FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2013/0005
Appellant:	Mark Snee
Respondent:	The Information Commissioner
Second Respondent:	Leeds City Council
Judge:	Warren

DECISION NOTICE

1. This decision notice concerns an application by Leeds for an order that Mr Snee should pay costs. The application is for full costs on the ground that the litigation was unreasonably brought and pursued throughout; alternatively for the costs of the hearing – or some other reasonable proportion – given the efforts made by Leeds to settle the case.

2. The Tribunal's decision dated 17 December 2013 is the background to this ruling and should be taken as read.

3. The application is made under Rule 10(1)(b) of the GLC Procedure Rules. The Tribunal may make an order in respect of costs if Mr Snee has acted unreasonably in bringing or conducting the proceedings.

4. It seems to me that there are some general considerations which I should take into account in exercising this jurisdiction.

5. First, although in the courts costs follow the event, tribunals have a different tradition, which is reflected in the present Rule 10. It is in my judgment, part of our public law system that challenges to a state decision before a Tribunal do not generally attract a penalty in costs if they fail. It works both ways. Millions of decisions are taken every year by public authorities. Inevitably, some are wrong.

There are many in which ordinary reasonable people, be they decision makers in the public authority or decision makers in the Tribunal, might reasonably differ. In general, both the public authority and the citizen gain from a cost free environment. The decision under appeal is properly scrutinised. No one pays out more in lawyers' fees than they choose to do so.

6. The importance of this principle is referred to in the recent judgments of Lord Carnwath and Lord Wilson in the Supreme Court decision in Kennedy; the dissenting nature of these judgments does not, in my view, affect the validity of this point.

7. A second important general consideration, in my view, is that public law tribunals often deal with complex issues on which it is difficult to obtain legal advice. This is certainly true of many jurisdictions within the GRC; and may be true more widely given the reduction in public expenditure on legal aid and legal advice. A particular challenge may seem to a trained expert lawyer to be futile or wrong-headed; it would be wrong to assume that the challenge is inevitably an unreasonable one for the citizen to bring.

8. I turn next to a point fairly and readily conceded by Leeds. One of the issues in this case was whether Mr Snee's request was "vexatious." Now there is a sense in which a vexatious request is an abuse of the Freedom of Information Act (FIA); almost an unreasonable act in itself. I accept the concession made by Leeds that it must be possible, depending on the circumstances, for the maker of a request regarded by everyone else as vexatious, to defend his or her position on that point without automatically being treated under the costs Rules as behaving unreasonably. To hold otherwise, it seems to me, would be to radically change the right of appeal in such cases.

9. Finally, it is right to remember the protections which already exist for public authorities in the context of vexatious requests or hopeless appeals. Before a right of appeal is even a gleam in the Tribunal's eye, there must be a complaint to the Information Commissioner (ICO). If the complaint to the ICO appears to be "frivolous or vexatious," then there is no need for him even to make any decision appealable to the Tribunal. See Section 50(2) FIA. I am not aware of any

published information about the extent to which the ICO makes use of this important provision.

10. Next, if an appeal has no reasonable prospect of success, it is open to the ICO or the public authority to stop it dead in its tracks by applying for it to be struck out. This avoids any costs associated with a hearing.

11. Third, while there will always be exceptional cases requiring exceptional treatment, it is a principle of the First-tier Tribunal that neither citizens nor public authorities should feel the need to be routinely legally represented. See the Leggatt Report. The judges and tribunal members in this jurisdiction have a duty to use their expertise effectively to enable public authorities as well as citizens to conduct cases proportionately, informally and flexibly. They must enable public authorities, as well as citizens, to participate fully in the proceedings. See Rule 2 GRC procedural Rules.

12. Turning then to this particular application, Leeds applied to be made a party to this case; were represented at the hearing by Queen's Counsel, and now apply for an order that Mr Snee should pay their costs in the sum of just over £20,000. I should say at once that the Tribunal was greatly assisted by the written and oral submissions which it received on behalf of Leeds. More than that, in the months leading to the hearing, much of the work done by Leeds' solicitors was aimed at settling the case and producing a resolution which Mr Snee might accept. Their approach, if I may respectfully comment, was exactly what courts and tribunals generally hope for and expect from public authorities.

13. In their application, Leeds point to the fact that the information request here was even wider than one which had earlier been refused on costs grounds. That is a fair point. The request was unreasonably wide. On the other hand I have to take into account the context that Leeds had in the past been apparently happy to receive very wide requests and the one with which the Tribunal was concerned could fairly be said by Mr Snee to arise from a hint dropped, however inadvisedly, by the ICO in an earlier decision notice.

14. The point is properly made that at the hearing Mr Snee was represented by Counsel who tried to argue for a much narrower interpretation of the information request. It is said that this, if it was ever a genuine point, should have been articulated from the outset. On the other hand, my reading of this is that Counsel at the hearing, who had been instructed late, advanced this point as a last throw of the dice to try to rescue the case. I have to view this point in the context of the absence of available free advice in a case such as this.

15. Next, Leeds complains of Mr Snee's failure to file expert evidence, despite his threats to do so. In my judgment this is a weaker point. Mr Snee who has technical expertise in computers did have some fair arguments to put about what was and was not possible. In this connection, he had received some help from a local councillor who agreed with him. Of course, as the tribunal found, Mr Snee's views were hopelessly at variance with the obligations of a city council in relation to data protection and the integrity of its older computer systems. That is not necessarily something that would immediately occur to the person in the street.

16. Taking all these matters into account, I would not characterise Mr Snee as having "acted unreasonably".

17. I therefore refuse the application for costs.

NJ Warren
Chamber President
Dated 9 May 2014