IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2016/0272**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50584503
Dated: 13 October 2016

Appellant: **Professor Nigel Ashton**

Respondent: **The Information Commissioner**

2nd Respondent: **The Cabinet Office**

Heard on the papers: Field House, Breams Buildings London WC

Date of Hearing: **19 June 2017**

Before

Chris Hughes

Judge

and

Malcolm Clarke and **Andrew Whetnall**

Tribunal Members

Date of Decision: **17 July 2017**

Subject matter:

Freedom of Information Act 2000

Cases:

Kennedy v Charity Commission [2014] 2 WLR 808,

Dransfield v ICO & Devon County Council [2015] EWCA Civ 454

Dransfield v ICO & Devon County Council 2012 UKUT 440 AAC

DECISION OF THE FIRST-TIER TRIBUNAL

SUBSTITUTED DECISION NOTICE

Dated: 14 July 2017

Public authority:	The Cabinet Office
Address of Public authority:	Room 405, 70 Whitehall, London SW1A 2AS
Name of Complainant:	Professor Nigel Ashton

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 13 October 2016

Action Required

The Cabinet Office, within 35 days, disclose the information requested having applied any appropriate exemptions.

Dated this 17th day of July 2017

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Professor Ashton holds a chair in International History at the London School of Economics. He has been on correspondence with the Cabinet Office with a view to obtaining access to the Prime Minister's Office files relating to relations between Libya and the UK and sought the assistance of the Information Commissioner. On 10 November 2014 he made a request which set out his interests when he asked for the release of all the Prime Minister's Office files on relations with Libya from 1988-2011. In this request he indicated his interests "*... the Lockerbie bombing and the subsequent investigations ... Libyan terrorist activities ... the Libyan nuclear programme .... relations with the former Libyan leader Muammar Qaddafi*" (bundle page 44). The final form of the request (9 February 2015) which was the subject of a decision by the Information Commissioner ("ICO") was for files covering 12 years:-

   "I would like to request the release under the FOIA of the following files:

   John Major

   Libya internal situation/relations - part 9 01/09/90 - 01/02/94

   Libya internal situation/relations - part 10 24/12/94 - 01/05/97

   Tony Blair

   Libya internal situation/relations 1 02/05/97 - 25/02/99

   Libya internal situation/relations 2 26/02/00 - 03/07/00

   Libya internal situation/relations 3 04/07/00 - 07/06/01

   Libya internal situation/relations 1 08/06/01 - 30/09/02".

2. The Cabinet Office sought to persuade him that he should frame his request in a more restricted way however no resolution was reached and on 27 November 2015 the Cabinet Office refused the request relying on s14(1) of FOIA – the request was vexatious. Following a formal investigation the ICO upheld this refusal in his decision notice and Professor Ashton appealed to this tribunal.

3. In his appeal Professor Ashton emphasised the role of the British Government in shaping the international community's handling of the Qaddafi regime. The significance of this made it one of the key areas of foreign policy over the years. He criticised the ICO for her approach to the burden of the request arguing that it was unclear the extent to which reliance was placed on this compared with other factors in coming to her decision. He acknowledged that the files would contain exempt information but argued:- *"The point of the FOIA request is to bring into the public domain information about the contradictory conduct over time of British policy toward Libya which was instrumental in creating the failed state that we now have on the southern shore of the Mediterranean. To argue in effect that the officials concerned cannot spend their time reviewing these files because they are too busy dealing with the consequences of the decisions entailed in them is to neglect the public interest enshrined in the FOIA."* He argued that given the ICO acknowledged the public interest in the request:- *"Having due regard to this test of proportionality between the burden imposed by complying with the request and the extent of public interest involved, my argument is that the Information Commissioner has erroneously judged the request to be vexatious."*

4. In resisting the appeal the ICO argued that the decision of the Court of Appeal in upholding the Upper Tribunal decision in *Dransfield* did not result in a different test for section 14 to that indicated by the Upper Tribunal; relying on parts of paragraphs 68 and 69 of the leading judgement:-

   "68... The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious...

   69... a rounded approach is required...

5. In the light of that analysis the ICO concluded that Professor Ashton's request engages s14 and is vexatious. The decision notice explains this decision in terms of three tests set out in paragraphs 69 to 73 of its guidance to Departments on Dealing

with Vexatious Requests under the heading "Requests which would impose a grossly oppressive burden but are not covered by the section 12 cost limits". The guidance sets out three tests which may indicate "a viable case" that s14 applies on grounds of resource burden:

- The requester has asked for a substantial volume of information AND
- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO AND
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

6. The ICO's view is that "reliance on s14(1) in respect of disproportionate burden has been established for some time now" citing first tier Tribunal decisions which depend on their own facts in respect of the scale, nature and usefulness of information sought, and are not in any case binding on our decision. (DN para 32).

7. The ICO accepts that these three tests apply to Professor Ashton's request, although it expresses some reservations about the time estimates given by the Cabinet Office, both as they concern the mechanics of making copies of documents and the time required by senior staff in the Cabinet Office and other Departments who would need to consider the application of exemptions. The Cabinet Office, while acknowledging differences in the position between itself and the ICO as to the precise time handling the request would take, concur with the decision that s14 applies and that the burden of dealing with the request outweighs any public benefit from disclosure.

8. From the evidence before the tribunal it is clear that in order to properly consider this material and whether it should be disclosed, in the light of the various exemptions to disclosure contained in FOIA including section 23 (information supplied by, or relating to, bodies dealing with security matters), section 27 (information likely to prejudice international relations between the UK and another state or the interests of the UK abroad) and section 40 (third party personal data) a considerable amount of time would need to be expended in considering the material, consulting other government departments and agencies and where appropriate redacting the material.

9. The time and effort required to do this will be considerable. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 prescribe the cost of complying with a request above which s12 FOIA allows a public

authority to refuse to comply with a request for information. However the method of estimating cost for these purposes only allows certain activities to count and limits the cost of time to £25 per hour. The cost of, for example, identifying redactions which need to be made in the interests of national security, do not fall within the list of activities which count towards the cost limit. If such activities did, the cost of this would far exceed the cost limit and the Cabinet Office could properly rely on s12. A Deputy Director of the Cabinet Office estimates the total time for the Cabinet Office at 80 hours, in addition to the time of other departments. The time allowed under the Regulations would be 18 hours and so within the cost limit. The Cabinet Office therefore cannot in this case rely on s12 FOIA to say that the burden imposed by the request is too high and it should not be required to comply.

10. Professor Ashton recognises that some of the material will need to be redacted.

11. The right to information held by public bodies is of considerable significance. The Supreme Court, in *Kennedy v Charity Commission* stated;-

    "153 The Freedom of Information Act 2000 was a landmark enactment of great constitutional significance for the United Kingdom. It introduced a new regime governing the disclosure of information held by public authorities. It created a prima facie right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure…."

12. Section 14(1) of FOIA provides that a public authority's duty under s1(1) to confirm to an individual requesting information whether or not it holds the information and, if it does, to supply it, does not oblige the public authority to do so if the request is vexatious. The Upper Tribunal in *Dransfield* identified four broad issues which could be relevant to the question of vexation in general – the burden of the request, the motive of the requester, the value or serious purpose of the request and harassment/distress to staff. However these were not an exhaustive description and there was a need to adopt a holistic and broad approach considering issues suggest as manifest unreasonableness, irresponsibility and lack of proportionality. In considering the ICO's guidance on the question (which was broadly similar to his own formulation), Judge Wikeley stated (paragraph 43):-

"43. Third, it follows that the five factors must be viewed as a means to an end, and not as an end in themselves. To that extent I have some reservations about the passage in the IC's Guidance (page 2) which advises public authorities that: "To judge a request vexatious, you should usually be able to make relatively strong arguments under more than one of these headings." This is acceptable if it is simply saying that a request which "ticks more than one box" of the five factors to an appreciable extent is more likely on a proper consideration to be found to be vexatious than one that "ticks only one box". However, it should not be read as implying that a request which only triggers one of the five factors can never be vexatious. The five factors are simply a non-exhaustive and illustrative list of matters that may point to a finding that a request is vexatious. The presence, or absence, of a particular feature is not determinative. So one particular factor alone, present to a marked degree, may make a request vexatious even if no other factors are present. The question ultimately is this – is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?"

13. When the case reached the Court of Appeal, Lady Justice Arden (with whom the other members of the Court agreed) in upholding the decision of the UT broadly endorsed the approach, however there were significant differences of emphasis:-

68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. 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. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request

was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross to accept that proposition, which of course promotes the aims of FOIA.

14. Furthermore in directly considering the question of resources she held:-

"72. Before I leave this appeal I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated."

15. In her conclusion Lady Arden stated:-

"86. As the UT held, there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of , or solely because of, the costs of complying with the current request.

87. In addition I would agree with the UT's observation that, if the authority can easily show that the limits in section 12 would be exceeded, it would be less complicated for it to rely on that section, rather than section 14."

Consideration

16. Those documents of the British Government that are considered of historic interest have for many years been placed in the Public Record Office and available to public inspection 30 years after the events in question. In preparing the records for transfer there is a process of review whereby certain material is withheld from public availability for a longer period due to its sensitivity. Amendments to FOIA contained in the Constitutional Reform and Government Act 2010 gave effect to a progressive reduction in the 30 year period to a period of 20 years which will be fully implemented in 2022. By that stage the Cabinet papers for 2002 will largely be available. Professor Ashton is conducting research on events in the recent history of the UK and its international relations. Certain documents for the period in which he is

interested have been made publicly available but the later records would not in the ordinary course of events be publicly available for some years and certain documents remain closed for certain periods after transfer to the National Archive. Professor Ashton's desire for the full record of the period now would create a substantial burden on the Cabinet Office. What the tribunal has to consider is a Freedom of Information request, and in particular whether it can be considered vexatious under s14 of the Act. It need not be construed as a request to reschedule the programme of release of the particular records requested, and which the Appellant has signalled an intention to request, to the National Archive. Although the Cabinet Office witness understandably sees the work entailed as comparable, there are significant legal considerations that distinguish the process of release under FOIA and release as part of a programme for transfer of records to the Archive, not least the disapplication of certain exemptions under s63 of the Act only when a record is 20 years old.

17. The records he seeks concern the reaction of the UK Government to the murder of hundreds of people over Lockerbie by a Libyan agent, the involvement of the Government of Libya in facilitating the murders committed by the PIRA, the rapprochement with that Government in the light of concern about Islamist terrorism and the decision to use force to protect an insurgency against that Government during the Arab Spring. These are all substantial questions of public policy where there is a profound public interest in understanding the Government's approach. The information sought is of great value to the public and to a historian. Clearly much information is in the public domain, in the form, for example, of Ministerial Statements in Parliament. However more information is held and some at least of the information sought could be released.

18. From the information before us there is no suggestion that there is any basis for the claim that the request is vexatious other than the burden which complying with the request would impose on the Cabinet Office and other departments. The guidance of the Court of Appeal must be read as a whole and is clear. The starting point is that this is a request for information which is of great public value and significance. That alone in the view of this Tribunal takes it outside the scope of the ICO's guidance referred to above - There is substantial public interest in the request, there is no suggestion of any improper motive, the request is aimed at *"the disclosure of important information which ought to be made publicly available"*; and it will be

subject to redaction. Given the public significance of what is sought it is not (as the ICO suggested) "grossly oppressive". The Cabinet Office witness statement sees Professor Ashton's potential series of requests for papers relating to relations with Libya between 1969 and 2011 as, in effect, having the consequence of moving forward the review and release to the National Archive of a whole series of files, with potentially disruptive effects for the programme of preparing other files for release and even resulting in a failure of their duties under the Public Record Act (see Witness Statement para 37, p103 bundle). We do not accept that this concern about the disturbance of other activities can override our decision on the application of s14 in the case before us. Redaction of the requested files will no doubt take time, but cannot in the present case and context be seen as a disproportionate squandering of public resources. As the Court of Appeal made clear the role of s14 in protecting public resources requires a finding the request is vexatious and (with respect to the aim of protecting public resources) - *"that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated."* Where a clear and substantial public interest in the request has been established, s14 cannot be invoked simply on the grounds of resources. Paragraph 86 of Lady Arden's judgement must be read in the context of the constitutional significance of the rights conferred by FOIA and as she indicated, reliance on s12 is more straightforward than s14 which requires the circumstances to justify a finding of vexatiousness which is a high standard.

Conclusion and remedy

19. It is clear that the Cabinet Office has substantial arguments as to the burden which is imposed by this request and has taken significant steps to try and come to some accommodation with Professor Ashton. We did not consider detailed arguments about the application of s63 FOIA, with a reduced set of exemptions relevant to historic records, to the papers requested, still less those that Professor Ashton may have it in mind to request as he carries his study through to 2011 or beyond. Such papers will not come up for consideration under the 20 year rule for many years. Until such time the full framework of exemptions under FOIA can be considered potentially relevant to the information request as the contents of the documents require. The

request as it stands and the circumstances surrounding it do not reach the high standard required for it to be considered vexatious. S14(1) is not engaged in this case. The tribunal is therefore satisfied that the decision notice is not in accordance with the law and the appeal is upheld. S14 is not an appropriate way for the Cabinet Office to approach Professor Ashton's request and the request and the significant exemptions which will be engaged should now be considered on their merits.

20. Our decision is unanimous

Judge Hughes

Date Promulgated: 18 July 2017

[Signed on original]

Date: 17 July 2017