ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50546642

Dated: 28th. January, 2015

Appeal No. EA/2015/0037

Appellant: Christopher Eaton

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Suzanne Cosgrave

and

Gareth Jones

Tribunal Members

Date of Decision: 4th. July, 2015

The appeal was determined on written submissions.

Subject matter:

Environmental Information Regulations, 2004 ("EIR") Reg. 5(1).
Whether the purported requests were requests for information.

EIR Reg. 3(2)
Whether, if they were requests for information, the information was held by the public authority.

EIR Reg. 12(4)(b)
Whether, if they were requests for information, the public authority was entitled to refuse to comply with them on the ground that they were manifestly unreasonable.

Authority: Dransfield v ICO and Devon County Council and other appeals [2015] EWCA Civ. 454

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that none of the "requests" was a request within EIR Reg. 5(1). It further finds that, if any was a request within Reg. 5(1), it was manifestly unreasonable and the public authority did not hold the information. It dismisses the appeal.

Dated this 4th. Day of July, 2015

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. The Appellant ("CE"), an industrial geologist, holds strong views on plate tectonics, the science relating to movement of the earth's crustal plates. He contends that such movement is caused, quite simply and in accordance with what he terms "natural law", that is to say common sense, by the conflicting flows of highly viscous magmas below those plates seeking their stable levels. His views are evidently at variance with current scientific opinion, which is supported by the Natural Environmental Research Council ("the NERC"), evidently reflecting the views of a significant part of the academic com-

munity. CE and others are confident that the academic world has fallen into fundamental error as to the mechanism of earth movement for nearly a century and are determined to expose such error, partly, it seems, through a form of Platonic dialogue.

2. Such disagreements led to a series of written challenges from CE to the NERC from about 2011 to 2014, requiring one academic geologist or another to justify NERC's rejection of CE's views, which, he says, are based on natural law principles. In 2014 a "petition" was served on the NERC by CE and about forty others, evidently presenting arguments and posing questions to which answers were demanded.

3. After a time the NERC refused to debate these issues further, insisting that CE follow normal academic practice and submit his thesis to a suitable academic publication for peer review.

<u>The Requests</u>

4. On 30th. April, 2014 CE wrote to Professor Wingham, Chief Executive of the NERC, with a series of eleven requests. They read as follows -

"*1 May I have copies of the letter to JL referred to in yours dated 6. June to me, the only one I ever received from you, and any other communications between you and JL and/or others concerning me and/or my work ?*

2 If there were none, why were there none ?

3 Specifically, did you ask JL to answer the questions in the petition and, if so, did you receive clear - cut answers to the questions and/or reasons why he was going to evade them ?

4 If you received either or both, would you kindly tell me what they were ?

5 If you did not, why did you not insist on clear - cut answers ?

6 Did JL (and/or DM) ever write or talk to you about my character as a contributory reason for refusal to answer my questions through the three years I have asked them ?

7 *Would you kindly explain why you did not make it clear that, in any case, the public had a right to expect clear answers to the petition ?*

8 *What is public dialogue and debate in NERC if key questions are ignored at will ?*

9 *I ask you personally, as a physicist, to agree with me that academic earth scientists' effective claim that DSLP*[1] *cannot be at work in the upper mantle is manifestly wrong. If you disagree with me, what first principle grounds do you have ?*

10 *There are none, so the comparative scrutiny of standing theory and density sorting rationale (DSR), announced publicly, would not be to determine relative popularity among academic geologists but for experienced representatives of all relative inside and outside academia to establish whether standing theory is deeply flawed and whether DSLP in the upper mantle answers all questions. Do you agree ? If not, why not ?*

11 *Would you please ask JL to tell us all why he never mentioned what is in Note 2. I refer you to my letter dated 14th. January, 2014 to JL and DM (;)you were sent a copy. Do you agree as a physicist with my comment in Enclosure 1accompanying that letter ? If not, I respectfully ask you to explain why."*

JL and DM are professors who reject CE's thesis/hypothesis – their views on the merits of the hypothesis had been succinctly summarized in 2013 as " *an incompetent restatement of what almost all geologists believe*." (Exhibit IV -Bundle page 222 email from JL to friend of CE) .

5. It is evidently common ground that the Request was the culmination of a sequence of requests, arguments and interrogations covering a period of about three years.

6. On 23rd. May, 2014 the NERC refused these requests relying on s.14(1) of FOIA, that is on the contention that they were vexatious. It maintained that refusal by letter of 24th. June, 2014, following an internal review.

[1] According to CE's Reply to the ICO's Response to his Grounds of Appeal, DSLP stands for nature's "density sorting/layering/stable - level - seeking/Earth - rounding process".

7. CE complained to the ICO. A large part of his complaint related to the merits of his theory, the primacy of natural law and the academic shortcomings of the NERC and the earth science establishment. In the course of the ICO's subsequent investigation he was provided with very extensive further submissions from CE, setting out in some detail the merits of his position and what he perceived to be the inadequate and devious responses from the NERC and the academic geologists whom he identified.

8. The ICO, when conducting his investigation, raised with the NERC the question whether these requests came within FOIA or the EIR. In the alternative, the NERC formulated its case in terms of manifest unreasonableness (EIR Reg. 12(4)(b)) and the balance of public interests.

The Decision Notice ("the DN")

9. The DN treated 1 - 6 inclusive as subject access requests for the purposes of s.7 of the Data Protection Act, 1998 and did not therefore consider them further. The Tribunal understands that the ICO is dealing with them separately. This Decision makes some observations on them but accepts that it remains for the ICO to rule on the complaint in so far as it relates to them.

10. The ICO determined that this complaint was subject to the EIR, not FOIA. As the DN notes, the distinction in this appeal is largely academic, though such a determination must be made.

11. He concluded that, whilst CE's concerns were entirely sincere and the requests, taken in isolation, were not vexatious or manifestly unreasonable, nevertheless, viewed in the context of the history of previous communications, such findings were justified. As to the public interest, he found that the diversion of intellectual and other resources to answering these requests outweighed the effect of the presumption in favour of disclosure (Reg. 12(2)). He dismissed the complaint. CE appealed.

CE's grounds of appeal.

12. These are extensive and include an Appendix which sets out to demonstrate that the NERC violated natural law in its views on plate tectonics and *"hence that . .neither NERC nor the IC could be correct in their judgements of me, my work and/or my requests put to NERC in my letter dated 30th. April, 2014 or in their judgements of me and my work as presented by me in correspondence through the three years leading up to the 30/4/14 letter"*. Indeed, both the grounds and CE's Reply to the ICO's Response may be summarised as a very forceful, lengthy and detailed submission that -

    (i) CE and his supporters are incontestably correct in their views as to the application of "natural law" to plate tectonics and the consequent conclusions;

    (ii) Standing theories supported by the academic earth sciences establishment could not explain the earth's dynamic mechanisms or observed events and

    (iii) The issue is of such paramount public importance that any apparent obstacle to the answering of these requests, whether legal or otherwise, must be swept aside.

13. CE relies on Article 1 of the Aarhus Convention, the origin of the domestic EIR, specifically its requirement for a guarantee of the rights of access to environmental information. He submits that his requests should have been dealt with *"professionally/technically from first principles"*. The ICO should have ordered (presumably the NERC) to conduct a full investigation into the merits of this dispute, involving experts from within and without the academic community. He accuses the ICO of *"indefensible bias"*. He argues that to pursue a dialogue in this dispute by publication and peer review was "too slow and uncertain". He subjects the DN to a paragraph by paragraph analysis, identifying criticisms of the content. He accuses the NERC of disingenuousness, of evasion of critical questions and of unsatisfactory distortion

The ICO's case.

14. The ICO added to the DN the submissions that CE had wholly misunderstood the purpose of the EIR and that the EIR did not provide a forum for scientific debate.

The Tribunal's reasons

15. Natural law means something different to lawyers from what it evidently means to scientists. Neither supersedes the law as enacted by Parliament, whether by statute or subordinate legislation, such as the EIR. That trite statement is necessary in the light of certain claims made by CE in his Grounds of Appeal and Reply.

16. We have no doubt that the EIR, not FOIA, govern this request, a view with which CE evidently concurs, since he bases part of his argument on the provisions of the Aarhus Convention. As already stated, the decisions required in this appeal would be the same, whichever regime was applicable.

17. The Tribunal is not qualified and does not need to be qualified to form any opinion on the merits of the scientific issues giving rise to these requests; it has not done so. The strength of CE's case is wholly immaterial to our decision as it was to the decision of the ICO. The ICO made no attempt to arbitrate between CE and the NERC in relation to their scientific disagreements, as CE suggests, and he would have been acting quite outside his remit if he had. The substance of CE's submissions is therefore of very limited assistance to the Tribunal in reaching its decision, though their volume and style may be relevant to its decision on Reg. 12(4)(b)

18. Considering the letter of 30th. April, 2014, the first question is whether any of the requests 7 - 11, which are within the scope of this appeal, was a request for information, whether under FOIA or the EIR. Plainly, they were not.

19. They are demands that the NERC justify refusals to answer questions or say whether it or named geologists accept CE's stance based on natural law principles and if not, why not. So far from being requests for information, they are, in CE's own words, *"requests effec-*

tively (asking) for me to be corrected, if possible, using available information". He further submitted *"that no such information exists anywhere" (*(see Grounds of Appeal. Open Bundle p.24). Such an analysis of itself demonstrates that they are not requests to which EIR Reg. 5 applies.

20. That conclusion accords with the obvious principle that FOIA and the EIR were not enacted for the purposes of conducting scientific or other academic debate to test the reasoning behind a thesis but to provide the public with factual information of substantial value which was held by a public authority. The Tribunal has no doubt that scientific polemics are properly conducted through publication, peer review and, if appropriate, rebuttal. That FOIA or the EIR could be used to compel a scientist serving a public authority to argue his case on a controversial theory with the threat of being found in contempt of court, if he refused (see FOIA s.54(3) and EIR Reg. 18(1)) is an utterly untenable proposition.

21. Furthermore, if these had been requests for information, it could not be information "held by" the NERC (see EIR Reg. 12(4)(a)) but rather information to be created by Professor Wingham or others in order to respond to CE's cross examination. Even the underlying information which he/they would require to provide such responses (see paragraph 18 above), information which, CE asserts, does not exist anywhere, was held, if it did exist, in various academic and other institutions, not by the NERC.

22. As to 1 - 6, on which the DN did not adjudicate, 1 and 6 were clearly requests for CE's personal data, hence excluded from the duty to make information available by virtue of EIR Reg. 5(3). 2 and 5 were of the same character as 7 - 11.

23. If, as the Tribunal finds, the letter of 30th. April, 2014 did not contain requests for information, then the question whether such requests were "manifestly unreasonable" (EIR Reg. 12(4)(b) does not arise.

24. However, had they been requests within the EIR, the Tribunal has no doubt that they would have been manifestly unreasonable, taking full account of the presumption in favour of disclosure provided for in Reg. 12(2).

25. Contrary to CE's submission, "vexatious" (FOIA s.14(1)) and "manifestly unreasonable" (EIR Reg. 12(4)(b)) have the same meaning (see *Dransfield v ICO and Devon County Council and other appeals [2015] EWCA Civ. 454* at paragraph 7.) The principles enunciated in Dransfield and approved by the Court of Appeal therefore apply to the question whether a request is manifestly unreasonable. They require the Tribunal to look at these requests and their effects in the round.

26. The NERC appended to its response to the ICO a spreadsheet summarising CE's communications over the previous three years, all devoted to aspects of the dispute no doubt inadequately summarised above. It is plain that CE's interrogations are likely to persist until the NERC caves in and admits its alleged errors, which is most unlikely to happen. The NERC further appended summaries of CE's communications linked to the ICO's Notes for Guidance on FOIA s.14(1) and examples of letters received from him.

27. In summary, it is clearly arguable that the requests of 30th. April, 2014, taken in isolation, are an abuse of the EIR and therefore manifestly unreasonable, given the considerations addressed above. Be that as it may, taking those requests in the context of the earlier demands and approaches, the following features demonstrate that they were manifestly unreasonable -

    (i) They ignore accepted procedures using publication and peer review. The fact that these may take time does not justify bypassing them.

    (ii) Professor Wingham, on behalf of the NERC and others, had indicated perfectly clearly from 2012 onwards that they had nothing to add to the rejection of CE's position already provided. Whatever the merits of the respective cases, further exchanges were, and had long been, sterile and pointless, as CE well knew.

(iii) CE's hectoring and often offensive demands for capitulation, coupled with dogmatic assertions of the unique correctness of his own opinions were insulting to highly qualified scientists and wholly inimical to constructive debate.

(iv) The sheer volume of demands, criticisms and expostulations placed a quite unreasonable burden on the personnel and possibly financial resources of the NERC.

(v) Only by invoking Reg. 12(4)(b) could the NERC bring the exchanges to an end.

28. It is clearly the case that if information existed showing a deliberate and prolonged cover up of a new scientific theory this would be a matter of great public importance. However CE has adduced no evidence of such misconduct. On the contrary we have seen evidence of years of NERC and others seeking courteously to deal with his requests and suggesting how he could advance technical debate of his hypothesis.

29. Therefore, even if, contrary to the Tribunal's primary findings, these were requests for information and that information was held by the NERC, the requests would be manifestly unreasonable and the public interest balance (as described in Dransfield) would result in withholding the information.

30. The Tribunal deprecates the persistence and the tone of CE's communications with the NERC and the resulting waste of time and money.

31. This appeal is therefore dismissed.

32. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

4th. July, 2015