IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0189**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50422872
Dated: 1 August 2012

Appellant: **LEICESTER CITY COUNCIL**

First Respondent: **THE INFORMATION COMMISSIONER**

Second Respondent: **J C SEDDON**

Determined on the papers

Date of decision: **14 January 2013**

Before
CHRIS RYAN
(Judge)
and
HENRY FITZHUGH
ANDREW WHETNALL

Subject matter:

Vexatious or repeated requests s.14
Information accessible by other means s.21

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0189**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and no action is required to be taken by the Public Authority.

REASONS FOR DECISION

Summary

1. We have decided that the Information Commissioner was wrong to conclude that the information request in question was not vexatious. We have also decided that any information covered by that information request would have been subject to the exemption provided by section 21 of the Freedom of Information Act 2000 ("FOIA"), (a ground not relied upon during the Information Commissioner's investigation) with the result that the Leicester City Council ("the Council") would have been entitled to refuse disclosure on that basis also.

The Request for Information

2. On 22 October 2011 Mr Seddon wrote to the Council drawing attention to an announcement in a local paper of a musical event due to take place at the East Park Road Working Men's Club in Evington. He asked if the club had registered the event with the Council ten working days prior to the event taking place. The letter went on to ask, also, if the Leicester Railwaymen's Club was in receipt of a "Premises License (sic)". We will refer to this letter as the "Information Request".

The legislative context of the Information Request

3. The significance of this two-part request lies in the provisions of the Licensing Act 2003 (“LA 2003”) as they apply to clubs. The Act creates separate regimes for the authorisation of certain events taking place on the premises of a club, depending on whether it is one in which the members own all the assets jointly (a “Membership Club”) or one in which the assets are owned by a separate individual or organisation (a “Proprietary Club”). The categories of events requiring authorisation are the sale or supply of alcohol and the provision of certain types of entertainment or late night refreshments. They are described as “Licensable Activities”. Both categories of club may carry out other activities without authorisation or restriction.

4. If any Licensable Activity is to be carried out it is generally necessary for a licence to be obtained (a “Premises Licence”). That applies to all types of premises, including those owned or operated by a Proprietary Club. However a bona fide Members Club may supply alcohol to a member, or the guest of a member, and may provide certain types of entertainment (“Regulated Entertainment”) without a licence, provided that it has obtained a “Club Premises Certificate”, which covers the activity in question.

5. If a Members Club wishes to carry out an activity that falls outside the scope of its Club Premises Certificate (typically one involving the sale of alcohol to members of the public who are not members or guests of a member) it has a choice. It may either surrender its Club Premises Certificate and apply for a Premises Licence, or it may rely on a system for giving a Temporary Event Notice (a “TEN”) in respect of each planned event. A TEN must be lodged with the local licensing

authority, with a copy provided to the local police, at least ten days in advance of the proposed event. If no objection is raised the club may proceed with the event, but if no notice is lodged, or if objection is raised, the event will not be authorised and an offence will be committed if it is proceeded with. A club may only avail itself of the TEN procedure on twelve occasions. It follows that if events falling outside the scope of the blanket authorisation provided by the Club Premises Certificate are likely to occur regularly a club will be forced to seek a Premises Licence covering the activity in question.

6. LA 2003 section 8 requires licensing authorities to keep a register (the “Licensing Register”) containing details of, among other things, each Club Premises Certificate and Premises Licence issued by it and each TEN received by it. The section then provides:

    “(3) Each licensing authority must provide facilities for making the information contained in the entries in its register available for inspection (in a legible form) by any person during office hours and without payment.

    (4) If requested to do so by any person, a licensing authority must supply him with a copy of the information contained in any entry in its register in legible form.

    (5) A licensing authority may charge such reasonable fee as it may determine in respect of any copy supplied under subsection (4).”

7. It may be seen, therefore, that the first part of the Information Request was, in effect, a request for information from the Licensing Register about any TEN filed by the club in question. The second part was for information about the Club Premises Certificate granted to the second named club.

The historical context of the Information Request

8. The Information Request had been preceded by a great deal of correspondence between Mr Seddon and the Council on the subject of the administration of clubs operating within its area, extending back to 2008. Mr Seddon had expressed the view, as early as March 2008, that the majority of clubs were being operated in breach of LA 2003 and indicated that he intended to draw these, at that stage unspecified, failings to the attention of the newspaper industry if those responsible for club regulation did not investigate them.

9. The Council provided Mr Seddon with a considerable amount of information about the impact of LA 2003 on both Proprietary Clubs and Members Clubs, including the categories of activities that a club could conduct without authorisation and those “licensable” activities for which authorisation was required by one or other of the means described above.

10. Although Mr Seddon initially appeared to be grateful for the Council’s time and effort in providing him with this information he appears to have concluded at some stage that the Council was not carrying out its duties with sufficient rigour. He made no challenge to the Council’s interpretation of the provisions of LA 2003 but began regularly to send it information about imminent events that he believed required a TEN and to criticise it for, in his view, failing either to prevent the event happening (because of the absence of proper notice, in his view) or to ensure that it was organised in a way that complied with the law (e.g. to ensure that no alcohol was supplied during the event to a member of

the public who was not either a club member or the guest of a member).

11. The frequency of correspondence increased over time and the issues raised overlapped one another. We have therefore set out in the annex to this decision a summary of all the correspondence during the 12 months prior to the Information Request. It will be seen from this that Mr Seddon concentrated his attack on eight clubs, but that he focused his attention, in particular on the Leicester Railwaymen's Club (section 6 of the Annex). In respect of that club:
    a. Mr Seddon wrote 13 letters between June and October 2011 in respect of amateur boxing events. Even though his first letter produced a response from the Council confirming that the Club Premises Certificate authorised boxing and wrestling (so that a TEN was not required) he continued to draw attention to advertised events and to assert that a TEN should have been lodged in respect of each one, culminating in an allegation that the Council Officer with whom he was corresponding could herself be charged with being in violation of the LA 2003.
    b. Mr Seddon asserted that a TEN should have been lodged in respect of a launch event for a new dance academy, the event being described as a "showcase of dance classes". He then wrote 19 letters between February and July 2011 repeatedly asserting, in increasingly strident tones, that the TEN procedures should have been followed despite the Council's clear explanation of why it believed that the event was covered by the Club Premises Certificate and its suggestion that there was no evidence that any activities had taken place that fell outside the categories of events authorised under it.

12. In respect of other clubs Mr Seddon asked questions in respect of, and complained about the Council's perceived failure to regulate, events such as:
    a. A surgery conducted by local councillors (New Parks Working Men's Club – Annex section 3.2 – 6 letters), culminating in one letter asserting that the surgery was "unlawful" and that the Council was guilty of condoning it;
    b. A community awards ceremony (Saffron Lane Working Men's Club – Annex section 4.2) including the suggestion that the Council's failure to insist on a TEN amounted to "a generous gift" to the club;
    c. A meeting convened by a local Member of Parliament to discuss the viability of social clubs (Saffron Lane Working Men's Club – Annex section 4.4)

<u>The refusal of the Information Request</u>

13. The Information Request was interpreted by the Council as a request for information under the FOIA. FOIA section 1 imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in the FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

    "in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

14. The Council refused the request. At that stage it did not rely on any exemption. It relied, instead, on FOIA section 14, which entitles a

public authority to refuse a request for information if it is vexatious. There is no statutory definition of “vexatious” for this purpose.

15. Although the refusal was communicated to Mr Seddon by means of a letter dated 28 October 2011 this did little more than to remind Mr Seddon that it had told him previously, by a letter dated 15 July 2011 (referred to in the Annex and hereafter in this part of our decision, as the “First FOIA Refusal Letter”), that it had come to the conclusion that his recent requests to its Licensing Team had been vexatious and that its refusal of those requests applied equally to the Information Request.

16. The First FOIA Refusal Letter had cited the number of requests the Council said that it had received from Mr Seddon (it said that there had been 57 separate requests since January 2011, although Mr Seddon subsequently denied that they should all be treated as FOIA requests). The Council also said that the requests had been received with considerable frequency, sometimes simultaneously, and that they had placed a disproportionate burden on its staff. It said, also, that some of the correspondence received from Mr Seddon had adopted a hostile tone.

17. Mr Seddon complained to the Information Commissioner about the Council’s refusal and, following an investigation, the Information Commissioner issued a Decision Notice on 1 August 2012 in which he decided that the Council had not been entitled to rely on FOIA section 14 and directed it to respond to the Information Request by either disclosing the information requested or issuing a valid refusal notice setting out any exemption on which it wished to rely.

18. In reaching his conclusion the Information Commissioner said that he had taken account of the complete context and history of the Information Request, including the 150 letters that he said Mr Seddon had written to the Council since February 2008. Following his own guidance as to the factors that may indicate that a request is vexatious the Information Commissioner concluded that:

    a. The requests and other correspondence had not imposed a significant burden on the Council, and had not diverted staff resources, because all the information requested would have been readily available to the relevant members of staff.
    b. There was a serious purpose to Mr Seddon's investigations of the Council's administration of club licensing matters, despite the Council's own scepticism as to whether he had the research interest he claimed and the fact that a portion of his enquiries had focused on the same issue (the absence of a TEN) in respect of successive events at a small number of clubs.
    c. There was no evidence that Mr Seddon's information requests were motivated merely by a desire to cause a nuisance.
    d. Although some remarks in Mr Seddon's correspondence were derogatory of the Council or its staff this did not amount to harassing members of staff and, contrary to the Council's contention, there was no evidence of racially offensive remarks.
    e. Mr Seddon was not guilty of being unwilling to accept any point of view that differed from his own and of wishing to take the Council over the same ground even after he had exhausted the Council's attempts to help him. The Information Commissioner was not convinced, therefore, that Mr Seddon's behaviour had been obsessive or manifestly unreasonable, as the Council had contended.

19. When considering whether Mr Seddon had harassed the Council the Information Commissioner added that he had seen, within the correspondence:

> *"…evidence that* [Mr Seddon] *was deeply dissatisfied with being directed to obtain information from a 'computer website'. He made clear that he wished to received (sic) licensing register information in hard copy form, something the council resolutely refused to provide."*

Elsewhere in his Decision Notice the Information Commissioner made clear that it was not within his jurisdiction to assess whether the Council had complied with LA 2003 section 8 by making the Licensing Register available to the public only in electronic, and not paper, form. At the same time he expressed the view that Mr Seddon was not comfortable with computers and suggested that it was not unreasonable for him to have required the information he requested to be provided in paper form.

<u>The appeal to this Tribunal</u>

20. On 30 August 2012 the Council submitted a Notice of Appeal to this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

21. The Notice of Appeal was accompanied by detailed Grounds of Appeal in which the Council asserted that the Information Commissioner's

decision had been perverse or otherwise wrong in law. It argued, in the alternative, that if and insofar as the requested information was held by the Council, it was exempt under FOIA section 21(1) (information reasonably accessible by other means). Although that provision had been mentioned in correspondence between the Council and the Information Commissioner it had not been relied upon previously. However, it is now established law that a public authority may introduce a new ground for resisting disclosure even after a Decision Notice has been issued.

22. In support of its primary case under FOIA section 14 the Council drew attention to the large quantity of correspondence received from Mr Seddon which, it said, was all concerned with the same issue of the authorisation of club premises and club events and on many occasions did not constitute a genuine attempt to obtain information, but was made for the purpose of making the point (which the council asserted was an ill founded one) that authorisation should have been sought for the event in question. The Council also relied on the frequency of letters from Mr Seddon and the sarcastic, dismissive and/or aggressive manner in which he expressed himself on occasions. It sought to cast doubt on whether Mr Seddon really was undertaking a study of the administration of clubs, as he claimed from time to time in his correspondence, and argued that Council staff felt harassed and found themselves diverted from their normal licensing functions. The Council drew attention, in particular, to the fact that requests continued unabated even after the Council had sent Mr Seddon its First FOIA Refusal Letter on 15 July 2011.

23. The Grounds of Appeal included comment on the passage from the Decision Notice quoted in paragraph 19 above and argued that the Council had been justified in not maintaining the Licensing Register in

paper form and that it should not be required to adopt a paper records system purely for the benefit of Mr Seddon.

24. In his Response to the Grounds of Appeal the Information Commissioner joined issue on whether the facts supported a finding that the Information Request had been vexatious but then expressed the view that:

> *"…the dispute in the present case actually arises from a genuine disagreement as to where the threshold lies between an individual requiring a legitimate level of assistance and accommodation due to factors of infirmity and limited technical expertise, and that individual's request in this case being deemed vexatious."*

    He went on to argue that the Council had disregarded the evident lack of technical expertise enjoyed by Mr Seddon and had focused solely on the existence of its own on-line resources.

25. Although, therefore, the Information Commissioner defended his conclusion under section 14, he was willing to concede, both that the Council was entitled to raise an argument under FOIA section 21 at this late stage and that the exemption was engaged because his own researches had established that the information held on the Licensing Register also formed part of the Council's publication scheme. In those circumstances the Information Commissioner invited the Tribunal to issue a substituted decision notice concluding that the Information Request had been lawfully refused on this basis, although not on the basis of FOIA section 14.

26. Although it might be appropriate, in these circumstances, for the Tribunal to decide the section 21 issue first and, if it found it to have

been engaged, not proceed to consider section 14 at all, we have in fact determined both issues.

27. Directions were given on 22 October 2012 for the appeal to be determined on the papers, without a hearing, and that Mr Seddon should be joined as a Respondent. In the event Mr Seddon wrote to the Tribunal to say that he did not wish to participate in the appeal beyond submitting some short written submissions. These were to the effect that he only wrote to the Council with questions about events at Institute Union clubs which had been held out as what he described as "public events" in the Leicester Mercury newspaper. He also drew the Tribunal's attention to some difficulties he had experienced since the date when the Information Request had been refused, in trying to access, online, the Council's Licensing Register. He argued that the Council was not complying with LA 2003 section 8 because it only provided the register required by that section online and not in paper form.

<u>Our conclusions on FOIA section 14</u>

28. Before stating our conclusions there are two issues that were covered in the submissions presented to us, but which we believe are not relevant.

29. First, we believe that all parties have placed undue emphasis on the question of whether the Licensing Register was maintained in electronic or paper form and, indeed, on the significance of that section to the facts of this case. The plain fact is that the Information Request did not constitute a request for a copy of the register entries for a particular club. In fact only one or two of the previous requests could fairly be characterised as such a request. It may be that, had the

Information Request asked for a copy of the register in respect of The East Park Road Working Men's Club, or even that part of its register entry dealing with TENs, then the proper construction of section 8 might have come into play. Even then it would not be for the Information Commissioner to determine that issue, as he has stated, and nor would it be for us to determine whether the language of the section precluded the adoption of a paperless format. It might nevertheless be relevant to the issue we do have to determine because, it might be argued, it is difficult to characterise as vexatious a request for something which, under another statute, a public authority is required to provide. However, the Information Request was expressed in different terms. It did not ask for access to the Licensing Register, or a copy of a particular club's entry, it asked whether a TEN had been lodged in respect of a particular event at one club and whether another club had a "Premises License (sic)".

30. We conclude, therefore, that we may approach the question of whether or not the Information Request was vexatious without concerning ourselves with any possible interplay between the FOIA and the LA, let alone any question as to the correct interpretation of section 8 of the latter statute.

31. The second issue which we believe we may ignore is the question of whether Mr Seddon's unfamiliarity with computers should have any impact on our determination even though, again, the point has been pressed on us by the parties. The Council reached the point where it concluded that the context and history of communications from Mr Seddon justified treating his requests on the same subject as vexatious when it wrote the First FOIA Refusal Letter on 15 July 2011. No issue had arisen at that stage as to whether Mr Seddon was entitled to insist on responses in paper form, for the simple reason that every previous

response had adopted that form in any event. The Council reiterated its view when, ignoring the First FOIA Refusal Letter, Mr Seddon submitted further requests, including the Information Request. The Council made it clear in its letter of 28 October 2011 that it was relying on the same grounds of refusal as it had set out previously. Then, in an apparent attempt to be helpful, it drew Mr Seddon's attention to the existence of information accessible electronically. It was only after Mr Seddon had subsequently attempted to avail himself of that resource that a debate arose in the correspondence as to the ease of access and the general acceptability of a paperless format. It is not therefore the case, as the Information Commissioner indicated in his Decision Notice (and elaborated upon in his Response), that the imposition of an electronic format played any part in the history of relations between the Council and Mr Seddon up to the date when the Information Request was refused on the ground that it was vexatious.

32. Having disregarded those two issues, we have reached the conclusion that the history of communications from Mr Seddon justified the Council in deciding, by 15 July 2011, that his enquiries on the subject of club events being authorised by a Club Premises Certificate, a Premises Licence or a TEN had become vexatious and that it was justified in maintaining that view when it subsequently received the Information Request.

33. Although the Information Commissioner's guidance is not binding on us, (and other Tribunal panels have warned of the dangers of using the guidance for a "tick box" exercise), we have included in our considerations each of the factors taken into account by the Information Commissioner, as summarised in paragraph 18 above. We deal with each in turn.

34. Significant burden: The quantity and nature of the correspondence summarised in the Annex demonstrates, to our satisfaction, that the Council's staff members dealing with it bore a not insignificant burden of work which was likely to have distracted them from other duties, including the regulation and control of the other categories of club which the Council regarded as giving rise to public risk (see Annex 4.3.8 in which the Council identified these as "premises that are acting in a way that causes problems in relation to crime and disorder, public nuisance, public safety, or the protection of children from harm") rather than the social clubs with which Mr Seddon was concerned.

35. Serious purpose: Mr Seddon adopted a view of the law, contrary to that adopted by the Council and explained to him in correspondence, which he then pursued by lodging a series of requests about individual events, such as those in paragraph 11 above. He made no attempt to debate with the Council why he thought that the interpretation it had adopted as to its duties was incorrect, but simply pursued his own view that each event he identified lacked proper authorisation and that the Council was failing in its duty by not intervening. He continued in this way even when the Council had clarified the point in respect of a particular event (see Annex section 6.5.22 - 6.5.36) and he adopted, throughout, a sarcastic and argumentative tone both in his requests and in the many subsequent letters of complaint he wrote about the way they had been handled or the Council's failure, in his view, to investigate how the particular event had been conducted (Annex section 5.1.6. and 6.5.14.). This is not a criticism of Mr Seddon's misunderstanding of the authorisation process (although the Council's explanation of it during the early stages of the correspondence was relatively clear) but on his obdurate pursuit of his own belief as to its effect, which became in our view obsessive. This attitude also served to undermine any argument to the effect that Mr Seddon was pursuing

a serious purpose. The issue of club administration may be a serious one, in general terms, but the pursuit of a particular interpretation of one element of it, with no apparent willingness to countenance any alternative view but one's own, has the effect of trivialising it. We therefore reach the conclusion that, whether or not Mr Seddon had a genuine academic interest in social club regulation, his pursuit of it by repetitious information requests (and associated correspondence) focused on one aspect of it did not serve any serious purpose.

36. Motivation to cause a nuisance: Two of us felt that Mr Seddon did set out to cause a nuisance by his information requests, but the third member of the panel preferred to give him the benefit of the doubt, particularly as we had not had an opportunity of assessing his motivation in a face to face meeting.

37. Derogatory tone: We also felt that, contrary to the Information Commissioner's conclusion, Mr Seddon had adopted a sarcastic and unpleasant tone throughout the correspondence, but particularly when the Council expressed any view that did not accord with his own (Annex section 4.3.10 and 4.3.14; 5.1.10; 6.3.7, 6.3.8, 6.3.18 , 6.3.20). This included one instance in which Council staff was accused of being in the pay of club owners (Annex section 6.5.38). Mr Seddon frequently resorted to unpleasantness, in the circumstances we have described, with no attempt to address the area of disagreement with logical argument. We can well understand that the Council's staff may have felt harassed by the tone of the correspondence, as well as the regularity of its submission, and believe that we saw evidence of this in the contemporary annotations made to some of the letters on the Council's file (Annex section 5.1.10) and in some of the language of Mr Seddon's letters, which appeared to threaten to continue the barrage of

communications until the Council adopted an approach which he considered more appropriate (Annex section 10.1.4).

38. We believe that the correspondence, summarised in the Annex and mentioned in paragraph 35 above, demonstrates occasions when Mr Seddon demonstrated an unwillingness to accept another point of view, particularly on the central issue as to whether a Members Club needed to utilise the TEN procedure in respect of an activity already covered by its Club Premises Certificate.

39. In light of the above, but in particular the lack of serious purpose achievable by the approach adopted by Mr Seddon to his information requests and associated correspondence, we have concluded that the Information Commissioner was wrong to conclude that the Council had not been entitled to refuse the Information Request under FOIA section 14.

<u>Our conclusion on FOIA section 21</u>

40. Section 21, which is an absolute exemption, provides that *"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."*

41. In its Grounds of Appeal the Council simply argued that, if and insofar as it held any information falling within the scope of the Information Request, that information would have been reasonably accessible to Mr Seddon via the online register maintained under LA 2003 section 8.

42. In his Response the Information Commissioner drew attention to the fact that the Licensing Register, in addition to being information which the Council was obliged to make available under section 8, was also included in its FOIA publication scheme. It was on this basis that, as previously explained, the Information Commissioner was prepared to accept that the section 21 exemption was engaged.

43. It seems to us that this is clearly correct and we therefore conclude that the Council would have been entitled to refuse the Information Request under this provision as well as in reliance on FOIA section 14.

Conclusion

44. It follows that the appeal should be allowed.

45. Except where otherwise indicated, our decision is unanimous.

[Signed on original]

Chris Ryan
Judge

14 January 2013

Paragraph 39 amended on 18 January 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009