Neutral citation number: [2023] UKFTT 883 (GRC)

Case Reference: EA/2023/0111

First-tier Tribunal
General Regulatory Chamber
Information Rights

Determined on the papers

On 16 October 2023
Decision given on: 24 October 2023

Before

TRIBUNAL JUDGE C GOODMAN
TRIBUNAL MEMBER R TATAM
TRIBUNAL MEMBER D SIVERS

Between

MICHAEL JOHN ASHWIN

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE ENVIRONMENT AGENCY

Respondents

Decision: The appeal is dismissed.

The Environment Agency is entitled to refuse to provide the information requested by the Appellant on 24 May 2022 on the basis that the request is manifestly unreasonable pursuant to Regulation 12(4)(b) of the Environmental Information Regulations.

REASONS

The Request

1. The Environment Agency ("EA") contributes to an annual report assessing salmon stocks in 64 rivers in England and Wales. Its assessments are used to inform

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measures to prevent and control certain fishing methods, including byelaws and Net Limitations Orders.

2. On 24 May 2022, the Appellant made the following request for information to the EA:

> "As part of our engagement with the National Stock Assessment Review process would you kindly provide the following in an appropriate file containing;
>
> The **last 10 years (2012 - 2021) - individual 1SW & MSW Rod Exploitation Rates** used for calculating annual egg deposition estimates **for each of the 44 principal salmon monitored rivers in England.**
>
> Please highlight and include the detail of any changes made in individual river Rod Exploitation Rates causing alteration to the original published annual stock assessments in this 10-year timeframe.
>
> Please indicate which salmon rivers with validated counter/trap facilities generate Rod Exploitation Rates data used in estimating their own respective river annual stocks, and/or provide Rod Exploitation Rate data for other river annual stock estimates."
>
> (We refer to this as "the Request" [emphasis in bold from original request])

3. The EA refused to provide the requested information on the basis that the Request was manifestly unreasonable pursuant to Regulation 12(4)(b) of the Environmental Information Regulations 2004 ("EIR"). The EA noted that its Deputy Director for Agriculture, Fisheries and the Natural Environment had written to the Appellant on 10 February 2022, stating that it would not reply to correspondence from him about salmon stock assessments "for the time being" (page 287 of the bundle).

4. The decision was not changed on internal review.

The Decision Notice

5. The Appellant complained to the Commissioner.

6. On 1 February 2023, the Commissioner issued Decision Notice IC-201267-M3X2. The Commissioner decided that while the Appellant had a serious purpose, the Request was manifestly unreasonable and that the EA was entitled to refuse it under Regulation 12(4)(b).

7. The Commissioner noted that the EA had breached Regulation 14(2) EIR by not issuing a refusal notice within the statutory timeframe, but no further steps were required.

The Appeal and Response

8. The Appellant appealed to the Tribunal. His position, as set out in his grounds of appeal and developed in his Reply and Final Submissions, is summarised below:

    a. The Appellant alleges that the EA's approach to assessment of salmon stock is inaccurate and unreliable because it uses a fixed "rod exploitation rate (RER) factor" which is not seasonally adjusted and has not changed over a number of years. As a result, he claims, the EA consistently underestimates the salmon stock with consequences for national measures to prevent and control fishing.

    b. The Appellant submits that there is a wide public interest in the EA's approach to salmon stock assessment because it impacts 25,000 migratory fish licence holders in England and Wales.

    c. The Appellant submits that the EA has committed to review river rod exploitation rates since 2004 and failed to do so. By refusing to disclose the requested information, he says that the EA is seeking to supress data which would demonstrate its errors and delays.

    d. The EA is undertaking a national review of its salmon stock assessment process. The Appellant says that he needs the requested information in order to inform his submissions to the review.

    e. The Appellant submits that he has long standing experience and expertise in advising and representing fisheries, and as a result, is required to engage extensively with the EA on behalf of the organisations he represents. Many of his interactions with the EA relate to the standard logging of river incidents, such as pollution, he says, and not to salmon stock assessment.

    f. The Request is civilly worded and the requested information is readily available. The EA has 10,600 employees and the task of providing the requested information can be delegated to technical staff. The Appellant says that Natural Resources Wales responded promptly to an equivalent request, despite being a much smaller organisation.

    g. Any stress caused to EA staff by his requests for information is due to the EA's own failure to accept its errors, to respond fully and accurately to his requests, and to implement the improvements he advocates. If the EA provides the requested information, the Appellant says that he does not anticipate making any further requests for information.

9. The EA was joined as a party to the appeal. In its Response and further submissions, the EA submitted that the Request was manifestly unreasonable because:

    a. The EA had engaged with the Appellant extensively on the subject of salmon stock assessments and regulations since 2016, including in face to face meetings, correspondence, its formal complaints procedure, and through formal consultation processes, as well as by responding to requests for information. Despite this level of engagement and effort, the Appellant

refuses to accept the evidence it provides and the case made by the EA in support of its approach to stock assessments.

b. While the EA is a large organisation with many employees, the Appellant's requests for information tend to be highly technical, lengthy and detailed, and the burden of responding falls mainly on a few technical specialists.

c. Responding to the Appellant's requests for information and other correspondence generates a further "continuous stream of email traffic and phone calls", requests for internal review or complaints.

d. The Appellant had caused an unjustified level of disruption, irritation and distress to EA staff and has ignored a request to direct his correspondence only to a particular EA email address.

e. The EA disputes that the Appellant represents the interests of a large number of anglers, submitting that the requested information is of interest only to the Appellant and a small number of people who share his views on this particular issue.

10. In its Response to the appeal, the Commissioner relied on the Decision Notice and the EA's Response and accompanying witness statements.

Evidence and Determination on the papers

11. In reaching its decision, the Tribunal took into account the evidence and submissions before it. The Tribunal had before it an open bundle of 409 pages plus final submissions from the Appellant dated 2 August 2023 and 9 October 2023, and from the EA provided on 3 August 2023. There was no closed bundle.

12. The Appellant had support in preparing his submissions from Professor Emeritus Brian Revell. The evidence provided by the EA included witness statements from four members of staff who had had dealings with the Appellant, including three fisheries technical specialists and a fisheries programme manager.

13. In considering the submissions made, and evidence provided, by the Appellant and the EA respectively, the Tribunal took into account submissions from each party about the other's submissions and evidence, and in particular objections made by the Appellant to the EA's final submissions. We find that it is not in the interests of justice for the Tribunal to rule individually on each such dispute and disagreement, noting that we have a duty to deal with cases in ways which are proportionate, and to avoid unnecessary formality and delay. We accept, for example, that an error in relation to the Appellant's attendance a meeting in February 2021 was a genuine oversight, which was conceded and corrected by the EA when drawn to their attention. We have not taken into account any new matters raised by either party in their final submissions contrary to Case Management Directions issued by the Tribunal. The Tribunal's role is limited to considering whether the Decision Notice is

in accordance with the law – it is not our role to consider the merits of the substantive arguments about salmon stocks and assessment methods.

14. All parties consented to this matter being dealt with on the papers and the Tribunal decided that it was fair and in the interests of justice to do so.

The Law

15. Regulation 2(1) of the EIR defines "environmental information" as:

> "…any information in written, visual, aural, electronic or any other material form on -
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components... and interaction among these elements;
>
> ….
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> …"

16. It was not disputed by the parties that the information requested in the Request was "environmental information" as defined in Regulation 2(1) and that the Request is therefore subject to the EIR and not the Freedom of Information Act 2000 (although both parties often refer to "FOIA" in their correspondence and record keeping).

16. Regulation 5 EIR provides:

> "(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

17. Regulation 12(1) EIR provides:

> "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."

18. Regulation 12(2) provides that: "A public authority shall apply a presumption in favour of disclosure."

19. Regulation 12(4) provides that:

> "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> …
>
> (b) the request for information is manifestly unreasonable;"

20. Grounds for refusing to disclose environmental information under the EIR should be interpreted in a restrictive way.

21. In *Craven v Information Commissioner and DECC* [2012] UKUT 442 (AAC), the Upper Tribunal stated that:

> "in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" under FOIA" [paragraph 30]

22. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 AAC, the Upper Tribunal interpreted "vexatious requests" under section 14 of the Freedom of Information Act 2000 ("FOIA") as being manifestly unjustified, or involving inappropriate or improper use of a formal procedure. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic approach.

23. In *Dransfield*, the Upper Tribunal observed in relation to "burden" that the "present burden may be inextricably linked with the previous course of dealings" [paragraph 29]. The context and history of the request must be considered, and in particular the number, breadth, pattern and duration of previous requests.

24. A request arising from a genuine public interest concern may become "vexatious by drift" where that proper purpose is "overshadowed and extinguished" by the improper pursuit of a longstanding grievance against the public authority (*Oxford Phoenix v Information Commissioner* [2018] UKUT 192 (AAC)). Public interest is not a trump card (*CP v Information Commissioner* [2016] UKUT 0427 (AAC)).

25. The Upper Tribunal's approach in *Dransfield* was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), which emphasised the need for a decision maker to consider "all the relevant circumstances" and noted that:

> "Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one and that is consistent with the constitutional nature of the right" [paragraph 68].

26. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> "(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

27. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before it. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

Discussion

28. The reasons for the Tribunal's decision are set out in full below.

29. The issue for the Tribunal is whether the EA was entitled to rely on Regulation 12(4)(b) to refuse the Request.

30. The Tribunal applied the law as set out in paragraphs 15 to 25 above. It took a broad and holistic approach while considering the four issues or themes set out in *Dransfield*, and took into account that the EIR regime for refusing manifestly unreasonable requests differs from the FOIA regime for vexatious requests. In particular, there is a presumption in favour of disclosure under the EIR and the Tribunal must carry out a public interest balancing exercise.

31. The Tribunal placed particular weight on the four witness statements provided by EA staff, which we found to be credible, detailed, specific, measured, and consistent with each other, and with the other evidence before us. Each witness has had considerable dealings with the Appellant over a number of years.

Burden

32. The EA accepted initially, in paragraph 13 of their Response, that the Request itself was short and focussed, and might not of itself place a significant burden on the organisation. However, the Tribunal must take into account not only the burden of the Request, but also the previous course of dealings between the Appellant and the EA, including the context and history of the Request, and the number, breadth, pattern and duration of previous requests. This may include not only statutory requests for information, but also other communications and correspondence.

33. In this regard, the Tribunal noted in particular the observations of Mr Ramsden that:

> "the Environment Agency has spent a colossal amount of time over recent years corresponding both in writing and in person with [the Appellant] on the subject

of salmon stock assessments and decision making based on these assessments. We have painstakingly considered, reviewed, and responded to his representations on the subject on a great many occasions through numerous different formal routes." [paragraph 4]

and of Mr Shields that the Appellant:

> "has communicated his position to us (in correspondence and requests for information) frequently, at great length and repetitively, and in response we have extensively and repetitively explained our data, our calculation methods and our position on stock protection.
>
> "The sheer volume of correspondence from Mr Ashwin is a particularly heavy burden as it has been extensive, very repetitive and crippling in terms of EA staff workload. The amount of senior staff time, including senior management time, involved in responding to Mr Ashwin has been exceptional, and far beyond that provided to any other customer that I am aware of." [paragraphs 3 and 4]

34. These statements were supported by copies of correspondence in the bundle and tables listing communications with the Appellant. The Appellant has been corresponding with the EA on the issue of salmon stock assessments since 2016. In addition to participating in consultations held by EA in relation to the management of salmon stocks, and other correspondence and communication, he has made 13 requests for information in relation to salmon stock assessments from 2020 to April 2022.

35. The Appellant's correspondence is often detailed and multi-headed, setting out technical information, tables, graphs, statistics, and analyses, and requiring extensive technical expertise to respond, and demanding that the EA explain or justify its position. The Tribunal accepted based on the evidence before us that significant time was required for the EA to respond to these requests, for colleagues to discuss, and in "compiling, redacting and presenting" the relevant information, as explained by Mr Ramsden at paragraph 9 of his witness statement.

36. The Appellant often appears dissatisfied with the responses provided by the EA, responding with further requests for information or clarification, questioning and challenging the EA's approach to data and analysis, requiring an internal review or raising a complaint. Correspondence and requests for information are often repetitive and unreasonably persistent, because the Appellant simply does not accept the EA's response and position on the issue of salmon stock assessment.

37. The burden of responding to the Appellant's requests falls on a small number of technical staff. The Tribunal accepts that the time required is significantly disproportionate to time spent on any other stakeholder or issue within their considerable responsibilities for fisheries across large areas (North Cumbria in the case of Mr Ramsden and the West Midlands in the case of Mr Bainger). Mr Shields

estimated that in 2017/2018, he spent one third of his time corresponding with the Appellant. The fact that the Appellant submits that Natural Resources Wales responded to a similar request for information from the Appellant is not relevant to this appeal, which concerns only the Request and the course of dealing between the Appellant and the EA.

38. The Tribunal took into account the submissions of the Appellant that not all his correspondence with the EA relates to salmon stock assessments, and that some relate to issues such as logging standard river incidents. However, even the Appellant acknowledges (in Appendix 8 to his Reply) that 43 of 91 items of correspondence logged by the EA from April 2017 to December 2022 related to salmon stock assessments. We noted in this regard that the EA's refusal to reply to further correspondence in February 2022 was limited to correspondence about salmon stock assessments.

39. We also took into account the Appellant's submissions that he was required to engage extensively with the EA because of his role in representing certain fisheries and fishing interests. There was insufficient evidence before us that the Appellant represented significant, national bodies and stakeholders who might justify this level of engagement with the EA. In any event, even as a representative, the Appellant has a responsibility to ensure that his engagement with the EA does not reach a level where it is manifestly unreasonable.

Value or serious purpose

40. The Commissioner accepted that the Request had a serious purpose in relation to the assessment of salmon stock in rivers in England and Wales. The Tribunal accepts that there is a genuine public interest in the regulation of salmon fishing and salmon stocks and widespread public interest regarding species under threat.

41. However, the Tribunal finds that this original serious purpose has to some extent become vexatious by drift, because the Appellant refuses unreasonably to accept that the EA's approach to assessment differs to his own and disregards any evidence and arguments which do not support his position. His original purpose in seeking to clarify and challenge the EA's approach has long since been "overshadowed and extinguished".

Motive

42. Notwithstanding the Appellant's stated purpose and motive, the Tribunal finds that the Request and much of the Appellant's other communications is aimed at pressurising the EA into accepting his approach to salmon stock assessment in place of its own. The Appellant seems to regard himself as a self-appointed independent peer reviewer of the EA's approach. The Tribunal accepts that the Appellant has become obsessed with pursuing this agenda and that he will not refrain until, as Mr Ramsden puts it at paragraph 4 of his witness statement, he gets his own way. This is demonstrated by the fact that the Appellant submits that any stress caused to EA

staff by his requests, is caused by the EA itself, and not by him, because the EA refuses to accept his position.

Harassment or Distress

43. The Tribunal found the evidence in the EA witness statements about the distress and anxiety caused to staff to be powerful and compelling.

44. The witnesses describe experiencing a "sinking feeling" when receiving communications from the Appellant, taking the unusual step of blocking his communications, even worrying about taking annual leave "for fear of returning to yet another piece of correspondence from him" [paragraph 6 of Mr Ramsden's statement] and acting uncharacteristically with colleagues and family due to frustration and stress caused by his correspondence. They describe having to request welfare support and questioning their future at the EA as a result, despite their deep personal commitment to their roles and to environmental regulation. Mr Shields describes the Appellant's impact on staff as being "utterly toxic" [paragraph 10].

45. While several witnesses observe that the Appellant's requests are courteous, the Tribunal finds that his tone is often condescending and disparaging, or belligerent and destructive (as described by Mr Shields at paragraph 10). He regularly copies multiple recipients into his emails, including senior EA staff and national angling bodies, and has made threats to embarrass or report staff to their superiors or other stakeholders. This compounds the anxiety and stress experienced by staff.

Public interest

46. Having considered each of the themes suggested in *Dransfield* and taking a broad and holistic approach, the Tribunal concluded that the burden of the Request in the context of the previous course of dealings, combined with the Appellant's motive, the lack of serious purpose, and in particular, the distress caused to staff, meant that the Request was manifestly unreasonable pursuant to Regulation 12(4)(b) EIR.

47. The Tribunal further found that in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the requested information. While the Tribunal accepted that there is a public interest in the EA's approach to assessing salmon stocks, it found that the EA had gone to great lengths to provide information and explanation to satisfy that interest, including in responses to the Appellant and in wider consultations. It is currently undertaking a national review of its methodology and engaging in public consultation. Its witnesses accept that challenge is appropriate and to be expected, and the EA had specifically informed the Appellant in February 2022 that it would continue to engage with him on public byelaw and Net Limitation Order consultations. The EA has, as the Appellant highlights, taken steps to withdraw and correct reports where errors have been identified.

Conclusion

48. The Tribunal concluded that, even taking into account the presumption in favour of disclosure in Regulation 12(2), the EA was entitled to refuse to respond to the Request on the basis that it was manifestly unreasonable pursuant to Regulation 12(4)(b) of the Environmental Information Regulations.

49. The appeal is dismissed.

Signed District Tribunal Judge Goodman Date: 18 October 2023