IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0082**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50465825
Dated: 26 March 2013

Appellant: **Mark Benney**

Respondent: **The Information Commissioner**

2nd Respondent: **The Department for Environment, Food and Rural Affairs**

Heard at: Field House

Date of Hearing: **20 September 2013**

Before

Christopher Hughes

Judge

and

Nigel Watson and **Dave Sivers**

Tribunal Members

Date of Decision: **10 October 2013**

Attendances:

For the Appellant: Mr Benney in person

For the Respondent: no appearance

For the 2nd Respondent: Robin Hopkins (Counsel) instructed by Gillian Jackson (Treasury Solicitor)

Subject matter:

Freedom of Information Act 2000

Cases:

IC and Devon CC v Dransfield [2012] UKUT 440 (AAC), [2013] 1Info LR 360.

Benney v Defra and the Treasury Solicitors [2012] EWHC 3957 (Admin).

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 March 2013 and dismisses the appeal.

Dated this 10th day of October 2013

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Mr Benney is a barrister who enjoyed a long career in the civil service. He spent approximately ten years in the Treasury Solicitor's Department and nearly eight years as a departmental lawyer, finishing his career in the civil service working for one of the agencies of The Department for Environment, Food and Rural Affairs (DEFRA).

2. In 2008 DEFRA was working towards the implementation of a new individual performance management system as part of what was called the "Renew Programme". Mr Benney was opposed to this and in December lodged a grievance against it and notified his concerns to others through the DEFRA e-mail system. He made FOIA requests concerning the Renew Programme. In the subsequent email correspondence DEFRA placed reliance on S12 FOIA – that compliance would exceed the relevant cost limit. In March 2009 he sought leave for judicial review of DEFRA's decision, this was not granted. On 23 and 24 April Mr Benney again communicated his concerns using the internal e-mail system. He was asked for an undertaking not to do so, did not provide it and on 27 April he was suspended on full pay. A disciplinary hearing was held on 21 July; on 23 July Mr Benney made a further request seeking the minutes of meetings of the Renew Programme. He received minutes of 14 January 2008 on 14 August and this led to a complaint from M Benney (bundle 6/79):- *"Between August and December 2009 I was pursuing a complaint about what I thought had been improper suppression of the 14 January 2008 minutes. I was concerned that they would have been relevant to my grievance, grievance appeal, judicial review and disciplinary hearings. I complained to senior DEFRA managers, the Secretary of State, HM Attorney General, the High Court, the Civil Service Commissioners and Rob Wilson MP, to no avail".*

3. On 27 August 2009 he received a final written warning for continuing to use DEFRA's internal e-mail to discuss his grievance with colleagues, having been asked not to. On 3 September he requested copies of emails in January and February 2008 involving 19 individuals, concerning the new system. On 18 September 2009 DEFRA confirmed that it had not supplied the 14 January 2008 minutes in February

2009 since that request had fallen within S12. On 8 October 2009 DEFRA confirmed to Mr Benney that it considered the request of 3 September fell within S12. An internal review of 23 October concluded that this had been correct.

4. Mr Benney was absent from work and DEFRA sought his agreement that he would comply with the requirements of the new system. He did not indicate unambiguously an intention to comply with the request by the specified date of 1 December. A briefing document was drawn up for DEFRA managers and considered by them in early December. Mr Benney was dismissed on 8 December 2009 and appealed internally against dismissal. Mr Benney applied to the Employment Tribunal alleging unfair dismissal, seeking interim relief and arguing that he had been dismissed for making protected disclosures relating to DEFRA's non-disclosure of relevant documentation. There was a direction for disclosure, but DEFRA did not provide the December 2009 briefing material. His application for interim relief was decided against him. In November 2010 Mr Benney received the December 2009 materials in redacted form (DEFRA maintaining the redactions were to protect legally privileged material - LPP) as well as two e-mails from February 2009 (Mr Benney considered DEFRA had lied to him about the existence of these e-mails) as part of the disclosure in the Employment Tribunal litigation.

5. On about 15 December 2010 Mr Benney and DEFRA conciliated his claim before the Employment Tribunal with Mr Benney accepting a financial settlement for loss of earnings and pension rights, a sum for injury to feelings and a payment for promising not to make derogatory, defamatory or disparaging statements about DEFRA, or other Government Departments or their staff.

6. Mr Benney was also aggrieved at his former trade union and in 2011 was preparing to bring a claim against them. He submitted further information requests from DEFRA and in January 2012 received a redacted copy of the December 2009 background document. He argued that the application of LPP was dishonest or grossly negligent and that the availability of the document could have had an impact on the Employment Tribunal pleadings. On 23 February 2012 Mr Benney requested another document from early December 2009, "the assessment document". Then in February and May 2012 Mr Benney made the requests which are the subject of this appeal.

<u>The request for information</u>

7. On 26 February 2012 Mr Benney requested:-

"I now require to release under the FOIA and/or the DPA of copies of any communications between

(a) any person acting on behalf of DEFRA in connection with the preparation of instructions to [name redacted] in November 2010 on the one hand and any persons acting as DEFRA's legal representative during the same period; and

(b) between any legal and/or HR staff and/or staff within DEFRA during the same period; and

(c) any related notes, manuscript annotations, meeting notes, telephone attendance notes, previous drafts (including any track changes notes) and or any other relevant material including but not limited to the document entitled "TN MB Dismissal Note" said to have been attached to the e-mail from[name redacted 2} to {names redacted} at 13.47 on 3 December 2009

in relation to

(i) the redaction of the document entitled "background notes" and/or dismissal note attached to the e-mail from [name redacted] to [name redacted] timed at 12.51 on 4 December 2009, the redacted version of which was sent to me by [name redacted] on 17 November 2010 and the un-redacted version of which was sent to me on 13 January 2012

(ii) The drafting of the document "Respondent's List of Redactions within Additional Disclosure" sent to me by [name redacted] by email at 17.27 on 25 November 2010

8. On 11 May 2012 Mr Benney made a further request focussing on the handling by DEFRA of his FOIA request of 3 September 2009. This request focussed on the identity and actions of a named individual who had carried out the review of 23

October 2009 which had concluded that S12 had been correctly applied. It queried her conduct:- "*..if so, why did she not declare that she had taken part in the Renew process during February 2008?"* It sought details of the papers she had examined and the people she had consulted.

9. DEFRA declined to provide the material relying on S14(1) and Mr Benney complained to the Information Commissioner.

The complaint to the Information Commissioner

10. In his DN the Commissioner found that there had been a long dispute between Mr Benney and DEFRA and these two requests were an extension of that dispute. In applying the approach outlined in *Dransfield*, he considered the number, breadth and pattern of requests, finding 17 requests for information between December 2008 and February 2010 involving 83 questions, 30 emails to DEFRA, other Government Departments and DEFRA staff between August 2011 and March 2012, and an e-mail to 31 DEFRA staff seeking to circumvent DEFRA FOIA processes. This had imposed a significant burden. The Commissioner considered that the original serious issue behind the requests had been largely lost because of the extent of the requests and correspondence and because issues at the heart of the dispute had been subject to formal proceedings. He considered that Mr Benney had been forcing DEFRA to repeatedly revisit an issue that had been already considered and looked at by an objective body. DEFRA had been correct to view the requests as vexatious.

The appeal to the Tribunal

11. In his appeal Mr Benney raised numerous objections to the Commissioner's decision. These include that the decision should have been under DPA, that the Commissioner was procedurally unfair, that the Commissioner incorrectly viewed the requests as an extension of the original dispute, that he gave too much weight to DEFRA's statistics and chronology, disputed that DEFRA staff would feel harassed, that there was evidence of fraud, that the decision notice was inadequately reasoned, that the support for DEFRA's use of S14 was irrational, flawed and unsustainable, and the balancing exercise the Commissioner carried out was inadequate or inadequately reasoned.

The question for the Tribunal

12. Although in his voluminous appeal Mr Benney raised many issues and arguments (for example with respect to procedural fairness by the Information Commissioner) which are not matters for this Tribunal, the issue before the Tribunal is whether the Commissioner's decision notice is in accordance with the law; whether he is correct to have determined that under S14(1) FOIA DEFRA was not obliged to comply with the requests for information because the requests were vexatious.

Submissions and analysis

13. In considering this matter the Tribunal was faced with a substantial bundle prepared by the Commissioner, supplemented by a further bundle submitted by Mr Benney following a permission given by the President of the Employment Tribunals. While the material was extensive the Tribunal was assisted by a comprehensive list of Mr Benney's requests for information which he kindly provided. He also supplied the Tribunal with an extensive speaking note of 22 pages he had prepared for the hearing which supplemented his oral submissions.

14. Although the history of the dispute between Mr Benney and DEFRA is long and involved, Mr Benney in oral submissions was able to present the fundamental argument in his appeal succinctly and with great clarity. He argued that his motive was to gather evidence of potentially criminal behaviour and that had the effect of negating the suggestion that the requests were vexatious; in short "Justification trumps vexatiousness". He identified and discussed what were described in his note as "smoking guns" which in his view clearly established culpability. While he intended to use the material gathered in relation to his attempt to reopen his Employment Tribunal claim against DEFRA which would financially benefit him (and it may be in other litigation) it was his process of investigating this misconduct and ensuring that justice was done which gave the public interest to his requests which counterbalanced vexation.

15. In developing his argument he suggested that the grievance hearing could have been different if the officer hearing the grievance had been aware of two e-mails: - "Surely [name redacted – the individual hearing the grievance] was entitled to know as she

was deciding on my grievance that an irrational decision was made". On examination of the two e-mails (bundle tab 17) it is clear that they record no such thing; one manager supporting one option with respect to implementation of the new individual performance management arrangements, another manager who was the senior lawyer in the department supporting a different option. The e-mail upon which Mr Benney appears to place such weight is from an individual supporting the administration of a meeting of the Renew Executive Board. It is dated 22 February 2008 and is headed;- *"IPM paper for Renew Executive Meeting – 25 February"*. It reads:-

"Please find attached the Individual Performance Management slides that [name redacted] will be presenting at Monday's Renew meeting, relating to year end assessment, moderation and rating distribution.

Gill has already reviewed these and is in favour of option 2"

16. One of the recipients of this e-mail replied setting out arguments why he considered that a different approach should be adopted:-

"… It seems a bit cowardly to say that we won't be competent to operate a managed distribution in the next 12 months. However if there really is a consensus view that we are not ready for the radical option, then I think we need to take some active steps to mitigate that risk…"

17. What this exchange of e-mails actually shows is a difference of approach with the Head of the Legal Branch being reported before a meeting (without explanation or reasoning given) as favouring one option and another person favouring a different option. From the context it seems that the second individual supported a more rapid process and the lawyer favoured a more cautious approach. Mr Benney's claim that they show that "an irrational decision was made" is a highly coloured over-interpretation of this e-mail exchange.

18. This view is fortified by the minute of the meeting which took the decision. The Head of the Legal Department is recorded as present. The minute summarises the discussion on this item (bundle tab 9 page 7):-

"4.3 [name redacted] told the Executive the pros for proceeding with option one would give an opportunity to trial the new arrangements before pay is formally linked to ratings in 2009/10, it also sends a clear message to staff that things are changing and as a Department we are serious about Performance Management. [name

redacted] explained one of the pros for option 2 would allow for the collation of baseline data against which future distribution decisions can be made and compared.

4.4 The Executive felt that not going for option one would send the wrong signals out to staff and there had been a long running history in Defra of changing appraisal systems year to year."

19. The minutes strongly reinforce the impression given by the e-mail exchange a consideration of the balance of advantages and risk between two possible courses of action; and no suggestion from the Head of Legal Branch that an irrational or unlawful course was being pursued – there are simply no grounds upon which Mr Benney can make his assertion (paragraph 15 above) that the officer hearing his grievance was entitled to know that an irrational decision was made.

20. Mr Benney stated had not pursued his application to commit DEFRA and the Treasury Solicitor's Department for contempt after the High Court had ruled against him because, while in his view the Court had been wrong in its view of mens rea, "I was willing to accept the Court's public interest judgement call". He felt that the Court and HH Judge Serota QC in the EAT had been wrong to view what had happened as errors or "cock-up", he maintained that what the Court had not said was that the "entirety of the allegation of misconduct and dishonesty was unfounded" and despite the views of Mr Justice Collins that some things could never be discovered, he was convinced that they could be and would show such dishonesty. It should be noted that the High Court directed that the application should be marked as totally without merit and warned him of his risk of being subject to a Civil Restraint Order.

21. In his presentation Mr Benney made specific allegations of grave misconduct against individuals.

22. It is appropriate to examine the "smoking guns" he identified.

23. The first is a letter (bundle tab 6/29 dated 1 February 2010) in which DEFRA applied s12 (cost) to one of his FOIA requests. It contains the statement "If any information is necessary to be disclosed to you in respect of your employment tribunal claim under the tribunal procedures, it will of course be made available to you".

24. The second was the note of a meeting chaired by the civil servant from another department relating to Mr Benney's appeal against dismissal. His comment on it was "no mention of briefings but claim on last page of rectitude". The note however does

disclose that the officer hearing the appeal was told about errors in FOIA disclosure. The "claim…of rectitude" Mr Benney specifically referred to reads:- "DEFRA had continued to refine the IPM system and consult with unions – and the current union focus was on discrimination. She stated that there had been a lot of transparency and consultation around the implementation of the system and that Mr Benney could have raised his concerns through those channels".

25. The third "smoking gun" "within three months of February 2010 promise (on 26 April 2010) DEFRA was lying to ET, through [the lawyer identified in the first request under consideration] with result that entire ET case was undermined and perverted with consequences that now appear" (bundle 5/31). In that communication to the Employment Tribunal the lawyer wrote: -

    "I have sought instructions from my client as to whether or not such a case conference took place prior to the Claimant's dismissal and, if so, whether a note of such conference was taken. I can confirm that a meeting did take place as referred to in the note of [name redacted] meeting with [name redacted] but that no note was taken of this discussion".

26. The first element of the underlying material behind these requests is the minutes of the 14 January 2008 meeting of the Renew Executive. On 18 September 2009 an internal review letter extending over 10 pages explained to Mr Benney that these minutes were not sent to him as a result of his requests in January 2009 because the scope of the request entailed excessive costs. When he specifically requested minutes they were provided. An indication of the scale of the efforts to comply with Mr Benney's requests is given at bundle 17/1 – an e-mail from the Permanent Secretary's Private Secretary:- *"I give you all this boring background because I am at pains to point out that I have not been avoiding Mark's questions and I had in fact spent a considerable amount of time searching through our archives trying to find the information he wants. I have managed to put together this information which was not immediately clear to me from the limited information he initially provided about when and what the meeting was on the access to archives that I had. I have put together what happened from several different e-mails in the archive over a few weeks, which I was not able to find straight away. I have taken considerable time out of my day job to try and look into this, time which I cannot well afford as Private Secretary to the Permanent Secretary, and Management Board Secretary as well. In summary, the*

item on IPM was taken at a Renew Executive meeting on 18th February. After time ran out, the Renew team circulated a short paper for comment and a possible decision by correspondence, asking to comments by 22nd February. Although there was reasonable consensus on the e-mails I've seen, the item was taken to discussion at the following Renew Executive meeting on 25th of February. The note of that meeting was then circulated on 13 March". In the Tribunal's view this does not amount to a smoking gun rather it points to the foreseeable difficulties of a large organisation in trying to track down documents.

27. The first request under consideration today relates to the redaction of documents. The key document is a briefing note considering issues around Mr Benney and his possible dismissal. On 25th of February 2012 (bundle 5/88) he wrote to a lawyer in the Treasury Solicitor's Department:-

    "I recently (and unexpectedly) received the attached "background note" from DEFRA under the FOIA. It shows that most of the reductions are applied to the version of the document given to me by way of inspection in the November 2010 should not be made. See the attached documents A and B.

    In the table of redactions (copy also attached) it was claimed that the redactions to this item (part of item 427) were in respect of legal professional privilege. That was obviously wrong, except in respect of eight words in paragraph 4.

    This is a serious matter

    Please let me know without undue delay whether the document was given to you already in redacted form or whether you and/or Counsel advised on the redaction and the claim to legal professional privilege.

    If it was given as you already redacted form please let me know who instructed.".

28. The following day he made the first of his FOIA requests under consideration today. The lawyer from Treasury Solicitor replied four days after the e-mail to her. She gave a full and clear explanation which was entirely satisfactory:-

    "I received both these documents in an unredacted form from DEFRA. I then redacted the documents in order to remove those parts of the documents that were privilege from disclosure prior to disclosing the documents to you on first of November 2010.

In the table of redactions provided to you on 25th of November 2010 I described the reductions made to these documents as being on grounds of legal professional privilege only. On re-examining the document I realise that this is not a complete description of the reasons the redaction. As you have noted, whilst redactions were made in both documents on this basis, redactions were also made to remove references to without prejudice communications between the parties. This omission was an inadvertent error on my part and I am sorry for any con fusion caused as a result of it. Nevertheless, it is my view that all material redacted from these documents was privileged from disclosure."

29. It is entirely clear to the Tribunal that this demonstrates that there is no conspiracy, misconduct, at worst there has been a minor "cock up" of no significance to the conduct of litigation. While Mr Benney has been insistent that this briefing note was the “record of a meeting” which he had sought through FOIA it self-evidently did not meet the description of a record of a meeting since it was prepared in advance and was an assessment of issues which might be relevant to the meeting. Again the existence of such a note and its delayed disclosure did not indicate any dishonesty or misconduct. When the lawyer wrote to the Employment Tribunal on 29 April 2010 (paragraph 23 above) she was precise accurate and correct: the meeting had been held and there was no note or record of the meeting; a briefing note for the meeting was later discovered. The statement by the lawyer was accurate.

30. From a review of the evidence and arguments submitted by Mr Benney the Tribunal is entirely unconvinced by his arguments that there has been misconduct of a most serious nature. The High Court in considering the history of some of these documents and their disclosure and redaction was extremely robust in indicating that it saw no merit in Mr Benney’s arguments. Mr Justice Collins intervened to state with respect to the briefing note:- *“at least the major part of it ought to have been disclosed, but there was a mixture of legal professional privilege and without prejudice privilege in the background. It was a view which might be regarded as not entirely unreasonable that it was not necessary to disclose it, but the key point is it would not make a blind*

bit of difference to the decision of the district judge if he had had it disclosed. In those circumstances, this is not an application which is going to go anywhere, is it not?..

…

…, the time has come to put this all behind you. I appreciate that you felt that the new arrangements in December 2008 were entirely wrong, but you tried judicial review against them and failed. They are history now, I am afraid."

31. The police have also declined to investigate these issues as a crime.

32. Counsel for DEFRA helpfully analysed the issues in the light of the decision in *Dransfield.*

33. The first of these issues is the burden of Mr Benney's requests which is helpfully considered at paragraph 16 and 17 of the decision notice. It is substantial and the exercises which staff have gone through in seeking to find information he has requested are illustrated by the quotation at paragraph 22 above from the Private Secretary to the Permanent Secretary.

34. The second is motive. Mr Benney's requests are motivated by a belief in wrongdoing against him in his employment and in the subsequent litigation; he voluntarily entered into a compromise agreement in relation to that litigation in which he received considerably more than one year's salary. As the Court made very clear in a judgement addressing the issues raised by Mr Benney as to misconduct there is no substance in his allegations. This strongly indicates that the application of section 14 is appropriate.

35. The linked issue of a value or serious purpose is also fully addressed by the clear conclusions of the Court which considered his application with respect to contempt of

court. This point is clearly indicated by the comment of Mr Justice Collins in the transcript of the hearing:-

“With great respect, this is an utterly pointless application, quite apart from having no merit. It does not do you any good at all except from an element perhaps of vindictiveness and an attempt to punish those who you think have done you down."

36. The fourth factor identified in *Dransfield* - harassment and distress is also clearly established. The nature volume and frequency the allegations of misconduct, including criminal misconduct on the part of officials undoubtedly will cause distress concern and harassment to at least some of the people who are subject to such allegations. In the documents which Mr Benney has submitted and in the requests themselves there is a very clear focus on individuals and a clear implication of misconduct.

37. The Tribunal is satisfied that the Commissioner was correct at paragraph 28 in his decision notice to conclude that Mr Benney had *“crossed over the line between persistence and obsessiveness by forcing DEFRA to repeatedly visit an issue that it has already considered; an issue that can be, and has been, looked at by an objective body."* There is no value in Mr Benney is continued investigations of his suspicions through FOIA; suspicions which have been comprehensively rejected by the High Court and the police.

38. The High Court advised Mr Benney that it was time to stop. He has placed constructions upon the documents he has seen which he believes support his theories of conspiracy and wrong-doing, but they are not constructions which any reasonable person would support. The Tribunal is satisfied having reviewed the evidence that there simply is no ground upon which Mr Benney can construct his edifice of misconduct. His argument that the allegation of vexatiousness is trumped by the

public interest he has claimed to have established falls entirely in the absence of any public interest in pursuing these issues.

Conclusion and remedy

39. The Tribunal is therefore satisfied that the decision of the Information Commissioner is correct in law and rejects this appeal.

40. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 10 October 2013