN**
Respondent:	**INFORMATION COMMISSIONER**
Additional Party:	**DEPARTMENT FOR ENERGY AND CLIMATE CHANGE**
On the papers	
Date of hearings:	**28 SEPTEMBER and 29 NOVEMBER 2011**
Date of decision:	**20 DECEMBER 2011**

Before

ROBIN CALLENDER SMITH
Judge

and

ROSALIND TATAM and PAUL TAYLOR
Tribunal Members

Representations:

For the Appellant: Rosalind Craven in person.
For the Respondent: Michele Voznick, Solicitor for the Information Commissioner.
For the Second Respondent: Tom Bullmore, Treasury Solicitor's Department.

Subject matter:

FOIA 2000
Vexatious or repeated requests s.14

EIR 2004
Exceptions, Regs 12 (4)
- Request manifestly unreasonable 4 (b)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 24 May 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant's requests to the Second Respondent ("DECC") related to high-voltage overhead electricity lines. They concerned – among other things – the acquisition of land rights, the legal rules, legislation and the procedures governing their installation, maintenance and removal.

2. Initially the Tribunal considered this appeal on 28 September 2011 in terms of an application by the Information Commissioner ("IC") to strike it out.

3. Ahead of that hearing there had been problems with service of the relevant documentation in relation to the appeal itself and – at the beginning of the process – on the Appellant herself.

4. With that background, the Tribunal did not consider it would be fair or in the interests of justice to proceed to a final determination in relation to the appeal and declined to strike it out on the basis that it had no prospect of success.

5. Directions were issued on 3 October 2011 so that the Tribunal could consider the appeal more fully. The Appellant clarified her grounds of appeal. There were unfortunately further problems in the timely service

of the new appeal bundle by the IC's office, on the Tribunal and all the parties, for the renewed hearing on 29 November 2011.

6. To make certain that there was no danger of the Tribunal being unable to consider all the documentation fully and to avoid any further injustice, the Tribunal members separately considered all the information on that day – by which time it had been available to the Tribunal members for a number of days - and subsequently conferred to arrive at its decision.

The request for information

7. The Appellant made a number of requests to DECC on 18 May 2010 which related to the primary and secondary legislation and other prescribed rules, regulations, and procedures governing the acquisition of land rights and the acquisition of other permissions, in connection with high-voltage overhead power lines.

8. The requests were contained over eight pages (p.6 to p.14) in one of the three ring-bound folders sent to DECC.

9. DECC subsequently refused to comply with the requests under s.14 FOIA as it deemed the requests vexatious and under Regulation 12 (4) (b) EIR on the basis that the requests were manifestly unreasonable, decisions it confirmed following an internal review.

The complaint to the Information Commissioner

10. On 16 August 2010 the Appellant contacted the IC in relation to DECC's application of s.14 FOIA.

11. The IC concluded that DECC had justifiably withheld the information requested on 18 May 2010 which was not environmental information under s.14 FOIA and, where it was environmental information, correctly applied Regulation 12 (4) (b) EIR.

The appeal to the Tribunal

12. The Appellant set out twelve grounds of appeal in her notice dated 21st June 2011:

    (1) Serious administrative shortcomings.

    (2) Errors in administrative procedures.

    (3) Possible procedural maladministration.

(4) Possible wrongdoing.

(5) Failures by the Information Commissioner to monitor compliance with adequate procedures.

(6) Unreasonable delay.

(7) Unfairness.

(8) Showing bias and partiality.

(9) Coming to conclusions which appear illogical, including:-

a. Taking into consideration irrelevant matters.

b. Taking into consideration allegations which are prejudicial and defamatory to her good character.

c. Misapplying the test of vexatiousness.

d. Misapplying the test of the public interest.

(10) Causing her to lose one opportunity to make representations thereby also losing me a right of appeal at the proper time.

(11) Failing to notify her that a particular case had been closed.

(12) Concealing these factors in the Decision Notice itself.

Following the Directions of 3 October 2011, the Appellant clarified her grounds of appeal by submission dated 14 October 2011, with reference to earlier submissions of the 10 August 2011. The clarification focused substantially on the three factors which the IC had determined were satisfied in his consideration of whether the request was vexatious or manifestly unreasonable (i.e. whether it was burdensome, obsessive, or lacking in serious purpose).

13. With regard to the burdensome element, the Appellant referred to statements which have been used in the course of DECC's correspondence. In relation to the finding that the request was obsessive in nature, the Appellant pointed to the fact that her three requests covered a span of some four years. She also pointed to the IC's advice that she should re-submit her previous requests and stated that the perceived obsession arose directly from this.

14. The IC did not find that the Appellant's request lacked any serious purpose or value, instead acknowledging that she was genuinely trying to pursue a matter which was of importance to her. However, he did state that the value was diminished by virtue of the underlying issues having been independently investigated and adjudicated upon.

15. The Appellant argued that the serious purpose rested on the fact that many thousands of individuals were affected by the laws, rules and regulations regarding wayleaves. She went on to state that DECC guidance is dependent on confirmation by the courts and that it was important that there are no hidden laws or secret procedures.

Submissions

16. Across both sets of submissions the Appellant stressed that she was advised by the IC to resubmit the request which, for the most part, is the subject of this appeal (i.e. that of the 18 May 2010).

17. The advice in question was said to be contained in a letter from the Commissioner dated 15 September 2006. This was in relation to an initial request dated 13 April 2005 which was refused in part by the Department for Trade and Industry ("DTI"), fore-runner to DECC. At the time of response, the DTI notified the Appellant that future requests would be treated as vexatious.

18. The request was duly re-submitted on 5 November 2006 (with amendments) and subsequently refused on the grounds of vexatiousness. Following a complaint to the IC, the matter was subject to informal resolution during March 2008. In March 2010 the Appellant contacted the IC to discuss how the matter could be appealed. She was advised that the case could not be re-opened due to the passage of time and that the request would have to be re-submitted in order to pursue a complaint to his office in the event that the request was again refused.

19. The request was resubmitted on the 18 May 2010 and forms the subject of this appeal.

20. In his response of the 28 July 2011, the IC argued that of the grounds advanced, those numbered 1-8 and 10-12 did not challenge the substance of his Decision Notice and were therefore outside the Tribunal's jurisdiction. In particular, he suggested that the grounds identified related to the conduct of the IC or to actions by DECC in respect of an earlier complaint which had been closed informally.

21. The IC asserted that the remaining ground (9) was the only one which related to the substance of the Decision Notice. He maintained he was entitled to take the context and history of requests and complaint to him of 2007 into account by virtue of the exemption / exception claimed in respect of s.14(1) FOIA and Regulation 12(4)(b) EIR.

22. The five factors which he used to determine vexatious or manifestly unreasonable requests were relevant considerations and he denied that any allegations prejudicial or defamatory to the Appellant's good character had been taken into account. The IC maintained that he had

applied the appropriate tests relating to vexatious or manifestly unreasonable requests and the public interest to the extent of those elements failing under the EIRs. So far as the grounds related to his advice in connection with earlier requests, the IC maintained that this did not preclude him from any subsequent finding.

23. In the main, DECC relied on the IC's stance. However, in its submissions of 20 October 2011 in response to the clarified grounds of appeal it addressed the matter of the re-submission of the Appellant's requests on the IC's advice. DECC pointed to its belief that the requests were in fact repeated and related to the same subject. DECC stated as a fact that the requests were repeated but made no assessment of how much of their content was repeated requests for the same information and how much for new information on same broad subject.

24. In relation to ground (9), DECC supported the IC's assessment of whether the request could be regarded as vexatious or manifestly unreasonable, asserting that this represented no misapplication. It added that the "extremely voluminous" requests would create a significant burden in terms of expense and distraction, due in particular to the considerable amount of text.

The questions for the Tribunal

25. Were the Appellant's requests for information on 18 May 2010 vexatious within s.14 FIOA and Regulation 12 (4) (b) EIR?

Conclusion and remedy

26. The Grounds of Appeal numbered from 1 – 8 and 10 – 12 are not matters that can be considered by the Tribunal. Those issues are outside the jurisdiction of the Tribunal.

27. The decision of the Tribunal is a majority decision of Judge Robin Callender Smith and Tribunal Member Rosalind Tatam. Both decided the matter was finely balanced and fell narrowly in favour of the IC and DECC. Tribunal Member Paul Taylor decided the matter in favour of the Appellant.

28. There was considerable agreement between all members of the Tribunal and – for clarity – the areas of agreement and disagreement are set out below.

(9)(a) Taking into consideration irrelevant matters

29. The Tribunal agrees with the IC and DECC that it is appropriate to take into account previous contact with an Appellant when determining whether a request is either vexatious or manifestly unreasonable. This can shed light on things such as whether the request seeks to re-open previously considered matters or indeed whether the information has already been requested and refused.

30. However, it is important that when doing so, full account is taken of all the circumstances arising from previous dealings, particularly those which may lead to the submission of a new request. For example, it is quite clear that the Appellant was prohibited from making an appeal to us in respect of her second request, dated 5 November 2006. Little has been said in relation to this by the other parties. The Tribunal is unanimous in its view that this ground of appeal fails.

(9)(b) Taking into consideration allegations which are prejudicial and defamatory to the Appellant's good character

31. The Appellant appears to have taken the other parties' arguments relating to the exemption / exception in question to be an affront to her character. It is an unfortunate - but inevitable - consequence of the effect of the wording of s.14 FOIA and Regulation 12(4) (b) EIR. This kind of complaint often arises in cases where these exemptions / exceptions are claimed but is without substance.

(9)(c) Misapplying the test of vexatiousness

32. The IC found that the request was burdensome, obsessive and lacking in serious purpose.

33. Burdensome: The IC based his conclusion on the letter to him from DECC dated 9 March 2011. Whilst setting out what DECC would need to do in order to respond, it cannot be said to have provided significant substantiation of the burden in terms of estimated expense or the amount of time that it would take to respond to the Appellant's request. The letter acknowledges that some of the requests are in fact questions yet goes on that it would take considerable effort to seek necessary advice and to compile a response. DECC ought instead to have refused those questions which did not seek recorded (or "held") information. These are more properly questions which relate to "business as usual". Both Regulation 5(1) EIR and s.1 (1) (a) FOIA make it clear that the regime only applies to information recorded or held at the point at which the request is received. The Appellant can only be given information that is held.

34. Further, DECC ought to have refused requests for copies of legislation under either Regulation 6(1) (b) EIR or s.21 (1) FOIA. This is because such information is publicly available elsewhere.

35. The Appellant had been told she could not expect DECC to provide her with legal advice or opinions, and that she should seek her own advice. She ignored the substance and effect of this advice and assistance in her approach and continued to submit requests that – in the Tribunal's majority view – could be seen as requests for legal clarification.

36. Had both of these filters been applied then the Tribunal finds that DECC would have been left with the following elements:

    a. 2 (b) (i)
    b. 2 (b) (ii) (b)
    c. 3 (a) (i) - (ii)
    d. 3 (b) (i) – 3 (c) (iii)
    e. C (i) – (iii)
    f. D (R1)
    g. E (R1) (i)
    h. 4 (ii)
    i. 5 (i) – (ii)
    j. 6 (i)

37. The IC did not consider this approach and, although DECC did allude to the matter of questions not being proper requests, it went on to include the burden of responding to these in their response to the IC.

38. An approximation of cost was provided by a relevant DECC employee in her witness statement of 20 October 2011 in the sum of £1,700, although she stated that this could potentially be higher. This was based on a Higher Executive Officer grade member of staff spending 3-4 days locating, searching and checking relevant documents. Also, a further 3-4 days assembling an analysis of information which had or had not been provided already (even though the Appellant has listed this at tabs 2 & 3 of her request). A further day of her own time (as head of Electricity Networks) as well as half a day of a member of the legal team would also be required to check the veracity of the response.

39. It is also stated that a number of responses to earlier requests were not kept electronically and that the relevant files would need to be requested and trawled as part of the process outlined above. There were still 22 elements to the request, considerably less than the 51 initially presented, but the majority of the Tribunal accept the witness's statement that her view is that some of the requests were "exceptionally wide in scope". The unanimous decision of the Tribunal is that this "burdensome" element of the test has been incorrectly applied as it believes that responding to the narrower requests would not have taken as long as is claimed.

40. Obsessive: In his decision the IC identified the following in support of his classification of the request as obsessive or manifestly unreasonable:

    a. the underlying issues have already been independently considered (i.e. the court case);
    b. due to the previous FOI requests on the same or similar issues as those surrounding the court case;
    c. correspondence prior to the introduction of the Act on the same issue;
    d. the voluminous nature of the latest requests.

41. The Appellant's voluminous correspondence is not just prior to 2005 but since FOIA came in, and appears to be driven by her past experience that letters have 'gone missing'. To mitigate this risk, she sent the same letter to more than one person in the Department.

42. The majority of the Tribunal finds that her previous requests should not be taken into account as a *singular* factor (both due to the IC advice to resubmit, and due to the time that has passed and the differences in actual information sought).

43. Despite that, the 18 May 2010 requests *can* be characterised as 'manifestly unreasonable' on the basis of their volume, scope and complexity *and* when taken against an assessment based on her past approach.

44. Lacking in serious purpose: Whilst the IC has acknowledged that the Appellant did have a serious purpose in that she was genuinely trying to pursue an issue that was of importance to her, he regarded the value of this as being reduced by the fact that underlying issues had been independently investigated and adjudicated upon via the court case.

45. The IC has overlooked the fact that the Appellant will, in the near future, be faced with renewal of the wayleaves which underpin her interest. The IC did not allocate any value in relation to the Appellant's desire to bring clarity to this complex area for the benefit of others.

(9)(d) Misapplying the public interest test

46. The IC concluded that the public interest favoured non-disclosure of the requested information. He argued this on the basis of burden and the obsessive and voluminous nature of the request. The IC could have asked DECC for evidence on the burden and would have been told that it would cost in excess of £1,700 to respond.

47. The majority of the Tribunal finds this would have been a significant resource allocation that would not have been justified on public interest grounds.

48. The Tribunal has recognised the public interest in openness, transparency and accountability and also that this issue could affect a reasonably large number of individuals, public concerns about environmental impacts, health and safety issues and potential detriment to land values and property prices.

49. The majority of the Tribunal finds that the public interest balancing exercise narrowly falls in favour of the IC and DECC's application of it.

50. For all these reasons the majority of the Tribunal finds that, on the balance of probabilities, the appeal fails.

51. There is no order as to costs.

52. Our decision is by a majority.

Robin Callender Smith

Judge

20 December 2011