



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/00198

**Heard at Alfred Place, London
On 28th. February, 2017**

Before

David Farrer Q.C.

Judge

and

Pieter De Waal and Darryl Stephenson

Tribunal Members

Between

Michael Piesse (“MP”)

Appellant

and

The Information Commissioner (“The ICO”)

First Respondent

and

Chief Constable of Hampshire (“the CCH”)

Second Respondent

Representation: Colonel Piesse was unable to appear due to illness;
Robert Cohen (Counsel) appeared for the CCH

The Tribunal allows this appeal and orders the CCH to respond to the Request within 28 days of receipt of this decision.

References to page numbers are to the pages of the agreed bundle.

Decision and Reasons

1. The Tribunal allows this appeal for the simple but unusual reason that the Decision Notice (“the DN”) does not relate to the request (R1) which is the subject of this appeal. The HCC responded to R1, not by reliance on s.14(1) of FOIA, but by invoking s.40(5)¹, which relates to the protection of personal data . Both Respondents confused separate, broadly similar requests when responding to the request (the HCC) and issuing the DN (the ICO). A DN which provides a decision on the wrong request is not in accordance with the law (see s.58(1)(a)). Section 14 focuses on the character of the request, not the requester. Correct identification of the request to be rejected as vexatious is essential.

¹ The response refers to s.40(5)(a)(i), a non - existent provision. HCC probably intended to refer to s.40(5)(a), which provides an exemption where there should have been a subject access request under DPA 1998. The error is irrelevant to this decision.

2. The background to this appeal can therefore be very briefly summarised.
3. On 22nd. April, 2015, MP received a fixed penalty notice in respect of an offence of speeding. He evidently believed that the process for issuing the notice may not have been in accordance with ACPO guidelines. . According to HCC, he made a request for information on 22nd. September, 2015, police reference HC/002814/15. It specified at the outset the number of the Fixed Penalty Notice and asked a series of questions running to four paragraphs.
4. That request was not exhibited in the agreed bundle and was probably never seen by the ICO. When the Tribunal directed its production, HCC served an email from MP dated 21st. November, 2015, together with its response dated 23rd. November, 2015, to which we refer below. However, MP's complaint to the ICO (p.46) and the ICO, in correspondence with both MP and HCC (pp. 70 and 102) referred to 22nd. September, 2015 without demur from HCC so the Tribunal assumes that the email produced by HCC was simply a repetition of the original request, which has never surfaced.
5. It was followed by a series of twelve similar requests on the same subject. It seems that all were refused as being vexatious, pursuant to s.14(1).
6. They included a request which received the reference HC/001023/16 (R2).
7. This was the request which the ICO recited in the DN as being the subject of the complaint from MP, hence of this appeal. As mentioned above, it was very similar to R1 but did not identify the particular penalty notice that MP had received in respect of 22nd. April, 2015. It was a distinct request, evidently made in 2016.

8. A further request in the series, HC000104/16 (R3) posed some similar questions but other questions distinct from those contained in R2. Somebody mistakenly scribbled at the top of the HCC response to this request the reference HC/002814/15, which is R1(p.59). This was attached to a letter dated 11th. February, 2016 (p.58) citing R2 and purporting to respond to a request for an internal review dated 13th. January, 2016. This request for an internal review was not exhibited but, despite the reference on the letter in response (p.58), it seems to have related to R1. (See also the Complaint form p.46). There was, already, considerable confusion in the handling of MP's requests, although HCC seems to have been unaware of it.

9. When the Tribunal examined what HCC identified as the original request (albeit apparently as reproduced two months later (see §4)), together with the full response from HCC, it was clear that the only ground for refusal relied on was s.40(5)(a)(i) (see Footnote 1). S. 40 relates to personal data. The response referred to six requests and stated that s.14(1) would be invoked in respect of any further requests on the same point. So far as the Tribunal is aware, s.14(1) was at no time relied on as regards R1 until the ICO responded to the Grounds of Appeal on 21st. November, 2016.

10. It seems that HCC did not consider the request of 22nd. September, 2015 vexatious, nor indeed its repetition in perhaps five further requests before 23rd. November, 2015. The fact that R1 was the first request in the series was plainly of critical significance in any claim that it was vexatious. Indeed, the fact that it preceded the response of 23rd. November, 2015 was material to any assessment of vexatiousness.

11. Furthermore, a fundamental flaw in the DN was that it identified the wrong request as the subject of complaint despite MP's accurate dating of the request

and citation of the HCC reference (p.46).² The DN does not mention s.40, let alone give a decision on a claim to rely on it as an exemption. A DN which adjudicates on a request which is not the subject of the relevant complaint cannot be in accordance with law. The Tribunal emphatically rejects the ICO's airy dismissal of such an objection in her Response (§7 at p.24) and the oral submissions of HCC to the same effect. S.14(1) demands an assessment of a specific request or requests, not of the requester or of the general character of a long series of requests, albeit that general character may be material to a judgment of the request under examination.

12. This appeal must therefore be allowed because HCC and the ICO have failed to perform the basic duty of identifying exactly which request is said to be vexatious and setting that request in the context of other requests in the series.

13. Having allowed the appeal, the Tribunal has to consider the appropriate order in these unusual circumstances. Clearly, HCC responded to an identical request given the same reference as R1 on 23rd. November, 2015 by relying on "s.40(5)(a)(i)", which was intended as a refusal to confirm or deny that HCC held the requested information. The Tribunal is not concerned with adjudicating on any s.40 exemption. However, R1 has never been produced by HCC. When ordered to produce it, HCC exhibited the request of 21st. November, 2015. Its response to that request and HCC's correspondence with the ICO suggest that there had been earlier responses and at least one internal review, which we have not seen.

14. That being so, the Tribunal directs that HCC responds to R1 as set out at §6 of the ICO's Response (p.23), within twenty - eight days. It will respond by reference to the facts as in late September, 2015.

² The fact that MP also evidently became confused as to which request(s) was/ were under scrutiny is neither here nor there.

15. This decision is unanimous.

David Farrer Q.C.,
Tribunal Judge,

Date of Decision: 29th March 2017

Dated Promulgated: 19 April 2017