First-tier Tribunal **EA/2019/0347**

(General Regulatory Chamber)

Information Rights

BETWEEN:

ROBERT LATIMER

APPELLANT

and

THE INFORMATION COMMISSIONER

RESPONDENT

HEARING: Wednesday 12 February 2020, at Newcastle Upon Tyne Magistrates Court:

PANEL: Brian Kennedy QC, Anne Chafer and Jean Nelson.

Appearances: Mr Robert Latimer for the Appellant:

Result: Appeal allowed.

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as modified by rule 18 of the Environmental Information Regulations 2004 ("EIR"). The appeal is against the decision of the

Information Commissioner ("the Commissioner") contained in a Decision Notice dated 21 August 2019 (reference FER0826020), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 12 February 2020 and have allowed the appeal.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Latimer's request for information and the Commissioner's decision are set out in the Decision Notice ("DN") and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Mr Latimer's requests for information relating to the sewerage treatment system in Sunderland, in particular in Whitburn, were manifestly unreasonable.

CHRONOLOGY:

1992	Information to local residents from Northumbrian Water ("NW") re Whitburn storm water pumping system in Sunderland.
1999	Appellant is advised as to spill rate and tunnel capacity at Whitburn
2001	Public Inquiry re frequency of spills at Whitburn, at which Appellant was present and received information in Inquiry Bundle
2003	European Commission ("EC") issues warning to UK re violations of Urban Waste Water Treatment Directive
2006	EC final warning to UK in Reasoned Opinion
23 Nov 2007	Appellant requests information from Environment Agency ("EA") regarding Hendon sewerage treatment works
17 Feb 2009	Commissioner upholds EA's refusal of the request as manifestly unreasonable
3 Aug 2009	Refusal upheld by First Tier Tribunal re Hendon
8 Sept 2009	Appellant requests discharge and flow records re Whitburn and Briardene stations
25 Sept 2009	EA discloses information re Briardene as this was a new issue raised but refuses re Whitburn

26 Jan 2012	Appellant receives opinion of Advocate General to the EC suggesting a disparity in figures presented for flow rates in discharge consent
14 Feb 2012	EA confirmed it would not respond to Appellant's on-going requests about Sunderland's sewerage system. Appellant turns to the Department for the Environment, Food and Rural Affairs ("DEFRA") with correspondence regarding flow rates at Whitburn
16 April 2012	DEFRA provides explanation as to disparity, suggesting a misunderstanding of its data provided to the Court on the part of the Advocate General
10 Sept 2012	Appellant requests all information, correspondence, consents etc. regarding four sewerage systems, Whitburn and three in Sunderland from EA
16 Oct 2012	EA provides some information regarding Whitburn but refuses the rest as manifestly unreasonable
18 Oct 2012	ECJ decision in *Commission v UK (C-301/10)* finds that the UK breached the Waste Water Directive at Whitburn
6 Nov 2012	Appellant complains to ICO and FTT that he had been treated unfairly in relation to his previous case
11 April 2013	Commissioner upholds EA's refusal of October 2012 as manifestly unreasonable
8 May 2013	Appellant appeals to FTT
4 Sept 2013	Refusal upheld by FTT re Whitburn. (FTT only upheld the Manifestly unreasonable finding in relation to the Sunderland sewage system).
14 June 2015	Request for information re Whitburn to Northumbrian Water
9 July 2015	NW refuses request under r12(4)(b) as manifestly unreasonable (11 Feb 2016, IC upholds NW refusal of July 2015 as manifestly unreasonable).
30 Aug 2016	Refusal upheld by FTT
15 Jan 2019	Present request for information regarding consent to sewage discharge levels at Whitburn
12 Feb 2019	EA refuses request as vexatious, citing FER0230659 Appellant requests internal review
13 March 2019	Review upholds refusal
24 Sept 2015	Appellant complains to Commissioner

21 May 2019 — EC Notice to Members re Appellant's petition regarding Whitburn confirms on-going monitoring but notes repeated engagement with Appellant to try to confine his correspondence to matters with the EC's purview

RELEVANT LEGISLATION

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.

[4] 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.

[5] 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.

COMMISSIONER'S DECISION NOTICE:

[6] The Commissioner set out some background to the Appellant's requests, and also some information provided by the EA regarding steps it has taken to improve the system at Whitburn and Roker in Sunderland. It also explained that as well as multiple requests on the same theme; the Appellant had previously made a complaint to the Parliamentary Ombudsman about the EA's actions in Sunderland that had not been

upheld. The Commissioner described the Appellant's pursuit of information on this subject to show an "*unreasonable persistence"* and an *"obsessive quality",* and any serious purpose to the request had been diminished by the fact that it had "*already been answered*"*.* The requests therefore were manifestly unreasonable by virtue of being vexatious, and the public interest lay in refusing the request.

NOTICE OF APPEAL:

[7] The Appellant described the impact of the Whitburn storm water system on the coastline near his house since 1996, complaining of foul smells and "*sewage debris coming ashore*". He accepted having made various requests for information about this issue over the years to DEFRA, EA, Northumbrian Water, the European Parliament's Committee on Petitions, the European Commission and the UNECE Aarhus Convention Secretariat, but stated that this was the fault of the intransigence of the EA and the Commissioner. The Attorney General's Opinion to the ECJ judgment suggested that the flow rates for the Whitburn system as described to the Court were not the same as described to the public inquiry in 2001. The Appellant's most recent request has emanated from this disparity and he maintained was not a repeat of earlier requests.

[8] The Appellant went on to argue that the discharge and flow rates provided by the EA are misleading, false or in breach of the waste permit. He accused the Commissioner of *"making a mockery of the whole EIR process*", of ignoring previous Tribunal directions and of existing to ensure that the public could **not** obtain information. He noted that the Tribunal's decision in 2009 explicitly stated that the EA could not refuse the Applicant's requests for new information, as opposed to information already covered in the appeal. The Appellant stated that as that appeal related to the Hendon sewerage system and not the Whitburn pumping system, the refusal of the request was inappropriate.

[9] The Commissioner then sought an extension of time to lodge her response. The Appellant stated that the Commissioner's use of a legal representative to provide a response was evidence of her bias in favour of public authorities, and said it was of great concern to him *"unless his/her knowledge is greater than mine on engineering calculations which I assumed this case is all about*". He argued that this made it more

difficult to present his case to the Tribunal, and the public interest lay in disclosing the material given the public expenditure on the sewerage systems. He also stated that there was no need to instruct any legal representatives if the Commissioner were to order disclosure. The Appellant lodged further documents to demonstrate that his complaints had a serious purpose.

COMMISSIONER'S REPLY:

[10] The Commissioner relied upon the *Dransfield* and *Craven* definitions of vexatiousness, emphasising the need for a holistic approach to the determination. In this instance, the Appellant is using the EIR *"to continue a campaign on an issue that, on an objective view, has been addressed by the relevant public bodies over a prolonged period*". In the context of his previous requests, the Appellant has been *"unreasonably persistent*" in making a high amount of frequent and similar requests to the EA which, have resulted in a disproportionate burden and diversion of the EA's time and resources. The public interest lies in protecting the authority from the Appellant's 'misuse' of the EIR.

APPELLANT'S RESPONSE:

[11] The Appellant expressed that he was aggrieved that the appeal concerned the Commissioner's handling of his complaint rather than his request for information. He submitted many further documents and items of correspondence to the Tribunal. He accused the Commissioner of bias, of presenting untruths, of ignoring the *"instruction*" of the FTT in 2009 not to refuse other requests, and of having *"lost their way*" in regards to the EIR. He accused the Commissioner of failing to take proper consideration of the holistic approach required in *Dransfield,* and denied that *Dransfield* or *Craven* had any relevance to his case. He reiterated his submissions about the spill rate of the system and the capacity of the interceptor tunnel being at odds with previous stated figures and repeated that the public interest was on the side of the exposing official wrongdoing and protecting the residents of Whitburn.

HEARING:

[12] The Appellant made lengthy but comprehensive submissions and presented as a reasonable and conscientious citizen with a significant concern and serious purpose for public health and safety issues in pollution problems and risks in the Whitburn and wider areas. With Reference to the Respondents Response to his Grounds of Appeal, he dealt with many points raised inter-alia the following under the heading "FACTUAL BACKGROUND" at page 71 on in the Open Bundle before us. ;

[13] He agrees with Para 21. At Para 22 he notes that he first wrote in 1998 about the system that as commissioned in 1996. He agrees with Para 23 and 24 and added some 300 items of sewage were found on the coast as a result of the system and this was reported resulting in a fine. He agreed Para 25 and indicated that this Public Inquiry came about as a result of his complaint about the smell of sewage etc. In relation to Para 26 the Appellant indicates that the EU does not have investigative powers of it own. He sent them a report from the Secretary of State's Public Inquiry by Margaret Beckett. Then EU investigators sought assistance from the Appellant in obtaining further information, which is what the Appellant was seeking to do.

He agrees with Para 27. In relation to Para 28 he agrees with the content but points out that the system at Hendon is a treatment sewage works. It is different from Whitburn, which is a storm pump network. He points out that there is no mention of Whitburn as the request in issue in the subject request referred to was Hendon not Whitburn.

He agrees with the content of Para 29 and points out that the subject request of this appeal was a new request, on this occasion about Whitburn. He also agrees with the contents of Para 30 pointing out that Whitburn and Briardene pumping stations are two sister schemes (not sewage works as in Hendon) and this request was as a result of the EU personnel asking him to seek information.

He agrees with Para 31 adding that this request was "New" in so far as it related to information concerning Whitburn. The subject request of this appeal was not for the same information he had sought in the past.

The appellant refutes the contents of Para 32 and stated that the only information he received over this period was from DEFRA and it conflicted with any information provided by EA who did not want to help.

The appellant agrees with Para 33 and expressed the view that it was vindication of his concerns. He explained that he had almost given up until this Opinion from the Advocate General was provided. He agrees Para's 34, 35, 36 and 37 adding the DEFRA came back and confirmed indicated some information provided to him had been wrong. He points out that Para 38 is wrong as it was not Sunderland and should have been Whitburn. He agrees with Para 39 and Para 40 but refers us to two important letters at Pages 117 & 118 of the Open Bundle before the Tribunal, which he says raised maters of serious concern to him and the general public both of a significant sewage overflow at Whitburn and that the Whitburn Steel pumping station has been operating even when there is no recorded local rainfall. The appellant refers also to Page 116 of the Open Bundle, ("OB") which raised cause for significant concern.

The appellant agrees with Para 41, which he points out raises a serious concern from DEFRA as a result of which he acted on their request and wrote to the EA, for this "new" information, who refused the information on the basis that it was "Manifestly Unreasonable".

On Para 42 he agrees and adds it includes Whitburn and was the request he had been asked to make by DEFRA. He agrees with Para 43 but points out again that it was not Sunderland but Whitburn. He agrees Paras; 44, 45 and 46 but does not accept the suggestion of the Public Interest in maintaining the exception and favouring non-disclosure.

In relation to the rest of the Paragraphs from 45 to 49 the Appellant simply states he continues to see chronic sewage disposals on the beach at Whitburn and his focus has slipped but that the whole debacle is disgraceful. DEFRA he says had suggested he inquire further and the EU bodies involved had not accepted an error had been made and also suggested he make further requests for Information. He asks, "Why I am having to do the work of the EA?". He refers us to and reads the correspondence on pages 88, 89, 92, 93 & 94 of the OB.

[14] THE REQUEST and PUBLIC INTEREST:

a) In relation to the Request the appellant refers us to Para 50 and states he had never previously asked about this specific change' and had never previously asked *for " . . . .a copy of the discharge consent that allows the CSOs spill at 4.5 XDWF ? ..* "' He insists this is the First time he has asked that question precisely and has never had an answer. It is, he points out, an important query in relation to responsibility for sewage spillage in the area of Whitburn and a proper request for information that the Public Authority in this case should properly respond to by disclosure of all relevant information they have.
The Appellant agrees with PARA 56 PAGE 77 which supports his point. He agrees also that he has been writing about similar concerns over many years now but the problem of chronic sewage spillage in his and neighbouring areas persists and he has not received answers or information as to causation and responsibility. He refutes entirely the contents of Para. 59 on page 77 of the OB. He insist his concerns are not of his personal interest alone but of interest to all residents in the area and he specifically refutes that the relevant Public Authorities concerned have addressed the issues of concern to the public at large.

b) In relation to matters pertaining to the Public Interest balance, the Appellant refers us to inter-alia, a number of matters.

The appellant indicates that there are chronic and serious problems with sewage spillage at the works he has sought information on, in a number of areas including Whitburn. The relevant public authorities are failing to address these problems. If the information sought was provided, he and others can demonstrate why and how the situation can be improved. He informs us that the 2011 census figures for Whitburn declare a population of 5,270 and the number of dwellings 2376. He is a member of the Whitburn Neighbourhood Forum, which has been designated as a recognised statutory body and they represent the interests of circa 5,000 villagers. The appellant went to great length to explain to the Tribunal how and why the Whitburn Forum was formed, what its purpose was. One of the areas of concern to the Forum is the need for the provision of 3,000 houses in the South Tyneside Council area, of which 397 will be in Whitburn, 400 in Cleadon and 1,000 in Boldon, all of which drain into the Whitburn Storm drain and the Hendon sewage system. . The chronic sewage spillage problem in the three areas of concern has never been properly addressed. Whitburn residents are all affected. This is not a matter where the

Appellant is on a personal crusade. He happens to be an engineer who can articulate the dire need for action and can identify precisely the cause of the damage to the environment. He is a spokesperson for the community. The Forum have made a request for information also and have been refused on the basis that the Appellant is named as a member. The residents of Whitburn need another sewage/storm drain treatment system. What they have there at present was only built for flood protection from excess rain. See inter-alia; OB Pages. 88, 89, 92, 93, & 94.

CONCLUSION:

[15] The Appellant attended the Tribunal hearing. The Respondent relied on the papers in the Open Bundle ("OB") before the Tribunal and in particular the Decision Notice itself and the substantive Response to the Grounds of Appeal. The Tribunal found the Appellant to be a reasonable, articulate and conscientious individual who presented his submissions in a competent, coherent and comprehensive manner. As an engineer he was able to explain to us the detail of concerns he has had for many years. He describes how despite years of effort the citizens of Whitburn and beyond have been deprived of suitable water treatment facilities. He feels he has come to the end of the line. He does not dispute that he has received assistance and information from the Public Authorities concerned but he has sought more and new information, as it is necessary to establish the cause of the problems and the need for change.

He has persuaded the Tribunal that the specific facts sought in the subject request are new and have not been specifically sought or provided before. He has persuaded us that the information sought is important and should be made available without causing distress or inconvenience to the Public Authority concerned. He has persuaded us that while it is clear the Public Authority concerned and others have had to deal with many requests, and have dealt with some, there remains a high and significant Public Interest in supplying the information sought for the population of the wider area in question and in this instance in particular the area of Whitburn. He demonstrates the effect of sewage spillage on the residents of Whitburn and how children and other residents and visiting families there have to suffer the chronic effects of inadequate water treatment facilities. He states that there is no sea life in the rock pools now, no warning signs re poor water quality at Whitburn and surfers have reported ear infections. He argues that if he had the requested information

he could show it at the planning meetings and explain why another treatment works was needed.

[16] The Tribunal are not persuaded that the Appellant is misusing EIR and are not persuaded that: *“ - - - the Public Authority have not been able to go about their business without having staff time and resources deployed on repetitive and unreasonably persistent requests for information.”* The Tribunal find the request generally, and in particular for *“consent that allows the CSOs to spill at 4.5XDWF”*, reasonable and not particularly demanding.

We have read the correspondence in the OB carefully and find that the tone is not particularly objectionable and not likely to cause offence. The correspondence generally demonstrates proper purpose and real concern even if on occasion, with a degree of frustration. In all the circumstances we do not accept that the subject request is manifestly unreasonable. Further on the specific facts of this appeal, we find the balance weighs in favour of the Public Interest not maintaining the exemption and favours disclosure.

[17] Accordingly we unanimously allow the appeal and agree with the Respondents suggestion at Para 79 of their Response to the Grounds of Appeal at page 80 of the OB, that the Public Authority (the EA), issue a fresh response to the Appellant not relying on r12 (4)(B) EIR.

Brian Kennedy QC Date: 4 March 2020

Tribunal Judge