



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

**Case No. EA/2015/0268**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Reference: FER0583961

**Appellant:** Alan Charles Cunningham

**Respondent:** Information Commissioner

**Before**  
Melanie Carter  
(Judge)

and

Henry Fitzhugh  
Alison Lowton

**DECISION OF THE FIRST-TIER TRIBUNAL**

1. This is an appeal by Mr Allan Cunningham against the decision of the Information Commissioner in his Decision Notice of 10 November 2015, ref. FER0583961. The Tribunal has decided, for the reasons set out below, to reject the appeal.

**Background**

2. The Appellant complained to the Information Commissioner in relation to Severn Trent Water Ltd's ("STW") handling of his information request made on 22 May 2015. The information request was as follows:

*"I would like you to conduct a review of all work that has been carried out around this property since 2002 and supply all details under the Freedom of Information Act.*

2. Full details of the removal of all the sewerage works and copy of notice that was served prior to 2002 that covers the disconnection from the sewerage works.

3. All notices served in 2004 to do with any installations on my property in 2005 and all technical details concerning any installations carried out by ST Water under section 101a Connection to Public Sewers 1991 Waters Act.

4. Consultation details between Severn Trent Water and the property owners of South Bank that are required by the Waters Act on private land.

Once again I remind you that I am still awaiting your 2004 Code of Practice that you have never served and failed OT provide on all requests.”

3. The background to this matter is that in December 2004, STW gave notice to the Appellant of its intention to install a sewer. It was installed in in 2005. Proceedings before the Lands Tribunal, for alleged damage to his property as a result of the installation were commenced by the Appellant and settled by mutual agreement in July 2010. A further complaint was made to Ofwat in October 2010 with regard to an alleged failure to consult over installation. Ofwat ordered STW to pay the Appellant compensation.
4. The tribunal understands that the Appellant continued to raise his grievances with STW following this. In June 2013, STW obtained an injunction against the Appellant (still in force) to prevent him from blocking and/or damaging the sewer.
5. The information request made by the Appellant related to the same matters.
6. On 2 June 2015 STW wrote to the Appellant, explaining that as a private company it was not covered by the provisions of the Freedom of Information Act 2000. Accordingly, it refused to respond to his request. When doing so, it noted that all of the Appellant’s complaints had already been dealt with previously and it indicated that it would not correspond further on the issues.
7. The Appellant contacted the Commissioner on 9 June 2015 to complain about the way STW had handled his request. The Commissioner subsequently wrote to STW stating that, given the terms of the Appellant’s request, the request appeared to be for environmental information under the terms of the Environmental Information Regulations 2004 (“EIR”). He further noted that private water companies were covered by the EIR. He asked STW to provide a response to the Appellant’s request.
8. STW provided its response on 4 August 2015. It stated that it did not hold the requested information and it indicated that if the information had been held, it would refuse to provide it on the basis that the request was manifestly unreasonable under the provisions of regulation 12(4)(b) EIR.

9. The result of the Commissioner's investigation was that he found that certain information falling within the scope of the request was in fact held by STW. The Commissioner concluded in the DN, further to considerations at paragraph 19 of the DN, that the only information held by STW was the 2004 notice, which the Appellant had a copy of. Whether or not information is held is determined applying the civil standard of proof, that is, the balance of probabilities.
10. The Commissioner went on to find that the matters complained of by the Appellant had been ventilated and adequately addressed in the context of the previous avenues of complaint the Appellant had already explored. The Commissioner therefore concluded that STW was right to find that regulation 12(4)(b) EIR was engaged and further that the public interest balancing exercise favoured maintaining the exception. He therefore found that STW was correct to refuse the Appellant's request.
11. The Appellant now appeals the Commissioner's conclusion to this tribunal.

## **THE LAW**

12. Regulation 12(4)(b) EIR provides that a public authority for the purposes of that legislation may refuse a request for information where that request is "manifestly unreasonable". That term is not defined in the legislation.
13. The Upper Tribunal has provided guidance on section 14(1) FOIA and regulation 12(4)(b) EIR in the linked cases of *Information Commissioner v Devon Country Council & Dransfield* [2012] UKUT 440 (AAC); *Craven v Information Commissioner & Department for Energy and Climate Change* [2012] UKUT 442 (AAC) and *Ainslie v Information Commissioner & Dorset County Council* [2012] UKUT 441 (AAC). The last two cases dealt with requests made under the EIR.
14. The leading case on the application of section 14 FOIA is *Dransfield*. In *Dransfield*, the Upper Tribunal defined a vexatious request as one which is a "manifestly unjustified, inappropriate or improper use of FOIA" (at [43]).
15. The judgment of the Upper Tribunal has been upheld by the Court of Appeal: *Dransfield v The Information Commissioner, Devon County Council* [2015] EWCA Civ 454.
16. The Upper Tribunal analysed the definition of "vexatious" by reference to four broad issues: (a) the present or future burden on the public authority; (b) the motive of the

requester; (c) the value and serious purpose of the request; and (d) whether the request causes harassment of, or distress to, staff.

17. The Upper Tribunal emphasised the importance of viewing a request in its context. Thus, in relation to issue (a), the Upper Tribunal noted (at [29]):

*“... the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of previous dealings between the individual requester and the public authority, must be considered in assessing whether it is properly to be characterised as vexatious.”*

18. In relation to (b), the Upper Tribunal explained that a request which may seem reasonable and benign *“may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority”* (at [34]).

19. The Upper Tribunal in *Dransfield* said, at [11] that section 14 FOIA:

*“...allows the public authority to say in terms that ‘Enough is enough – the nature of this request is vexatious so that section 1 does not apply.’”*

20. The Court of Appeal, which upheld the UT decision in *Dransfield* found that the starting point for an assessment of vexatiousness is whether there is any *“reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public”* (at [68]). The Court of Appeal agreed that the previous course of dealings between the requester and the Authority could affect this assessment. Arden LJ, giving the judgment of the Court, said at [68]:

*“... If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation.”*

21. *Dransfield* was taken by Judge Wikeley as the lead case in the troika of cases and he used it to undertake a detailed analysis of the application of section 14 FOIA.

22. In *Craven*, at [2] Judge Wikeley noted that regulation 12(4)(b) EIR *“provides the public authority with a broadly equivalent [to section 14 FOIA] ‘escape clause’ where the request is ‘manifestly unreasonable.’”* He stated at [7] that his decision in that case was to be read in light of the analysis undertaken in *Dransfield*.

23. At [22] of *Craven*, Judge Wikeley accepted the *“principle submission that in practice there is no material difference between the two tests under section 14(1) and regulation 12(4)(b)”*. At [83] of *Craven*, Judge Wikeley expressly adopted his reasoning at [24] – [39] of *Dransfield*. At [91] he confirmed that the *“core factors to be considered in assessing whether a request is ‘manifestly unreasonable’ under regulation 12(4)(b)...are essentially the same as those relevant to section 14(1)”*.

## THE GROUNDS OF APPEAL

24. The Appellant's grounds of appeal are set out in full at section 5 of his Notice of Appeal. The Appellant states that he is entitled to the information he seeks because STW have a duty of care to its customers. He acknowledges the wider historical context to his request and says that he wants *“to emphasize that one of my primary concerns is that since 2002 STW have been charging me for something...I am not receiving.”* in his view, is being charged for a service which is *“neither safe, nor effective, and which does not in any way connect to a public sewer”*. He says that *“In this context...my request is a very reasonable one.”* He further claims that there is a public interest to consumers of water services *“especially as there seems to be considerable differences between the water companies’ codes of practice in different regions of the UK and how those codes of practice impact on the rights of consumers.”*

## ANALYSIS

25. The Appellant's grounds do not address the substance of the Commissioner's DN that his request was manifestly unreasonable.

26. The tribunal considered whether regulation 12(4)(b) EIR had been correctly applied. It asked itself first whether the request for information was manifestly unreasonable and secondly, if so, whether the public interest in maintaining the exemption outweighed the public interest in complying with the request.

27. Thus it considered whether the request was likely to cause a disproportionate or unjustified level of disruption, irritation or distress. It took into account the evidence before it of the impact of the request on STW and weighed against this the Appellant's assertions as to the purpose and value of the request. In this regard, it was relevant to take into account the context and history of the request.

28. The tribunal was of the view that this was essentially a private matter as between the Appellant and STW. Whilst there may have been public interest aspects arising from STW's handling of the installation of the sewer on the Appellant's property, these matters had been looked at previously by both the Lands Tribunal and Ofwat. Thus, what public interest there was in furthering the accountability of STW was significantly reduced by this prior scrutiny. In these circumstances, whilst not in any way casting aspersions on the seriousness with which the Appellant considered these matters, the tribunal concluded there was very little public purpose or value behind the request. The request appeared to be an attempt to reopen private matters already extensively considered.
29. Against this, the tribunal weighed the continued nature of the Appellant's engagement with STW in seeking to resolve his concerns. This had included, as mentioned above, the Lands Tribunal and Ofwat. It was also relevant that STW had obtained an injunction against the Appellant. The tribunal was of the view that there was evidence of a significant burden having been placed on STW in terms of resources, albeit no evidence of actual irritation or distress.
30. Balancing these factors, the tribunal concluded that there had been no error of law in the Commissioner concluding that STW had been entitled to refuse the request. The tribunal agreed that regulation 12(4)(b) had been properly applied by both STW and in turn the Commissioner.

## **CONCLUSION**

31. The tribunal decided on a unanimous basis to reject the appeal.

Signed

**Judge Carter**

Date 31 May 2016