IN THE FIRST-TIER TRIBUNAL Case No. **Appeal No. EA/2012/0211**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50441183

Dated 12th September 2012

BETWEEN

MR JEFF REMINGTON Appellant

And

THE INFORMATION COMMISSIONER Respondent

Determined on the papers on 14th January 2013 at Field House

Date of Decision 23rd January 2013

BEFORE

Fiona Henderson (Judge)

Alison Lowton

And

Rosalind Tatam

Subject matter: EIR– R 12 (4) request is manifestly unreasonable.

Cases: GIA/1871/2011

Decision: Appeal Allowed

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50441183 dated 12th September 2012 which concluded that the Royal Borough of Windsor and Maidenhead Council (the Council) were entitled to rely upon regulation 12(4)(b) of the Environmental Information Regulations (EIRs) as the requests were manifestly unreasonable.

2. The Appellant has been in dispute with the Council since January 2011 as to whether he requires planning permission to display certain advertisements advertising his business (and associated issues). This led to the Council prosecuting the Appellant and his partner in the Magistrates Court for the display of 2 signs without consent. The case was concluded in January 2012 and the Appellant given a 6 month conditional discharge and ordered to pay costs.

3. The Appellant wrote to the Council on 16th January 2012 seeking written confirmation that the signage that he was now proposing was compliant with the *Town and Country Planning (Control of Advertisements) (England) Regulations 2007*. The Council's view was that he would need planning permission for this, and they advised him to seek pre application advice from a planning officer (they subsequently offered to waive the fee for this). Additionally the Council's Planning Development Manager visited his business in January 2012; however, no resolution was reached.

4. On 23rd February 2012 an article appeared in the Maidenhead Advertiser (and its associated newspapers) which stated inter alia that the Appellant had been prosecuted for *"not complying with an enforcement notice to remove the banner"*. The Appellant established on 27th February 2012 that his information had been provided to the newspaper by the Council, in an email to the newspaper stating that the Appellant was prosecuted: *"following his non-compliance with an enforcement notice. The enforcement was actioned for the display of an unauthorised advertisement...*
Many types of development do not need planning consent – they are regarded as "deemed" – but that does not apply to advertisements."

5. This information conflicted with the letter provided to the Appellant on 31st May 2011 from the Chief Executive of the Council stating:

   "I make it clear again that the Council has NOT served you with an Enforcement Notice".

   Additionally the regulations that the Appellant was relying upon and believed were applicable included types of deemed consent which applied to certain categories of advertisement.[1]

Information Request

6. On 27th February 2012 the Appellant made the information request[2] which is the subject of this appeal asking for copies of the Enforcement notice documentation and for copies of the regulations that the Council were relying upon which appeared to him to state the law differently from the ones that he was relying upon (both as referenced in the Council's letter to the newspaper and in relation to remaining elements of dispute between the Council and the Appellant relating to his proposals for signs).[3]

The Response

7. The Appellant was sent a letter from the Council's Chief Executive dated 8th March stating that *"following a review of your recent, and many previous emails to the Council in particular to [name] the Head of planning and development a decision has now been taken to declare you as vexatious."*

   On the same day that the letter was sent a correction was printed in the newspaper clarifying that the reference should have been to "*enforcement action"* not "*an enforcement notice"* and apologising to the Appellant for the error. The Appellant received no direct communication or apology from the Council in relation to the enforcement notice and nothing in relation to whether deemed consent could ever apply to advertisements.

[1] The Tribunal makes no finding as to whether or not any of the types of deemed consent listed in the regulations relate to the advertisements that the Appellant wishes to display.
[2] As set out in the Decision Notice paragraph 2
[3] The Tribunal makes no findings as to whether or not the Appellant's interpretation of the regulations is correct.

8. The Tribunal notes the Council's email of 16th May 2012 to the Local Government Ombudsman[4] stating: *"The Council accepts that there are 16 classes of deemed consent in the Town and County Planning (Control of Advertisement Regulations) 2007"* and setting out the Council's position that none of these applied to the Appellant's case. This appears to contradict the statement to the newspaper that deemed consent did not apply to advertisements.

9. The Appellant was sent a letter dated 19th March 2012 referencing the letter of "7th March"[5] stating that in light of the fact that the Appellant had been declared vexatious a response to the FOIA request would not be provided.

10. In his correspondence the Commissioner was critical of the Council's response under FOIA:

    "the Council would appear to have refused to answer Mr Remington's requests of 27 February on the basis that the Council had taken a decision to declare him vexatious. For the reasons explained [reference to s14(1) FOIA that it is the request not the requestor that must be vexatious] a public authority cannot adopt such a position in order to refuse to answer FOI requests from a particular individual".

    The Commissioner then indicated that in light of the information involved, the request should be considered under EIRs not FOIA.

11. The Council accepted that because they had not responded to the requests they had not engaged either FOIA or EIR and they recognised that this was inappropriate. Although the Decision Notice recorded that no exemption under FOIA was referred to in the refusal notice of 19th March and that the request should have been considered under EIR, the Commissioner made no specific finding of a breach. The Tribunal clarifies here that it is satisfied that this was a breach of regulation 14(1) EIR.

Manifestly Unreasonable:

12. Regulation 12(4)(b) EIRs allows a public authority to refuse the request on the grounds that the request is manifestly unreasonable. This is not defined within the Regulations,

[4] The Tribunal understands the complaint to the LGO to have post dated the information request and has not had sight of any determination (provisional or final) from the LGO.
[5] The letter was in fact dated 8th March

but the Commissioner argues that the factors applicable in this case are to a large degree the same factors which he would take into account in determining a vexatious request under FOIA. This exemption is subject to the public interest test and should be applied in the context that there is a presumption of disclosure under r12(2) EIRs.

13. Following the Council's submissions to the Commissioner, the Commissioner found that the requests were obsessive, had the effect of harassing the public authority and lacked any serious purpose or value. The Tribunal adopts these headings as both parties have marshalled their arguments under these categories.

14. We note the observations of Judge Jacobs in paragraph 10 of GIA/1871/2011 (refusing Permission to Appeal against the First-tier Tribunal decision in EA/2010/0166, which is followed and approved by Judge Wikeley in GIA/1880/2010) relating to vexatious requests but consider that they have applicability to whether requests are manifestly unreasonable:
"*Inherent in the policy behind section 14(1) is the idea of proportionality. There must be an appropriate relationship between such matters as the information sought, the purpose of the request, and the time and other resources that would be needed to provide it... There are numerous ways in which requests can become vexatious. The background that I have outlined shows what might be called a classic example of vexatiousness by drift*".

15. Whilst the Appellant had corresponded with the Council on several fronts we are satisfied that these requests were not themselves the subject of "drift" - being rooted in the primary concern of the basis upon which he was being told he could not display advertisements without planning permission. The information requested was clearly specified, easy to locate if held, and if held would not require much in the way of time or other resources to fulfil (see paragraph 14 above).

Obsessive

16. The Commissioner concluded in his Decision Notice[6] that the Appellant was seeking *"to re-open issues that have already been considered"* and that a vital consideration was "*that in January 2012 the Magistrates Court found in the Council's favour with [regard to] the applicability of the relevant legislation*".

[6] Paragraph 22 DN

The Commissioner concluded that:

"there must be a point where individuals who engage with public authorities accept the decisions of that authority and any independent body who has verified the position of that authority."

17. The Tribunal disagrees. We are satisfied that the Magistrate's Court verdict is limited to the facts and circumstances of the specific advertisements displayed on a specific day and has no general applicability beyond that. The Tribunal has not seen the summons but does have handwritten notes of the hearing from the Prosecuting Solicitor and the Court Clerk. From the Prosecuting Solicitor's opening speech to Court it is clear that the case related to 2 specific signs of a specific size in 2 specific locations on a particular date. Correspondence from the Prosecuting Solicitor[7] confirms that

> *"The Court did not find that [the Appellant] had a forecourt, let alone the sign was too large for it, or indeed what size of sign would be acceptable. That was not the courts remit to do. [The Appellant and his partner] were found guilty of breaching the advertising regulations as set out in the summonses. That is they did not have consent for the banner advert nor the sign displayed on the highway verge. That was as far as the Court could go."*

18. Additionally the Commissioner considered that the volume and frequency of the correspondence added weight to his finding that the requests were obsessive. He noted that *"between 12 September 2011 ...and the court hearing the Council's prosecuting solicitor had received 89 emails from the complainant's partner or the complainant all of which had been sent on behalf of the complainant's company.... [the Council] had two and half lever arch files of similar correspondence"*[8] The Commissioner did not review the correspondence and consequently the Tribunal has not had sight of it; however, some samples of correspondence are included in the case papers.

19. The Appellant does not dispute the volume of correspondence but he argues that the Council share the responsibility for this volume. He cites:

[7] Email dated 14th May 2012
[8] DN paragraph 16

a) Correspondence relating to clarification that The Garden Centre[9] and the Appellant's business are not the same.

b) The Council repeatedly referred (incorrectly) to 1992 legislation as being the "relevant legislation", and this continued despite the Appellant drawing this to their attention. Indeed the Tribunal notes that the Council's letter of 19th January 2012 (shortly before the information request) again cited the 1992 regulations instead of the 2007 regulations.

c) The need for clarity of the criminal case against them The Appellant states that the terms of the summons was amended, and the Appellant provided at the Council's request the entirety of his defence case to the Council including evidence he had gathered in support of his attempt to prove historic use.

d) Change of staff at the Council and different departments dealing with different elements. Again the Tribunal notes the email thread of 6 emails from 20.1.12 to 23.1.12 - which are entirely caused by another member of staff seeking to field an email in the absence of the original member of staff and without reference to her original correspondence - as an example of unnecessary correspondence arising from this circumstance.

20. We note the contents of the examples of correspondence that we have before us and the circumstances surrounding the newspaper article and are satisfied that on a balance of probabilities the Council have at times been inaccurate, and inconsistent and that this has contributed to the volume of correspondence. On balance, there is insufficient evidence to satisfy us that the volume of correspondence is unreasonable.

Is the request harassing the Council?

21. The Commissioner did not find that the tone or language of the Appellants correspondence was hostile, abusive or offensive. His reasoning for finding that the request had the effect of harassing the public authority mirrored his reasons for finding the requests obsessive. The Tribunal repeats its reasons as set out above and does not find that there is any objective evidence that this ground is made out.

Serious purpose

[9] The Appellants business is on the site of a garden Centre from whom he rents his premises.

22. The Commissioner did not dispute that the Appellant's intention was to secure the promotional advertising he wished for his business and that this was a serious purpose. However, in the Decision Notice he was doubtful that the requests themselves could be said to have any value as he viewed these requests as an attempt to re-open a matter that had been determined by the Court case, finding that in his opinion post the Court decision "*the only option that would appear to be realistically available ...[to the Appellant] was to submit a planning application"*[10]. The Tribunal repeats its findings in relation to the scope of the Court case and its inapplicability to the outstanding issues in dispute between the parties.

23. The Tribunal makes no observation as to whether planning consent is required or not; however, we are satisfied that :

a) The information would serve the purpose of clarifying the Appellant's understanding of which regulations the Council are relying upon in support of their contention that his only option is the planning process,

b) The Commissioner now appears to concede that the dispute is not concluded - stating in his Response that whilst these appeal proceedings would not be able to consider the underlying legislation or otherwise resolve or comment on the actions of the Council regarding the underlying issue "*There may, however, be other options open to the Appellant if he wishes to pursue this aspect of his concerns"*[11]

c) It would serve the purpose of clarifying the factual basis upon which the prosecution had been brought in light of the conflicting information provided by the Council.

d) It would be relevant to his decision whether to seek independent legal advice.

e) We note that the Council told the Commissioner[12] that "*it appears that [the Appellant] has not understood the situation with regard to how his advertisements were deemed to be illegal and the action available to [the Council] to have them removed"*. The Appellant is subject to a conditional discharge. We do not consider it unreasonable for the Appellant to seek

[10] DN paragraph 30
[11] Response 2.11.2012 paragraph 27.
[12] Email 27.7.12

clarification from the prosecuting authority who were also the regulatory authority as to the regulations that they rely upon in informing their decisions.

24. For the reasons set out above we are not satisfied that the request was manifestly unreasonable. However, if we are wrong we are also satisfied that the public interest favours disclosure in any event.

Public Interest Balance

25. Whilst we acknowledge that there is a public interest in ensuring that the resources of the Council are being used most effectively, we consider on the facts of this case that it is outweighed by the public interest in the information being provided. We repeat our finding that the Council has contributed in part to the volume and nature of the correspondence, and rely upon the serious purposes as outlined above in support of this conclusion.

26. Additionally we give greater weight than the Commissioner on the facts of this case to the public interest in ensuring that those who engage with the Council understand the reasons for decisions made by the Council which affect them, in light of our findings as to the serious purposes as set out above.

27. We also note the presumption in favour of disclosure as set out in r 12(2) EIRs which adds weight to the public interest in favour of disclosure - which does not appear to have been explicitly considered in the public interest test by the Commissioner.

Conclusion

28. The Tribunal is satisfied that the Council failed to serve a refusal notice that complied with r14(2) EIRs and that the Council were not entitled to rely upon r12(4)(b) in that the request was not manifestly unreasonable. The Council is therefore required to serve the information within scope or issue the Appellant with a refusal notice pursuant to r14 EIRs within 35 days of the date of this decision.

Dated this 23rd day of January 2013

Fiona Henderson

Tribunal Judge