



**Neutral Citation Number**

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

**Case No. EA/2013/0027**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0458553**

**Dated:** 23 January 2013

**Appellant:** Peter Silverman

**Respondent:** Information Commissioner

**Public Authority:** Department for Transport

**Heard at:** Field House, London

**Date of hearing:** 9 July 2013

**Date of decision:** 14 July 2013

**Before**

Angus Hamilton, Judge

and

Darryl Stephenson

and

Steve Shaw

**Subject matter:** EIR 12(4)(b) – refusal to disclose on the basis that the request for information is manifestly unreasonable.

**Cases considered:** Information Commissioner v Devon County Council & Dransfield [2012] UKUT 440 (AC)

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 23 January 2013.

**SUBSTITUTED DECISION NOTICE**

**Dated : 14 July 2013**

**Public authority:** Department for Transport

**Address of Public authority:** 76 Marsham Street, London SW1P 4DR

**Name of complainant:** Peter Silverman

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 23 January 2013.

**Action Required**

The Department for Transport (Highways Agency) is to respond to the enquiries submitted by Mr Silverman as set out in Annex A of the Decision Notice of 23 January 2013 by 13 August 2013.

Dated this 14 day of July 2013

Signed

Angus Hamilton DJ(MC)  
Judge

## **REASONS FOR DECISION**

### Introduction

- 1 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.
- 2 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)).
- 3 Regulation 12(2) EIR requires a public authority to apply a presumption in favour of disclosure.
- 4 The Commissioner in his submissions to the Tribunal helpfully points out (and no party disagrees) that there is no binding definition of 'manifestly unreasonable'. However its meaning has been held as essentially the same as the meaning of 'vexatious' under section 14 FOIA (see *Craven v IC & DECC* [2012 UKUT 442 (AC) at 30]).
- 5 The leading case on the meaning of vexatious is now *IC v Devon County Council & Dransfield* [2012] UKUT 440 (AC).
- 6 The Upper Tribunal's analysis of section 14 FOIA is set out at paragraphs 24 to 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).

### The Commissioner's Decision

- 7 The Information Commissioner in his Decision Notice (DN) of 23 January 2013 has correctly set out the chronology leading up to this appeal.

### The Appeal to the Tribunal

- 8 On 20 February 2013 the Appellant submitted an appeal to the Tribunal (IRT). The appellant disputed the Commissioner's conclusions as to the time which responding to his requests would take, the consequent conclusion that dealing with the request would be burdensome and the conclusion that the requests were to a certain extent obsessive bearing in mind the previous history of similar requests submitted by the appellant to the public authority.

### The Questions for the Tribunal

- 9 The Tribunal decided that the first question for them to answer was whether Mr Silverman's requests for information could, on balance, properly be characterised as manifestly unreasonable bearing in mind the guidance given in Dransfield.
- 10 The Tribunal further decided that it would only be necessary for them to consider the public interest test in Regulation 12(1)(b) if they first found the requests to be manifestly unreasonable.

### Evidence & Submissions

- 11 This matter was considered by the Tribunal by way of an oral hearing although the only party attending court was Mr Silverman himself. Extensive written submissions were, however, received from the Commissioner. Mr Silverman had also prepared and submitted written

submissions in advance of the hearing. No submissions were received from the public authority and it was not altogether clear to the Tribunal whether or not the public authority had been joined or offered the opportunity to be joined as a second respondent. The Tribunal members were grateful to the parties for the effort they had clearly put into the preparation of their submissions.

12 In his decision notice the Commissioner referred to a number of factors which he took into account in reaching his decision that Mr Silverman's requests were manifestly unreasonable:

- a) The length of time that it would have taken the public authority to respond to the requests. The public authority estimated the time at 72 hours. The Commissioner felt this to be slightly excessive although did not carry out his own analysis or offer a substitute figure.
- b) The number of previous requests that had been made by Mr Silverman since May 2010.
- c) The public authority's positive response to previous representations from Mr Silverman.
- d) Mr Silverman being unsuccessful in his application for a litter abatement order in proceedings brought against the public authority.
- e) The latter three points taken together led the Commissioner to conclude that Mr Silverman's applications could properly be described as 'obsessive'.

13 Mr Silverman explained that his requests for information from the public authority all related to a campaign he was running entitled 'Clean

Highways' which sought to tackle litter problems on the United Kingdom's road network. The Commissioner in his submissions identified Clean Highways purposes as:

- Finding out why litter legislation is not working and advising the government accordingly.
- Issuing litter abatement orders against bodies who failed to clean their land and encouraging others to do the same.
- Encouraging local authorities to make more use of their powers under the Environmental Protection Act.
- Acting as a focal point for those interested in UK litter legislation

14 Mr Silverman submitted that the time estimate provided by the public authority to deal with his request was grossly exaggerated and that the time required was more in the order of five hours. Mr Silverman provided calculations for how he arrived at his estimate.

15 Mr Silverman also submitted that although there may have been some recent improvement in the Highways Agency's monitoring and enforcement of its obligations in relation to litter on highways this was not a valid reason for suggesting that he could or should reduce the number of requests for information to check that the public authority was doing what it was obliged to do.

16 Mr Silverman conceded that he may have lost the recent application for a litter abatement order but he had been successful on previous occasions. In relation to the unsuccessful litigation he had only been required to pay one quarter of public authority's costs which was a clear indication in his submission that even his unsuccessful application was not without merit.

- 17 Mr Silverman also explained that he liaised with other groups who have overlapping interests to 'Clean Highways' to try and ensure that his was the only campaign group making these particular information requests to the public authority.
- 18 Taking these points together, Mr Silverman submitted, it was quite wrong to characterise his request for information as being 'obsessive' or manifestly unreasonable.

### Conclusion

- 19 The Tribunal first of all concluded that Mr Silverman's campaign was a decent worthwhile campaign with a serious aim and purpose which was of general benefit to the whole community. The Tribunal noted that the Commissioner shared largely the same view (see, for example, p21e bundle).
- 20 Bearing this in mind and considering the four broad issues raised in Dransfield the Tribunal concluded that there were no issues around Mr Silverman's purpose in making the requests, the serious purpose of the requests or the harassment or distress of the public authority's staff that could lead to a conclusion that the requests were manifestly unreasonable.
- 21 This then left only the issue of the burden on the public authority to be considered. In relation to this issue the Tribunal looked both at the time it might take for the public authority to answer the requests and also looked at the total number of requests that Mr Silverman had submitted to the public authority as detailed in the schedule at page 59 of the bundle.
- 22 In relation to the time that it would take to deal with these particular requests the Tribunal was confronted with quite conflicting evidence. The public authority submitted an estimate backed up by calculations which

led them to conclude that it would take 72 hours to answer the requests. Mr Silverman calculated that it would take five hours. The Commissioner felt that the 72 hours estimate was somewhat excessive but did not propose a substitute figure or any calculations. Neither the Commissioner nor the public authority attended court to defend their positions.

- 23 The Tribunal felt unable to provide an estimate of their own in relation to the time it would take to answer these particular requests. The Tribunal concluded, however, that on balance that the time it would take could not be properly characterised as placing an unreasonable burden on the public authority.
- 24 The Tribunal was not assisted by any references to the effective time limits imposed in relation to FOIA requests. The Tribunal did not think that it was appropriate to try and import such time limits over into the EIR framework. Such time limits are entirely missing from the EIR and the Tribunal felt that this was a fairly compelling indication that the FOIA time limits were not a pertinent consideration in relation to EIR applications.
- 25 The Tribunal also looked at the total number of requests submitted by Mr Silverman to the public authority. The Tribunal noted that many of these are simply referred to as enquiries rather than applications under EIR or FOIA. There are only 13 FOIA or EIR applications over a period of two and a half years. The Tribunal did not consider, on balance, that this was excessive in light of the worthwhile nature of Mr Silverman's campaign.
- 26 The Tribunal felt that the Commissioner's submissions in relation to Mr Silverman's requests being obsessive were muddled and unpersuasive. The Tribunal was in particular bewildered by the Commissioner's apparent suggestion that because the public authority had improved and had promised to improve in the future that there was less of a need for Mr Silverman to submit requests designed to check on the public authority's performance. The Tribunal felt that a promise to perform well still quite

- clearly required monitoring – especially if there has been previous poor performance.
- 27 The Tribunal could also not see the particular relevance of Mr Silverman's single failed application for a litter abatement order especially when so little information was provided about the litigation in question.
- 28 The Tribunal also heard and accepted evidence from Mr Silverman that he had made a number of FOIA/EIR applications since the requests giving rise to this appeal. These had been answered without problem. The Tribunal felt that this rather undermined the suggestion that Mr Silverman's requests had reached a level where they could be objectively characterised as obsessive.
- 29 Consequently, the Tribunal unanimously concluded that, on balance, Mr Silverman's requests could not be properly characterised as manifestly unreasonable. Having reached this conclusion it was not then necessary for the Tribunal to go on to consider the public interest test in Regulation 12(1)(b) EIR.
- 30 The Tribunal also wish to comment that they did not agree with the Commissioner's conclusion that the Highways Agency had provided Mr Silverman with advice and assistance to enable him to modify his requests to make them less burdensome (p21f bundle). It was quite clear to the Tribunal that the public authority were making an offer to improve the handling of Mr Silverman's requests in the future and were not doing anything to provide advice and assistance in relation to the requests which are the subject of this appeal.

Signed:  
Angus Hamilton DJ(MC)

Tribunal Judge

Date: 14 July 2013