

**Between:**

**STOP POLLUTING CAMDEN**

**Appellant:**

and

**THE INFORMATION COMMISSIONER**

**Respondent:**

**Hearing: Leeds Magistrates Court: 3 September 2019.**

**Introduction**

1. This decision relates to an appeal brought under Regulation 18 of the Environmental Information Regulations 2004 ('EIR') and section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 9 April 2019 (reference FER0780010).
2. The Tribunal Judge Brian Kennedy QC and lay members Jean Nelson and Malcolm Clarke sat to consider this case on 3<sup>rd</sup> September 2019.

**Factual Background to this Appeal:**

3. Full details of the background to this appeal, the request for information and the Commissioner's decision are set out in the DN (a matter of public record) but essentially the appeal concerns the question of whether the Public Authority, in this case, the London Borough of Camden ("the Council") was correct to determine that the request was manifestly unreasonable under Regulation 12(4)(b) of the EIR. The Request was made by the Appellant on 13 April 2018 and was for information regarding the operation of ice cream vans in the Borough of Camden and is in the DN, which are not repeated verbatim herein.

## **CHRONOLOGY**

13 April 2018	FOIA request for information regarding ice-cream vans on certain streets
11 May 2018	Council requests clarification of part of request
5 June 2018	Council refuses, citing EIR reg.12 (4)(b) and stating that it aggregated three other requests from 29 May and 3 June 2018
7 June 2018	Internal review refuses disclosure
27 Aug 2018	Appellant complains to the Commissioner
9 April 2019	DN-upholding refusal of disclosure

## **RELEVANT LEGISLATION**

### ***Environmental Information Regulations 2004***

#### **Reg. 9. Advice and assistance**

- (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- (2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall -
  - (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
  - (b) assist the applicant in providing those particulars.
- (3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.
- (4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.
- (5) The provisions referred to in paragraph (4) are -
  - (a) regulation 5(2);
  - (b) regulation 6(2)(a); and
  - (c) regulation 14(2).

## **Reg.12. Exceptions to the duty to disclose environmental information**

- (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) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
  - (a) it does not hold that information when an applicant's request is received;
  - (b) the request for information is manifestly unreasonable;
  - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves the disclosure of internal communications.
- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
  - (a) international relations, defence, national security or public safety;
  - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
  - (c) intellectual property rights;
  - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
  - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
  - (f) the interests of the person who provided the information where that person –
    - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

- (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

#### **Reg.14. Refusal to disclose information**

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including
  - (a) any exception relied on under regulations 12(4), 12(5) or 13; and
  - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).
- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.
- (5) The refusal shall inform the applicant
  - (a) that he may make representations to the public authority under regulation 11; and
  - (b) of the enforcement and appeal provisions of the Act applied by regulation 18.

#### **COMMISSIONER'S DECISION NOTICE**

4. The Commissioner confirmed that the request fell under EIR. She stated that a request may be deemed 'manifestly unreasonable' in two circumstances: it is vexatious, or compliance would incur an unreasonable level of cost or diversion of resources. The Commissioner reminded herself of her guidance on the issue of vexatiousness, namely that the central question is whether the request "*is likely to cause a disproportionate or unjustified level of disruption, irritation or distress*".
5. The Council explained that the request of 11 May 2018 followed a series of requests about the pollution caused by the diesel engines of street trading ice cream vans, and that the service area of the Council was so small that handling the requests alongside

the usual workload was unduly burdensome. It added that this was exacerbated by the fact that the information was not recorded in an easily searchable format. The request came from the campaign group 'Stop Polluting Camden', a group which it stated began with a serious purpose but made so many requests that the volume of correspondence was no longer in proportion with the value of the request. It told the Commissioner that seven requests comprising 16 questions were sent to the Council between May and November 2017, and then three further requests in May and June 2018.

6. The Appellant raised concerns about the activities of ice-cream vans in the borough, and stated that the group had contacted various Councillors and Council officials to "*find out why Camden is not taking action*". It noted that the issue of ice-cream vendor 'territory' had resulted in "*violence*" between rival vendors and as such the individual members of the group are reluctant to identify themselves personally. In regard to the amount of requests, the Appellant stated that "*it was not possible for us to identify all the requests in one go because information learned (or provided) identified where further questions might prove relevant... Our use of the FOIA was simply because we were not getting any response from the Council on our attempts to work collaboratively...*". The Appellant accepted a growing sense of frustration, but assured the Commissioner that the group strove to maintain civility and brevity in correspondence.
7. The Commissioner accepted that the group had resorted to FOIA out of frustration and disenchantment with the Council's responses. Nevertheless, the vexatiousness or reasonability of the request must be judged objectively. The Commissioner accepted that despite the "*serious, public spirited motive*" for the requests and the history of unsatisfactory engagement, the Council must apportion its resources as it sees fit, and there is "*no evidence for wider public concern regarding pollution and ice-cream vans*". While acknowledging that the correspondence has been generally polite, the Commissioner stated that dealing with these questions could cause "*an unjustified level of irritation or distress*". She determined that the request of 11 May 2018 has "*little value and appears to have little purpose other than to irritate the Council*", citing the fact that "*confirmatory or interrogatory questions...is not an appropriate or productive use of EIR*". Instead, she suggested that the matter be referred to the Local Government Ombudsman, as "*compliance with the complainant's requests is a necessary or proportionate means of demonstrating the Council's accountability*". The

continued requests were deemed to show “*unreasonable persistence*”, and so reg.12 (4)(b) was engaged.

8. Turning then to the public interest test, the Appellant noted that any burden occasioned by the requests was of the Council’s own making in its failure to engage properly with the group. The wider public interests identified by the group were regarding unlawful trading, pollution and potential misfeasance in public office by reason either of collusion with the traders or “*at best...gross incompetence*”. The Commissioner warned that any suspicion of wrongdoing must amount to more than a mere allegation, and stated that she could not assess whether there had in fact been any maladministration. This would be within the remit of the Ombudsman, and therefore she attached no weight to the allegations of wrongdoing. She found there to be greater weight in the argument that public authorities must be protected against the disproportionate use of resources by repeat requests from dissatisfied applicants. She was therefore satisfied that there was sufficient evidence that the request was manifestly unreasonable.

## **GROUNDS OF APPEAL**

9. The Appellant provided the Tribunal with a dossier of evidence to ground its allegations of wrongdoing on behalf of the Council and to show its history of engagement with various individual Councillors, and listed four grounds of appeal:
  - i. The Commissioner took into account irrelevant considerations, namely some of the previous requests, which the Appellant stated were made by an individual without the approval of the Appellant group;
  - ii. The Commissioner misunderstood one of the requests, which was a line-by-line series of questions. The Appellant stated that it used this format to attempt to clarify what it saw as previous “*contradictory responses*” from the Council.
  - iii. Insufficient weight was given to the concerns of the Appellant regarding wrongdoing and the evidence it provided to the Commissioner to underpin those concerns;
  - iv. In conceding that there are grounds for complaint to the Local Government Ombudsman, the Commissioner was unreasonable in refusing all information requests.

## COMMISSIONER'S RESPONSE

10. The Commissioner reiterated the comments made in *Craven v ICO and DECC* [2012] UKUT 442 (AAC) at para.30 to the effect that the concept of 'manifestly unreasonable' under EIR is essentially the same as 'vexatious'. She then addressed each of the four grounds in turn.

### ***Ground I – Irrelevant Considerations***

11. The Commissioner denied that she relied on requests made on the subject by other people to come to the conclusion that the Appellant's request was manifestly unreasonable; however, she stated that other requests were "*an important part of the context in which the present request must be considered*" in assessing the burden on the Council.

### ***Ground II – Misunderstanding of the request***

12. The Commissioner denied that she had misunderstood the request. Instead, she noted that some of the questions appeared "*rhetorical and derisory, and an attempt to ridicule the Council*" but also accepted that there was a serious motive behind the request. Motive for the request is only one factor to be considered, and it did not override the insulting tone of the request.

### ***Ground III – Allegations of wrongdoing***

13. The Commissioner stated that the dossier provided by the Appellant did not include any substantiated evidence of wrongdoing or misfeasance on the part of the Council.

### ***Ground IV – Wednesbury Unreasonableness***

14. The Commissioner stated that she did *not* conclude that there were grounds for complaint to the Ombudsman; rather, she stated that the allegations are better ventilated before the Ombudsman than the Commissioner. In any event, allegations that the DN was Wednesbury unreasonable are outside the Tribunal's jurisdiction and should be pursued through a judicial review.

## TRIBUNAL FINDINGS

15. The Tribunal concurs that this matter falls within the ambit of the EIR; the request concerns the state, *inter alia*, of pollution in the air by ice cream vans, and the Council's policies and activities for the management of such pollution. This is clearly an important issue for the Appellant and the local area, and the Tribunal concurs with the Commissioner that the motive is serious, public-spirited and a matter of significant

public interest. The Tribunal is somewhat surprised that the Commissioner, having accepted this motive, then went on to state that the request had little purpose other than to irritate the Council. We do not share her view in this regard.

16. Considering the *dicta* of Judge Wikeley in *Craven* at para 30, we accept that the concept of ‘manifestly unreasonable’ in EIR is essentially the same as ‘vexatious’. With that in mind, we remind ourselves of the four broad themes identified by Judge Wikeley in *Dransfield* [2012] UKUT 440 (AAC): burden on the authority, requester’s motive, request value or purpose, and any harassment or distress occasioned.

17. The context of the case is essential for the consideration of these four themes. The Appellant has provided us with extensive documentation of their attempts to obtain information from the Council without resorting to the framework of FOIA or EIR. We pause here to note that this is precisely the situation in which FOIA and EIR were intended to apply, and attempts to acquire information explicitly through the statutory mechanisms when informal engagement has failed is not generally to be criticised.

18. In contrast to the evidence provided by the Appellant, the Tribunal has not received any significant or persuasive evidence that would establish that the request would be unduly burdensome. We have stated above that we accepted the proposition put forward and agreed by the Commissioner and we consider the motive for the request to be public-spirited and genuine. We accept the Respondent’s view that some of the questions at 1 to 9 are confirmatory and interrogatory, which may not be appropriate for an EIR request, however the questions are about an important Council Policy and of significant public interest to which the request of the Appellant’s list of questions are related. The Council did not provide any effective advice or assistance on how to amend or refine the request, as it is supposed to do under Regulation 9. The extent of its engagement with the request was to clarify with the Appellant that it was referring to the Council in its request. We do not accept that the tone of the request was so derisory or offensive as to justify its summary refusal. In all the circumstances and for the above reasons we do not accept that the request was Manifestly Unreasonable.

19. Accordingly, we allow the appeal. The Council may wish to provide advice and assistance to the Appellant as to how best to refine the request.