



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0206

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50537214
Dated: 15 July 2014**

Appellant: AHMED HERSI

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: THE LEGAL AID AGENCY (MoJ)

Heard at: FIELD HOUSE, LONDON

Date of hearing: 13 FEBRUARY 2015

Date of decision: 9 MARCH 2015

Before

ROBIN CALLENDER SMITH
Judge

and

MICHAEL JONES and ALISON LOWTON
Tribunal Members

Attendances and submissions:

For the Appellant: Mr J Bunting, Counsel instructed by Mr Hersi.
For the 1st Respondent: Written submissions from Ms M Vosnick, Solicitor for the Information Commissioner
For the 2nd Respondent: Written submissions from Mr R Hopkins, Counsel instructed TSol on behalf of the Legal Aid Agency.

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0206

Subject matter: FOIA

Refusal of request s.17.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal from the decision notice dated 15 July 2014 and substitutes the Decision Notice below.

SUBSTITUTED DECISION NOTICE

Dated 9 MARCH 2015

Public authority: THE LEGAL AID AGENCY (MoJ)

Name of Complainant: MR AHMED HERSI

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 15 July 2014 for the reasons set out in its decision below.

Action Required: Within 31 days the Legal Aid Agency must issue Mr Ahmed Hersi with a refusal notice in accordance with section 17 (5) FOIA explaining why it was relying on section 14 FOIA in refusing the relevant requests.

Robin Callender Smith

Judge

9 March 2015

REASONS FOR DECISION

Background

1. Mr Ahmed Hersi (the Appellant) wanted information from the Legal Aid Agency (LAA) relating to a tender bid process in 2010 for legal aid work. The LAA is an executive agency responsible to the Ministry of Justice (MoJ).
2. The Appellant is a solicitor whose law practice was part of a tender bid in 2010 for legal aid work. The firm launched judicial review proceedings against the LAA which is ongoing.
3. The Agency had previously refused a request for information on the same subject matter under section 14 (1) and that had been held to be a correct application of that section of FOIA as expressed in a subsequent Decision Notice.
4. The Agency had provided a notice on 20 May 2013 informing the Appellant that it would not respond to further requests on the same subject matter on the basis of section 17 (6) FOIA. The Appellant's second request was a resubmission of an earlier request in 2011.
5. At the time of the Information Commissioner's initial suggestion in April 2013 that the Appellant resubmitted the 2011 request there had been no finding that the Appellant's subsequent request would be refused as vexatious.
6. His second request was not made until sometime after the notice given under section 17 (6) after finding by the Information Commissioner in the second decision notice.
7. The two information requests in relation to this appeal both related to the tender process and proceedings which were the subject of the section 17 (6) notice.

8. The Agency had warned the Appellant that it would not respond to further requests and, by virtue of section 17 (6), it maintained it had not acted unreasonably in refusing to do so.
9. The Information Commissioner had previously found an earlier request on the same subject to be vexatious and the Agency could not revisit that request (the second Decision Notice) in the context of the present requests.
10. The Information Commissioner concluded that the Agency had appropriately relied on section 17 (6) in not responding to the requests.

The Appellant's view of the background

11. Looked at through from the perspective of the Appellant, the background elements for the request were summarised by his Counsel, Mr Bunting, at the oral hearing were as follows:

- (1) The Appellant had brought judicial review proceedings against the rejection of his tender bid. As explained in that claim, the LAA assessed his application for a contract to provide publicly funded immigration services in the 2010 tender round on an incorrect factual basis, failed to take adequate steps to clarify his tender application, and breached the public law principle of equality of treatment. The judicial review claim sought an award of damages to reflect the Appellant's loss of income estimated in the region of £4,413,685.71.
- (2) Neither of the Respondents had suggested that the Appellant's judicial review claim was unarguable. It was a central aspect of the Appellant's judicial review claim that the Legal Aid Agency had treated his application for a tender differently to the manner in which it treated other firms. In related judicial review claims brought by other firms in respect of the 2010 tender round, the Legal Aid Agency has been found to have provided inconsistent evidence (see the summary of the

evidence in *R (AAR) v Legal Services Commission* [2011] EWHC 964 (Admin), at [156-157]) and has been required to apologise “unreservedly” for misleading disclosure.

- (3) The Appellant had therefore made a number of requests to the Legal Aid Agency for information, pursuant to s.1 Freedom of Information Act 2000. The schedule of requests provided by the LAA in this appeal was not an accurate summary of the Appellant’s requests under section 1 FOIA as its schedule also included decisions of the Commissioner and other correspondence.

The Issue in the Appeal

12. The former General Regulatory Chamber President, Upper Tribunal Judge NJ Warren, crystallised the issue to be considered in this appeal in a case management note dated 26 August 2014. He noted

This appeal appears to raise a question concerning the construction of Section 17 (6) FOIA. That question is whether, for Section 17 (6) to apply, the public authority must first be satisfied that Section 17 (6) (a) applies to the instant request. Put another way, does Section 17 (6) absolve the authority from the duty to provide information under Section 1? Or does it merely absolve the authority from its duty to give notice under Section 17?

13. The Tribunal notes this issue of statutory construction in relation to section 17 (6) – in this context - does not appear to have come before the Information Rights Tribunal before.

14. The authorities to which we were referred were *BBC v Sugar and another* [2009] 1 WLR, in particular, Lord Phillips observation that

Section 17 imposes requirements as to the explanation that must be given by a public authority to the maker of a request for information when the public authority claim that information is exempt information or exercises a right to decline to “confirm or deny”.

We were also referred to *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC) and, in particular (at Paragraph 27), the observation that FOIA is a “statute designed to ensure greater public

access to official information and to increase accountability and transparency”.

15. We also considered an observations in *Information Rights Law and Practice*

The FOIA s. 17 (6) (b) refers to a previous notice that the public authority is relying on a claim that s. 14 applies and not just a previous notice that the public authority is relying on a claim that a request was vexatious. Accordingly it would seem that a public authority is entitled to rely upon the provisions of s.17 (6) where it has previously served either a notice that a request is vexatious or notice that a request is a repeat request. The Scottish provisions are slightly more restrictive, in that the public authority is only excused from giving a notice if it has previously given notice in respect of an identical or substantially similar request: FOIA(S)A s. 16 (5) (a).¹

The Law

16. In relation to the refusal of the request, Section 17 states (with s.17 (6) italicised):

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain

¹ Philip Copell QC *Information Rights Law and Practice* 4 Edn Hart 2014 459 (footnote 38).

an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) *Subsection (5) does not apply where—*

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

The LAA's Submission

17. The LAA noted that Section 1(1) of FOIA conferred rights of access to information held by public authorities. Section 1(2) indicates that those rights are qualified (for instance they are subject to the substantive exemptions under Part II of FOIA).

18. The Part II exemptions relate to the nature of the requested information. Where a public authority relied upon Part II exemptions in refusing to

disclose requested information, it was required to provide the requester with a written notice under section 17 FOIA explaining the basis for the refusal.

19. FOIA also contains certain provisions which are concerned not with the nature of the requested information as such, but rather with the impact of the request upon the public authority (and thus the public purse). Those provisions are designed to ensure that public authorities are not placed under unacceptable levels of burden in responding to FOIA request.

20. One such provision is section 12, which is concerned with specified aspects of the cost of complying with a request. Another provision which, in part, seeks to guard against unacceptable burdens is section 14 (vexatious or repeated requests), which provided as follows:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

21. In *Dransfield*, the Upper Tribunal found that one of the key considerations in determining whether section 14 applies is the burden imposed by the request, viewed in context, i.e. viewed in terms of previous related requests and correspondence. Other key considerations are the motive and purpose/value of the request, and any harassing or distressing effects of the requester's correspondence (including the request at issue). These considerations are reflected in the Commissioner's guidance on section 14 FOIA.

22. There was a separate requirement under section 17 FOIA for a public authority which was relying on one of the burden-related provisions to notify the requestor in writing that it is doing so. In particular, section 17(5) states:

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

23. That requirement is dis-applied in section 14 cases, to the following extent – in section 17 (6):

(6) Subsection (5) does not apply where— (a) the public authority is relying on a claim that section 14 applies, (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

24. The LAA submitted that it was clear why the ‘refusal notice’ duty is dis-applied for follow-up section 14 requests. This is because section 14 FOIA is aimed in part at preventing public authorities from incurring the burden of dealing with vexatious or repeated requests. Part of that burden arises from the duty to provide a refusal notice under section 17.

25. Section 17(6) allows public authorities to draw an “enough is enough” line so that, where appropriate, they do not have to keep on responding to requests which form part of a series of vexatious or repeated requests.

26. The LAA maintained that is exactly what has happened to the Appellant. The LAA had previously issued Mr Hersi with a refusal notice under section 17(5) explaining that section 14 was being relied upon and that future requests on the same issues would not be responded to. Mr Hersi complained to the Commissioner about the LAA’s application of section 14. The Commissioner issued a decision notice in the LAA’s favour. That decision notice was not challenged on appeal. In the circumstances, it would have been unreasonable for the LAA to have to issue another section 17(5) refusal notice in response to the relevant requests, which were on the same issues as those covered by previous requests.

27. Were the conditions under section 17(6) met in respect of the relevant requests? In the LAA’s submission, it is clear that they were because

a) The LAA was clearly “relying on a claim that section 14 applies” to the relevant requests. Contrary to Mr Hersi’s submission, limb (a) of section 17(6) is not about whether section 14 was properly engaged (which is a question of judgment and analysis). Rather, it is about whether or not the public authority was relying on a claim that section 14 applied (which is a question of fact). There is no basis whatsoever for concluding that, in respect of the relevant requests, the LAA was doing anything other than relying on a claim that section 14 applied. This was obvious on any reasonable standard.

b) As explained above, the LAA had given Mr Hersi a notice in response to previous requests explaining very clearly that it was relying on section 14, and that future requests relating to the same issues would not be responded to.

c) In all the circumstances, it would be unreasonable to expect the LAA to issue a further section 17(5) refusal notice in response to the relevant requests.

(d) It should also be noted that, on 21 February 2014 (which post-dated the relevant requests), the LAA received yet another repeat of the same requests which had already been dealt with. This time, they were made not by Mr Hersi directly, but by someone else acting for him. The LAA considered that, in the circumstances, the duty under section 17(5) did not arise in respect of the 21 February request either. However, given that this request was not submitted directly by Mr Hersi, the LAA decided to explain its position in writing. The LAA considered that it did not have to take that step. It was simply trying to be helpful to the submitter of that particular request. That in no way detracted from the LAA’s position in respect of the relevant requests. On the contrary, it showed that the LAA sought to assist where it was reasonable to do so.

28. In respect of the relevant requests themselves, however, the LAA was entitled to take the view that “enough is enough” in terms of requests from Mr Hersi on the same issues which had already been addressed. It would have been unreasonable to expect the LAA to engage further with such requests from Mr Hersi.

The core of the Appellant’s submission

29. At the core of the Appellant’s submission is the proposition that, at its height, section 17 (6) acts as a limited exception to the requirements set out at section 17 (5). It does not set out an exception to section 1 (1) of FOIA.

30. To interpret section 17 (6) more widely would not only be contrary to the purposes of FOIA but would “drive a coach and horses” through section 14 as interpreted in *Dransfield*. Section 14 applied to a request and not to a requestor. Simply because a single request is deemed to be vexatious that should not give a licensed public authorities to use section 14 as a “means of forestalling genuine attempts to hold them to account”.
31. Unless section 14 applied then any public authority must comply with section 1 (1). If a public authority seeks to rely on section 14 it must provide a notice to the requestor by virtue of section 17 (5). If in complaint about a failure to comply with section 1 (1), the public authority must still satisfy the Information Commissioner that section 14 applies.
32. The Information Commissioner erred in law in failing to consider whether the LAA had properly complied with section 1 (1). In this case that meant considering whether section 14 applied in this case. At best, the LAA had suggested that it was “relying on a claim that section 14 applied”.

Conclusion and remedy

33. It appears to the Tribunal that it is possible to construct scenarios where - for a public authority to refuse to respond to an information request from a previously identified requestor by relying on section 17 (6) - would be to rely on that sub-section unlawfully and unreasonably.
34. Such a scenario would occur if Mr Hersi’s request to the LAA (and the MoJ) related to something *other than* the actual topics that did occupy his requests and – despite that - the public authority deemed these other requests as falling under the shadow of the existing section 17 (6) notice and refusal.
35. That would be personalising and refusing what could be completely legitimate information requests in a manner in which neither section 17 nor section 14 permits by characterising them as being the product of a particular individual requestor rather than as a particular information

request (which may or may not have a context or topic that may or may not make it one which is repeated or vexatious).

36. That would be tantamount to using section 17 (6) as a block to prevent a particular requestor from ever having any further information request considered.
37. It must logically be a requirement for section 17 (6) to operate that the public authority has to be able to demonstrate that it has undertaken an assessment that the current request does in fact relate to the topic or topics which formed the subject of the previous, vexatious request.
38. Without that assessment, it is not clear how the public authority can demonstrate that it is not using section 17(6) as a block to all further information requests from that requestor. Nor is it clear how the public authority can demonstrate that it is relying on a claim that section 14 applied.
39. This is not to argue that such an assessment needs to be extensive or that the public authority needs to inform the requestor that it has undertaken that assessment. That would render section 17(6) redundant. But it does have to do something – even if it is just a file note which could then have been part of proceedings such as these - in order for the phrase ‘relying on a claim’ to mean anything.
40. In this case, the LAA proffered no evidence that it had undertaken any form of assessment. The ICO made no attempt to establish whether the LAA had made any assessment. It was therefore left to the Tribunal to infer whether the LAA had correctly used section 17(6).
41. Although it is possible for the Tribunal to compare the former vexatious request with the current request, this does not assist in understanding whether the LAA at the time of the request was relying on a claim that section 14 applied. That exercise in comparison is one the LAA should have undertaken.

42. The alternative – and one we reject - is to allow what happened in the background facts that led to this appeal to permit what amounts to a *carte blanche* section 17 (b) refusal.
43. The Appellant is a repeated requestor on a narrow and specific topic. The background for this has been set out in some detail at the beginning of this decision. The requests were about a particular tender for a legal services contract which was awarded to a named firm. There is a history to these requests and correspondence on the same issue. There is a Decision Notice (FS50505670) - issued by the Information Commissioner on 18 December 2013 which was also about requests from the Appellant for information about the same tender – which substantially upheld a section 14 refusal and which was not challenged on appeal. He had been reminded in that Decision Notice that the LAA had told him it would not be responding to future FOIA requests on the same or related issues.
44. The LAA has relied *on a claim* that section 14 applies and then it has given him notice – in response to other earlier requests – which explains very clearly that it was relying on section 14 and that future requests relating to the same issues would not be responded to.
45. Our view is that it is completely lawful, reasonable and proportionate for the LAA to be required to demonstrate that it applied its mind to the actual substance of this request before jumping to the section 17 (6) “block”.
46. We are not satisfied that this important step is evidenced here. It is not enough for the LAA to say, without further ado, that “enough is enough” and to apply section 17 (6) simply because the request is from this Appellant.
47. For all these reasons we find that the Appellant’s appeal succeeds.
48. The Tribunal substitutes the Decision Notice in the terms stated at the beginning of this decision.
49. Our decision is unanimous.

50. There is no order as to costs.

Robin Callender Smith

Judge

9 March 2015