IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Appeal No: EA/2011/0192

BETWEEN:

DAVID CLEMINSON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CUMBRIA COUNTY COUNCIL

Second Respondent

DECISION AND REASONS

Determined on the papers on 8 February 2012, by:
Judge Alison McKenna
Nigel Watson
Rosalind Tatam

Decision dated: 22 February 2012

Subject Matter: Regulations 2(1) and 12(4)(b) of the Environmental Information Regulations 2004

DECISION

The appeal is hereby dismissed.

REASONS

Background

1. This Appeal relates to an information request made by Mr Cleminson ("the Appellant") to Cumbria County Council ("the Council") on 8 September 2010 in the following terms:

> *"Please note that I am making a request within the Freedom of Access to Public Information Act 2000.*
> *1. In August 2000 H & H Borderway Motor Auctions Ltd offered for sale a Jaguar Car Registration No.. for…County Court (29 Aug 2000). Hence as the instructions came from Cumbria County Council and the actions were at the public's expense, can you please identify the valid lawful authority that was valid to commit the actions and use the name of the County Court as the seller of the goods…..*
> *2. When replying please identify Cumbria County Councils as Highways Authority lawful authority to prohibit my personal freedom of passage along any public highway that is a public right of way that contains traffic calming humps – cushions and table top humps to such a height and design that prevent the passage of the standard Avon registration no…"*

2. On 31 March 2011 the Information Commissioner ("the Commissioner") intervened to ensure that the Appellant received a response to his request as he had by then only received an acknowledgement. The Council responded to the Appellant in May 2011 stating that it had provided the answers to his questions in the past. The Council's reply included a schedule showing the requests made and the responses given. The Council at that stage relied upon the Freedom of Information Act 2000 ("FOIA") rather than the Environmental Information Regulations 2004 ("the EIR") in refusing to supply the requested information because it regarded the request as "vexatious".

3. Following the Appellant's complaint to the Commissioner, an investigation was conducted and Decision Notice FS50392213 was issued, dated 27 July 2011. The Commissioner held that (i) the request for information in relation to the vehicle was a subject access request under the Data Protection Act 1998 and would thus be dealt with under a separate Decision Notice (which it has been). In relation to request (ii), the Commissioner held that it fell under the EIR rather than under FOIA but that the Council was in any event entitled to refuse to disclose the information requested and to view it as a vexatious request.

However, this would be in reliance upon regulation 12 (4)(b) of the EIR on the basis that the request was manifestly unreasonable and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Council was not required by the Commissioner to take any further steps.

4. The Appellant appealed against the Commissioner's Decision Notice by lodging with the Tribunal a Notice of Appeal dated 15 August 2011, accompanied by Grounds of Appeal. He argued in summary, that:

   (i) The Respondent should have considered both information requests in the Decision Notice;
   (ii) That in respect of the first request, the Council has not shown its lawful authority to sell the car;
   (iii) That in respect of the second request, the Council should have protected his use of the highway and human rights but has not done so because, inter alia, inappropriate gradients were used;
   (iv) That the Respondent did not answer some of his letters or allow him a personal appointment;
   (v) That the Commissioner's decision was flawed, he is involved in a conspiracy to deprive the Appellant of his rights, and has breached the Data Protection Act by discussing the Appellant with the Council.

5. The Appellant initially requested an oral hearing of his appeal but it was subsequently agreed between the parties that the matter should be determined on the papers. The Tribunal agreed that this was an appropriate method of disposal.

6. In his Response to the Notice of Appeal dated 12 September 2011, the Respondent applied for a strike-out of certain parts of the Appellant's appeal. The Appellant filed a reply dated 15 September and sent a letter a letter dated 16 September opposing the proposed strike out. In the course of this correspondence he raised an apparently new Ground of Appeal which was that his request should have been considered under FOIA and not the EIR. Having considered the representations from the Appellant, Judge McKenna struck out parts of the Appellant's appeal by a ruling dated 19 September 2011. She issued a fully reasoned decision, which is not repeated here. It followed that the only remaining issue for the Tribunal to determine in this appeal was the Appellant's argument that the

Decision Notice was flawed in its application of regulation 12(4)(b) of the EIR. The Tribunal took the view that the Appellant's most recent argument – that his request should have been dealt with under the provisions of FOIA – was an aspect of the remaining Ground of Appeal and decided to treat it as such.

7. The Commissioner asked the Tribunal to direct that Cumbria County Council be made a party to the appeal. The Appellant opposed the joining of the Council as a party. Having considered his representations, the Tribunal joined the Council as a party to this appeal by directions dated 8 November 2011. However, the Council indicated that it was content to rely upon the Commissioner's representations and did not wish to file any additional evidence or argument. It has accordingly played no further part in these proceedings.

8. The Appellant has continued in the months following the strike out ruling and the directions to send the Tribunal letters, photographs, diagrams and documents about speed humps and about his litigation and complaints concerning the loss of the vehicle. As Judge McKenna explained in her strike out ruling, and as was made clear once again in the subsequent directions, this issue is not within the jurisdiction of the Tribunal. The Appellant has an understandable sense of grievance given the long history of this matter. He has suggested in correspondence that the Council and the Commissioner are involved in a conspiracy to pervert the course of justice. The Tribunal cannot rule on these allegations as they are outside its jurisdiction. We have, in any event, seen no evidence to support them. When the Tribunal explained that it would not be involving the criminal justice agencies in this appeal, the Appellant accused the Tribunal Judge and the Tribunal's own staff of being involved in the conspiracy. We very much regret that the Appellant has in correspondence expressed his lack of confidence in our decision before we had even made it.

Evidence and Submissions

9. The Tribunal received an agreed open bundle of documents running to some 160 pages. The Appellant subsequently added certain documents (with the agreement of the Commissioner) by letter dated 14 January 2012. There was no witness evidence in this appeal, neither was there any closed material.

10. The Tribunal invited written submissions from the parties in advance of its meeting to determine the appeal on the papers. These were directed to be filed by 20 January 2012. The Appellant sent in some additional submissions after that date. These were dated 23 January, but the Tribunal decided to consider them in any event. In these submissions, the Appellant argued that the Commissioner had not complied with the Tribunal's directions because the Appellant had not received the submissions on 20 January. He asked that any submissions made by the Commissioner should be struck out by the Tribunal. The Tribunal received the Commissioner's submissions on 19 January by e mail and notes that he posted a copy to the Appellant on that date. We find that the Tribunal's direction to lodge submissions with the Tribunal and to exchange by post with the Appellant were therefore complied with by the Commissioner and have considered them accordingly.

11. As noted above, the Appellant's submissions dated 23 January have been considered by the Tribunal, notwithstanding the fact that they were received a few days out of time. However, we found that they did not address the issues now before the Tribunal and so they did not help us.

12. The Commissioner's submissions dated 19 January 2012 asked the Tribunal to dismiss this appeal for the following reasons:

    a. Regulation 2 (1) of the EIR provides a wide definition of "environmental information" which encompasses the Appellant's request for information relating to the highway, in particular his request for the legislative provisions governing traffic calming measures such as speed humps. The Commissioner's Decision Notice is therefore correct and the Appellant has not presented argument as to why that decision should be over-turned by the Tribunal, other than to assert that his request was not for environmental information.
    b. As the information requested is properly to be regarded as environmental information, the Commissioner was correct to apply the EIR rather than FOIA.
    c. The Commissioner was correct to conclude that the Council was entitled to rely upon regulation 12 (4)(b) of EIR in all the circumstances.

The Law

13. In view of the Commissioner's decision that the request fell under the EIR, this appeal is brought under regulation 18 of the EIR (which incorporates s. 57 of FOIA so that the

appeal rights are identical). The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

14. The Commissioner's decision was based upon his interpretation of two particular provisions of the EIR. The first of these was regulation 2(1)(a) of EIR which defines "environmental information" and where relevant reads as follows:

> *"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 factor referred to at (a)and (b)as well as measures or activities designed to protect those elements".*

15. The Commissioner clearly understood the Appellant's request for "the Council's lawful authority" to be a request for a copy of the legislative provisions permitting the use of traffic calming measures such as speed humps. The Commissioner concluded that a request for this information fell within the definition of "environmental information" in regulation 2(1) of the

EIR because it was a request for legislation (so falling within (c) above), which affected an element of the environment, (namely the road - so encompassed within the reference to "land" - which is referred to in (a) above). This does not seem to us to be an unreasonable interpretation of the request. However, we note that the evidence shows that the Appellant had previously been supplied with the legislation providing the Council with lawful authority for its actions, and so it may be that he was really asking for an explanation of the Council's actions (and if they were lawful) rather than re-requesting the statutory materials. It may have been reasonable for the Council to have clarified the request in such circumstances.

16. The Commissioner, having concluded that the request was for "environmental information" then upheld the Council's refusal of the information requested, applying regulation 12 (4) (b) of the EIR to the Appellant's request. The Tribunal notes that regulation 12(4)(b) of the EIR provides a somewhat stricter test for the refusal of information by a public authority than does s. 14 of FOIA as it is subject to a public interest test and a presumption of disclosure. The Tribunal notes that the Appellant might therefore have been disadvantaged if his request had been considered by the Commissioner under FOIA rather than the EIR, as he has submitted it should have been.

17. Regulation 12 of EIR reads (where relevant to this appeal) as follows:

> ***"Exceptions to the duty to disclose environmental information***
>
> ***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.*
>
> *(2) A public authority shall apply a presumption in favour of disclosure.*
>
> *(3)…*
>
> *(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*
>
> *(a)…*
>
> *(b)the request for information is manifestly unreasonable;*
>
> *[…]"*

18. The Commissioner's finding at paragraph 54 of the Decision Notice was that the Appellant's request was manifestly unreasonable so as to fall within regulation 12 (4) (b) of

the EIR. The evidence before us shows that the Council had replied to the Appellant's identical or similar requests on a number of occasions between 1989 and 2010, as listed in its letter to the Appellant of 18 May 2011 (contained at pages 98 – 114 of the bundle), by supplying him with the relevant legislation. On the basis of this correspondence, and viewed in the context of the Appellant's repeated (and largely unsuccessful) litigation and numerous complaints to bodies such as the Local Government Ombudsman, the Commissioner concluded that the request in this appeal could properly be characterised as obsessive, that it could be said to have the effect of harassing the Council, and that the effect of the request (when viewed in context) would be to impose a significant burden on the Council in terms of expense and distraction.

The Tribunal's Conclusions

19. The Tribunal concludes that the Appellant's request was reasonably understood to be one for the legislation permitting the Council to construct speed humps on the highway. The Tribunal is satisfied that the Appellant's information request was therefore appropriately considered by the Information Commissioner under the provisions of the EIR. We therefore reject the Appellant's argument that his request should have been dealt with under FOIA.

20. The Decision Notice shows that the Commissioner then undertook the relevant public interest balancing test and that he took into account the presumption of disclosure under the EIR. The Commissioner relied on the evidence in concluding at paragraph 64 of the Decision Notice that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Appellant has not challenged the evidence presented by the Council to the Commissioner in this regard; neither has he challenged the Commissioner's conclusions based on that evidence.

21. We have, in the course of making this decision, reviewed the evidence for ourselves. Having looked at all the evidence afresh, the Tribunal concurs with the Commissioner's conclusion that the Appellant's request was manifestly unreasonable. We have reminded ourselves that the burden of proof in showing that the Information Commissioner's decision was wrong rests with the Appellant. In all the circumstances we are satisfied that the Commissioner correctly directed himself to the correct legal test and that it was reasonable for him to rely upon the evidence presented to him by the Council to support his

conclusions. We find no error of law or wrongful exercise of discretion in the Commissioner's conclusions and, for all these reasons, we now dismiss the appeal.

Signed:

Alison McKenna
Tribunal Judge
Dated: 22 February 2012

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Appeal No: EA/2011/0192

BETWEEN:

DAVID CLEMINSON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CUMBRIA COUNTY COUNCIL

Second Respondent

RULING ON APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

DECISION

The application for permission to appeal is hereby refused.

REASONS

Background

1. This Appeal relates to an information request made by Mr Cleminson ("the Appellant") to Cumbria County Council ("the Council") on 8 September 2010 concerning its construction of speed humps on the public highway. The Council responded to the Appellant in May 2011 (following the intervention of the Information Commissioner) stating that it had already provided the answers to his questions and included a schedule showing the requests previously made and the responses previously given. The Council at that stage relied upon the Freedom of Information Act 2000 ("FOIA") rather than the Environmental Information Regulations 2004 ("the EIR") in refusing to supply the requested information because it regarded the request as "vexatious".

2. The Information Commissioner issued Decision Notice FS50392213 on 27 July 2011. The Commissioner held that the request fell under the EIR rather than under FOIA but that the Council was in any event entitled to refuse to disclose the information requested in reliance upon regulation 12 (4)(b) of the EIR on the basis that the request was manifestly unreasonable and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

3. The Appellant appealed against the Commissioner's Decision Notice by lodging with the Tribunal a Notice of Appeal dated 15 August 2011. The Respondent then applied for a strike-out of certain parts of the Appellant's grounds of appeal, which I determined by a ruling dated 19 September 2011 with a fully reasoned decision which is not repeated here. It followed that the only remaining issue for the Tribunal to determine in this appeal was the Appellant's argument that the Decision Notice was flawed in its application of regulation 12(4)(b) of the EIR and that in any event the matter should have been considered under FOIA.

4. The Appellant has repeatedly alleged that the Council and the Information Commissioner are involved in a conspiracy to pervert the course of justice. When the Tribunal explained that it would not be involving the criminal justice agencies in this appeal, the Appellant accused me and the Tribunal's own staff of also being involved in a criminal conspiracy.

The Hearing

5. The Tribunal panel determined the Appellant's appeal on the papers (with the agreement of the parties) on 8 February 2012. In so doing, we had before us an agreed open bundle of documents running to some 160 pages. The Appellant had added certain documents to the bundle (with the agreement of the Commissioner) by letter dated 14 January 2012. There was no witness evidence in this appeal, neither was there any closed material. The Tribunal invited and considered written submissions from the parties in advance of its meeting to determine the appeal on the papers. The Tribunal considered the Appellant's submissions notwithstanding that they were submitted a few days late.

The Tribunal's Decision

6. On 22 February the Tribunal issued its determination of the appeal. The appeal was dismissed on the basis that the Decision Notice was not wrong in law and did not involve any inappropriate exercise of discretion by the Information Commissioner.

7. In particular, the Tribunal found that:

   (i) The Appellant's request was reasonably understood to be one for the legislation permitting the Council to construct speed humps on the highway. The Tribunal was satisfied that the Appellant's information request was therefore for environmental information and appropriately considered by the Information Commissioner under the provisions of the EIR. The Tribunal rejected the Appellant's argument that his request should have been dealt with under FOIA.

   (ii) The Tribunal agreed with the Commissioner's conclusion that the Appellant's request was manifestly unreasonable in all the circumstances.

   (iii) The Decision Notice showed that the Commissioner had undertaken the relevant public interest balancing test and that he had taken into account the presumption of disclosure under the EIR.

   (iv) The Commissioner had reasonably relied on the evidence provided by the Council and the Appellant to support his conclusions. The Appellant (upon whom the burden of proof rested) had not challenged

the evidence presented by the Council to the Commissioner and neither had he challenged the Commissioner's conclusions based on that evidence.

The Application for Permission to Appeal

8. By a notice dated 27 February 2012 the Appellant asks for permission to appeal the Tribunal's decision dated 22 February. His grounds for doing so are that there are two errors of law in the decision:

   (i) The first is that there was in fact no response to the Appellant's information request so that paragraph 2 of the Tribunal's Decision is incorrect. The Appellant states that he only received an acknowledgement from the Council and not an answer. He goes on to say that he had required an answer to a question first raised with the Council in August 2000 regarding the seizure of a vehicle and that it is only by obtaining an answer to this question that he can rule out a conspiracy to pervert the course of justice.

   (ii) The second is that the request relating to speed humps does not fall under the EIR because the speed humps do not comply (and the Council has not submitted evidence to prove that they comply) with the relevant standards and regulations governing their construction.

   He asks the Tribunal to order the payment of compensation for his loss of the use of the public highway, and for the loss of the vehicle that was seized and to direct the removal of the speed humps.

9. The Appellant's application falls under part 4 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. On receiving an application for permission to appeal, the Tribunal must first consider whether to undertake a review of its decision pursuant to rule 44 of the Rules. The Tribunal may review its original decision if it is satisfied there was an error of law in it. I have accordingly considered whether the Grounds of Appeal as summarised above identify what may be described as "errors of law" in the First-tier Tribunal's decision.

10. The Appellant's first ground might be described as being that the Tribunal made a material error of fact in concluding that the Council had replied to his information request.

The Appellant does not address the fact that we had in evidence before us a reply from the Council which, whilst it was provided late and only after the intervention of the Commissioner, was found by the Commissioner to constitute a reply to his request. The Appellant does not say why that was an unreasonable finding by the Commissioner and (implicitly, because the point had not been argued in the written submissions) an unreasonable finding by the Tribunal. He also does not explain why he says that this alleged error of fact materially affected the outcome of his case. I conclude that this ground of appeal does not in the circumstances raise an error of law.

11. The Appellant's second ground is in my view also without merit as a point of law. The question of whether the speed humps have been lawfully constructed or not is, in my view, incapable of affecting the question of whether the request for information relating to the highway was a request for environmental information so as to fall under the EIR.

12. The Tribunal has repeatedly explained to the Appellant that it cannot become involved with his complaints about unlawful speed humps or with matters relating to the seizure of his vehicle, and that it cannot order compensation and cannot direct a criminal investigation. I do not therefore regard the inclusion of these matters in the grounds of appeal as relevant to the application I must now decide.

13. In all the circumstances, I conclude that there is no power for the Tribunal to review its decision in this case and I have also, for the same reasons, concluded that permission to appeal should now be refused.

Signed:

[Signed on original]

Alison McKenna

Tribunal Judge Dated: 9 March 2012