**EA/2013/0027**

**IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**
**BETWEEN:**

**PETER SILVERMAN**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**INFORMATION COMMISSIONER'S RESPONSE**

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***Introduction***

1. This is an appeal under section 57 of the Freedom of Information Act 2000 ("FOIA") as amended by the Environmental Information Regulations 2004 ("EIR") against a Decision Notice FER0458553 issued by the Commissioner on 23 January 2013.

2. The Commissioner serves this Response to the appeal in accordance with rule 23 of the Tribunal Procedure (First-tier) (General Regulatory Chamber) Rules 2009 ("the Rules"). For the reasons given below, the Commissioner opposes the appeal.

3. The Commissioner encloses a paginated bundle of documents with this Response. References in square brackets below are to pages of that bundle.

***Factual background***

4. The Appellant runs a campaign, Clean Highways, against litter problems on the UK's road network. According to its website (www.cleanhighways.co.uk), Clean Highways' mission is:
    - To find out why the litter legislation is not working and advise the Government accordingly.

- To issue Litter Abatement Orders against duty bodies who fail to clean their land and encourage others to do the same.
- To encourage local authorities to make more use of their powers under the Environmental Protection Act.
- To act as a focal point for those interested in UK litter legislation.

5. Between January and June 2011 the Appellant made around 20 requests for information / enquiries to the Highways Agency in relation to the issue of litter on the road network, in particular on the M40. Three requests were then made direct to the Department of Transport between June and September 2011 and three further requests were made to the Highways Agency between February and March 2012. (see §17 of the Decision Notice and [4-5]).

6. The requests for information with which this appeal is concerned were made to the Highways Agency on 25 April 2012 [22], 30 April 2012 [23], 3 May 2012 [24] and 16 May 2012 [25]; the latter three contained multiple requests for information. These requests also all concerned the issue of litter on the road network.

7. On 24 May 2012 the Highways Agency responded to the Appellant informing him that it considered his four requests were manifestly unreasonable and it was therefore refusing to comply with them under regulation 12(4)(b) EIR [26-30].

8. The Appellant requested an internal review of the Highways Agency's decision on 4 July 2012 [31-36]. The Highways Agency replied on 23 July 2012 upholding the refusal [37-38].

9. The Appellant complained to the Commissioner about the handling of his request [39-42]. The Commissioner carried out an investigation in the usual way [43-59] before issuing a Decision Notice on 23 January 2013 [1-12].

***Relevant law***

10. Regulation 5 EIR imposes a general obligation on a public authority which holds environmental information to make that information available on request. That general obligation is however subject to a number of exceptions.

11. The Highways Agency is an executive agency of the Department for Transport. As such, it is therefore the Department for Transport that is the public authority for the purposes of FOIA / EIR.

12. Under regulation 12(4)(b) EIR a public authority may refuse to disclose environmental information if the request is "manifestly unreasonable" and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure (regulation 12(1)(b)). Regulation 12(2) EIR "a public authority shall apply a presumption in favour of disclosure".

13. There is no definition of "manifestly unreasonable". However, its meaning has been held as being essentially the same as the meaning of "vexatious" under section 14 FOIA (see *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AC), §30).

14. The leading case on the meaning of "vexatious" under section 14 FOIA is *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AC) (*"Dransfield"*). Whilst *Dransfield* was issued after the Commissioner's Decision Notice in this case, it is binding authority on the Tribunal.

15. In *Dransfield* Judge Wikeley stated that the purpose of section 14 FOIA was "…*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" (§ 10). The common theme underpinning section 14 FOIA was a lack of proportionality (§ 27).

16. The Upper Tribunal's analysis of section 14 FOIA is set out at §§24-39 of *Dransfield*. Whilst neither exhaustive or to be used as a formulaic checklist, the Upper Tribunal found that it may be helpful to consider four broad issues; the burden (on the public authority and its staff); the motive (of the requester); the value or serious purpose (of the request) and any harassment or distress (of and to staff) (§28).

17. As to the burden on the public authority, which is the issue of most relevance to the present case, the Upper Tribunal noted as follows:

> *"29. First, 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 the previous course of dealings*

*between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.*

*30. As to the number, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. Volume, alone, however, may not be decisive. Furthermore, if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against such a finding that the new request is vexatious.*

*31. As to their breadth, a single well-focussed request for information is, all other things being equal, less likely to run the risk of being found to be vexatious. However, this does not mean that a single but very wide-ranging request is necessarily more likely to be found to be vexatious – it may well be more appropriate for the public authority, faced with such a request, to provide advice or guidance on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.*

*32. As regards the pattern, a requester who consistently submits multiple FOIA requests or associated correspondence within days of each other, or relentlessly bombards the public authority with e-mail traffic, is more likely to be found to have made a vexatious request.*

*33. Likewise, as to duration, the period of time over which requests are made may be significant in at least two ways. First, a long history of requests e.g. over several years may make what would otherwise be, taken in isolation, an entirely reasonable request, wholly unreasonable in the light of the anticipated present and future burden on the public authority. Second, given the problems of storage, public authorities necessarily have document retention and destruction policies in place, and it may be unreasonable to expect them to e.g. identify whether particular documents are still held which may or may not have been in force at some perhaps now relatively distant date in the past."*

***The Decision Notice***

18. The Commissioner issued a Decision Notice on 23 January 2013 upholding the refusal [1-12]. In reaching this decision, the Commissioner noted as follows:

(i) The four requests made by the Appellant followed at least 20 sets of requests made between January and June 2011 for information on the subject of litter on the road network and a further 3 between February and March 2012. All were concerned with information about litter and all were responded to (§17 Decision Notice).

(ii) The Commissioner considered that the Highways Agency's estimate of the time it would take to comply with the requests was excessive. However, he was mindful of the number and frequency of the previous requests made by the Appellant on the same subject matter and took the view that complying with the four further requests would continue a pattern of requests which had resulted in a significant diversion of the Highway's Agency's resources from its core functions. (§20 Decision Notice).

(iii) The Commissioner accepted that the Appellant was pursuing a campaign with a serious purpose, that he was not motivated by any desire to cause a nuisance and that his campaign had resulted in a positive outcome in terms of the litter on the roads. The Commissioner also noted that the Highways Agency had responded to the Appellant's campaign by taking steps to keep the road network litter free. However, the Commissioner considered that the Appellant had now gone beyond the reasonable pursuit of information and beyond persistence and the four requests could therefore been seen as obsessive (§§23-24 Decision Notice).

(iv) In respect of the public interest balance, the Commissioner recognised that there was a public interest in the disclosure of information that would contribute to discussions as to whether the Highways Agency is meeting its obligations in respect of litter on the road network. However, he considered that this was outweighed by the public interest in not diverting further significant resources from the Highways' Agency core functions to comply with the four requests in this case (§§34-35 Decision Notice).

***The grounds of appeal & Commissioner's Response***

19. In opposing this appeal the Commissioner relies on the reasoning set out in his Decision Notice. The Commissioner responds to the specific points raised in the Appellant's grounds of appeal below.

20. As summarised at §§19-20 of the Decision Notice, the Highways Agency estimated that it would take 72 hours of officer time to comply with the Appellant's requests. The basis for this estimate is set out in Annex A of the Highways Agency's letter to

the ICO dated 8 October 2012 [51-52]. The Appellant suggests that the estimate is a gross exaggeration and that the requests could be complied with in 5 hours.

21. This is not a case where the costs limit under section 12 FOIA is relied upon (such limit being £600 which equates to 24 hours for an authority such as the Department of Transport). There is no equivalent limit under the EIRs. However, where compliance with a request places an unreasonable demand on the resources of a public authority, then the request may be treated as manifestly unreasonable.

22. It should be noted that the Commissioner did not in fact accept the estimate provided by the Highways Agency, noting that it was "slightly excessive" (§20 DN). However, the Commissioner does not accept that the Appellant's estimate is to be preferred. The Commissioner would invite the Tribunal to accept the estimate provided by the Highways Agency as set out in Annex A of the Highways Agency's letter to the ICO dated 8 October 2012 [51-52] subject to the reservations expressed by him at §20 of the Decision Notice.

23. Whilst the Commissioner doubted the estimate provided by the Highways Agency, he nevertheless remained of the view that, on the evidence before him, compliance with the requests would result in a significant diversion of the Highway's Agency's away from its core functions.

24. The Commissioner notes that the Appellant himself accepts that compliance with his requests would entail the expense of "a not .. insignificant amount of resource". The Appellant however states that "at no time" did the Highways Agency provide him with any advice or assistance to enable him to modify his requests to make them less burdensome. This is denied. On carrying out its internal review dated 23 July 2012 [37-38] the Highways Agency accepted that it had previously failed to provide the necessary advice and assistance. It acknowledged that *"… we did not meet the requirements of regulation 9(1) in providing the right level of advice and assistance in order for you to be able to limit the number of your requests to a reasonable level. In order for you to adopt a more measured approach it would be helpful if you could contact our central Network Development and Delivery team at: NDDCDBT@highways.gsi.gov.uk for any future requests so that we are able to better target your requests for information to meet your core requirements. By doing this we will be able to work with you to ensure you receive the information you require without resourcing pressures impeding the flow of information"*.

25. If a public authority fails to provide advice and assistance then there will be a breach of regulation 9(1) EIR. However, such a failing does not of itself render a refusal under regulation 12(4)(b) invalid. In this case, whilst the Highways Agency initially failed to provide advice and assistance, it remedied this deficiency at internal review. The initial failing does not render its refusal under regulation 12(4)(b) EIR invalid.

26. The finding that the Appellant's requests were manifestly unreasonable was not in any event based solely on the time that would be expended by the Highways Agency in complying with them. The Commissioner also considered whether, taking into account their context and history, the requests could be fairly characterised as obsessive (see §§22-27 of the Decision Notice).

27. In his grounds of appeal the Appellant refers to the serious purpose behind his campaign. The Commissioner accepted that the Appellant's campaign was for a serious purpose and that he was not motivated by any desire to cause a nuisance. He further acknowledged that it appeared that the Appellant's persistence in his campaign had resulted in positive outcomes in terms of litter on the road network (§23 Decision Notice). However, on the basis of the evidence before him, the Commissioner decided that the requests had "gone beyond the reasonable pursuit of information and beyond persistence". In reaching this view he took into account the number of previous requests made by the Appellant on the subject matter, the fact that the Appellant's application of a litter abatement order had not been granted and the steps that had been taken by the Highways Agency to address the issue of litter on the roads. The Commissioner therefore concluded that the requests could be seen as obsessive (§24 Decision Notice).

28. The Appellant suggests that the impression given at §§23-24 of the Decision Notice is that his complaint about litter has been dealt with and that it would therefore be "pointless" continuing with his campaign and making further information requests. However, this is not the point being made by the Commissioner. As stated above, the Commissioner accepted that the Appellant's campaign had a serious purpose and was therefore far from "pointless". The Commissioner does not of course claim that the UK road network is wholly free from litter. The point made by the Commissioner at §§23-24 was simply that the Highway's Agency had responded positively to the Appellant's campaign and that it was understood that the Appellant's most recent application for a litter Abatement Order had been unsuccessful. These

were factors in taken into account by the Commissioner in concluding that the requests were manifestly unreasonable.

29. Whilst it is understood from the Appellant's grounds of appeal that he has *previously* been successful in obtaining an Abatement Order, that does not undermine the relevance of the outcome of a more recent application. Indeed, this would appear to suggest that the steps taken by the Highways Agency have and are having some effect.

30. The Appellant argues that even if the Commissioner found that compliance with all four sets of requests would involve an unacceptable burden, he should have used his discretion to require the Highways Agency to comply with those parts that could be dealt with using minimal resources. However, an authority is entitled to aggregate the costs of responding to multiple requests for information relating to the same or similar subject matter under the EIR when considering whether the requests are manifestly unreasonable under regulation 12(4)(b). Having concluded that the requests, when aggregated this way, were manifestly unreasonable, the Highways Agency was under no obligation to comply with just a smaller part of the requests.

***Conclusion***

31. As the Commissioner accepted at §25 of the Decision Notice, this case is not a "gross or flagrant" example of vexatious requests. However, taking into account the time it would take the Highways Agency to comply with the requests and *"the number, breadth, pattern and duration of previous requests",* it is submitted that the Commissioner was correct to find that the requests in question were manifestly unreasonable.

32. The Commissioner therefore invites the Tribunal to dismiss the appeal.

33. The Commissioner considers that this appeal can be determined on the papers.

14 March 2013

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