Appeal number: EA/2016/ 0306

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DEPARTMENT OF HEALTH **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
SID RYAN

TRIBUNAL: JUDGE ALISON MCKENNA
Mr DAVID WILKINSON
Mr PIETER DE WAAL

Sitting in public at Alfred Place on 24 May 2017
The Appellant was represented by Catherine Callaghan, counsel.
The Information Commissioner was represented by Rupert Paines, counsel.
Mr Ryan appeared in person.

DECISION

1. The appeal is dismissed. The Decision Notice stands. The public authority is required to respond to the information request without relying on s. 14 of the Freedom of Information Act 2000.

REASONS

Background to Appeal

2. Mr Ryan, who is an investigative journalist and campaigner in relation to the Private Finance Initiative, made an information request to the Department of Health ("the Department") on 18 January 2016. His request (not included in the open bundle but attached to his witness statement for the Tribunal) was prefaced by an explanation that he was unsure of the "*status and composition of the Private Finance Unit and therefore can't direct this FOI as clearly as I would like"*. He asked for the Department's assistance under s. 16 of the Freedom of Information Act ("FOIA"). He also expressed a preference to have the information provided in a particular format under s.11 FOIA.

3. The request was in the following terms:

"*1. For the previous 18 months, the diary for the Director of the Private Finance Unit. I would expect this to include a list of meetings attended by the individual, dates, attendees, etc.*

a. Based on my current understanding, this could be the diary of the 'Deputy Director for Corporate & Private Finance', or Ben Masterson's Diary or another person entirely.

2. For the previous 18 months, the diary for the Deputy Director of the Private Finance Unit. I would expect this to include a list of meetings attended by the individual, dates, attendees, etc.

3. The minutes of any meeting in the previous 18 months with the PFU and:

a. Peterborough and Stamford Hospitals Foundation Trust or its representatives

b. Progress Health or its representatives

c. Maquarie Bank or its representatives

d. Brookfield Multiplex or its representatives

4. The e mail correspondence in the previous 18 months with the PFU and:

a. Peterborough and Stamford Hospitals Foundation Trust or its representatives

b. Progress Health or its representatives

c. Maquarie Bank or its representatives

d. Brookfield Multiplex or its representatives".

4. The Department advised Mr Ryan that the PFU no longer existed but identified an individual said most closely to fulfil the roles referred to in the information request. It did not provide the diaries, informed Mr Ryan that the post holder it had identified had not met with any of the parties mentioned in the request, said it held no relevant minutes, and provided copies of some e- mail correspondence redacted in reliance upon sections 40 (2) and 43 (2) of FOIA.

5. At the internal review stage, the Department identified a second individual whose duties it said fell within the scope of the request. In relation to his diaries, it relied upon s.12 of FOIA. It maintained the exemptions relied upon to redact the e-mails. Later, during correspondence with the Information Commissioner's Office in October 2016, the Department indicated that it wished to rely on s. 14 (1) FOIA on the basis that Mr Ryan's request was burdensome.

6. The Information Commissioner issued Decision Notice FS50623603 on 16 November 2016. The Decision Notice concluded that the Department was not entitled to rely on sections 12 or 14 of FOIA. It required the Department to make a fresh response to the information request which did not rely on either of those sections. In respect of Mr Ryan's request for the information to be provided in a particular format under s. 11 FOIA, the Information Commissioner concluded that the Department was entitled to refuse to do so on the ground of cost. In respect of the redacted information, the Commissioner found that the redactions went too far and directed the Department to provide additional disclosure as set out in a confidential annexe to her Decision Notice. The Commissioner found no breaches of s. 16 or s. 17 FOIA.

Appeal to the Tribunal

7. The Department's Notice of Appeal dated 14 December 2016 was in respect of the Information Commissioner's conclusion as to s. 14(1) FOIA only. It relied on grounds that it would take the Department 300 hours of officials' time to answer the request, which would be disproportionate to the value to the public of the information requested. It stated that the value of the information was in fact negligible.

8. The Information Commissioner's Response dated 9 February 2017 maintained the analysis of the Decision Notice and resisted the appeal in respect of s. 14 (1) FOIA. It was submitted that, whilst s. 14 FOIA can in principle be relied upon on grounds of cost alone, there is a high bar for public authorities seeking to make such a case because it would be wrong in principle to use s. 14 to outflank the exemption

provided by Parliament under s. 12 FOIA and the Fees Regulations. The Information Commissioner submitted that the Department's case did not meet this high bar.

9. Mr Ryan was joined as a Respondent at his request but he did not make a cross-appeal. His Response dated 23 February 2017 set out his reasons for being unhappy with the Decision Notice and with the Department's continued reliance on s. 14 FOIA. He described his reasons for requesting the information as follows:

> *"…In short because what happened at Peterborough Hospital was a scandal, and it was a scandal that was handled very badly by the Department. The settlement agreement for the serious fire safety defects was pitifully small and the contractors admitted no liability for their faults. Multiple reputable sources speak of the coercion exerted upon the Trust by both the Department and the Contractors. It is not unreasonable, when the Trust itself complains of the same, to suspect that there may be some undue collusion between the PFI industry and the notoriously opaque and 'open for business' Private Finance Unit.*
>
> *I don't have enough good faith in the Department to believe it when it says there have been [no] meetings which are of interest to me…there are e mails to suggest such meetings have taken place. But even if there were no meetings with the specific companies I requested, the diary itself remains a valuable public record. Upwards of 15 PFI hospitals were found to have severe building defects which put patients at serious risk, as far as I am aware none of these cases has ever come to open court and the public sector has barely been compensated.*
>
> *Clearly, the response to uncovering this slew of defects was coordinated through the Private Finance Unit during the period of time I have requested records from. The intent of this request always had a series of purposes, and whilst the first was to obtain records relating to Peterborough Hospital and examine what instructions were provided to Peterborough and Stamford Hospitals Trust, the second was to review the diaries, place them onto the timeline of this incident and then decide on where to look next. This kind of iterative research into the PFI sector is something that I and the campaign group I founded, People vs PFI, have been doing for several years and the information provided to date has already led to [an] episode of File on Four and the resultant support from MPs on this issue".*

10. The Tribunal considered an agreed open bundle of evidence comprising over 125 pages and a closed bundle comprising over 300 pages, consisting of the withheld information.

11. The Tribunal heard evidence and submissions in both open and closed session. Mr Paines, on behalf of the Information Commissioner, tested the Department's witness evidence in the closed session, adopting the IC's role of guardian of the legislation, as referred to by the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050. Although Mr Ryan left the hearing room for that part of the evidence, the

Tribunal gave him a gist of what had occurred in his absence. Mr Ryan elected to give witness evidence himself and to be cross-examined by the other parties' representatives.

12. In his witness statement filed shortly before the hearing, Mr Ryan expressed doubts that Mr Mills' diary would contain the information he had requested and thought that Mr Masterson's diary might have been within the scope of his request. Ms Callaghan, on behalf of the Department, characterised this as a concession on Mr Ryan's part and invited the Tribunal to make its Decision in relation to Mr Saunders' diary only. Mr Ryan explained that he had not intended to make a concession and that he was unhappy to rely on the Department's own assessment of the utility of the information he had requested. His request had been for the diaries of unknown persons and it had been the Department who had suggested Mr Mills. Mr Paines, on behalf of the Information Commissioner, suggested that Mr Ryan could make a fresh information request for Mr Masterson's diary. The Tribunal agreed with this approach and declined to narrow the scope of the issues before it. It seemed to us fair and just to consider the appeal against the Decision Notice in its entirety.

13. The Tribunal is grateful to all parties for their helpful oral and written submissions at the hearing. Mr Ryan provided some further thoughts by e-mail after the hearing, which it was not appropriate for us to take into account as they were made after the Tribunal had formally retired to reach its Decision.

The Law

14. S. 14 FOIA provides as follows:

> *14. Vexatious or repeated requests*
>
> *(1) Section 1 (1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

15. There was little difference between the parties as to the applicable law in this appeal. Ms Callaghan and Mr Paines referred us to the same authorities, described below. Mr Ryan said that he was content to rely on Mr Paines' submissions on the law.

16. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 AAC, the Upper Tribunal interpreted "vexatious requests" as being manifestly unjustified or involving inappropriate or improper use of a formal procedure. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority's staff.

17. In respect of the burden of complying with a request, at paragraph 10 of its Decision, the Upper Tribunal commented that:

" …*The purpose of s.14 must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA"*.

18. In respect of the value of a request, the Upper Tribunal commented at paragraph 38 of its Decision that:

> *"…usually bound up to some degree with the question of the requester's motive is the inherent value of the request. Does the request have a value or serious purpose in terms of the objective public interest of the information sought? In some cases the value or serious purpose will be obvious…In other cases, the value or serious purpose may be less obvious from the outset. Of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14, unless there are other factors present which raise the question of vexatiousness. In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident"*.

19. The Upper Tribunal stressed the importance of taking a holistic approach. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider "*all the relevant circumstances*". In *CP v Information Commissioner* [2016] UKUT 0427 (AAC) Upper Tribunal Judge Knowles QC found that the Court of Appeal's approach to s. 14 FOIA was consistent with that of the Upper Tribunal.

20. In the Court of Appeal, Arden LJ commented on the issues of value and purpose and resources at paragraphs 68 and 73 of her judgment as follows:

> 68. "….*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…. .*

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."

21. The Information Commissioner's Guidance on dealing with vexatious requests suggests at paragraph 52 that the purpose and value of a request should be judged as objectively as possible; *"in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the authority"*. The Guidance also comments on requests where collating the requested information will impose a significant burden on the public authority. It suggests that s. 12 FOIA would be the more appropriate regime in such cases and that there is a high threshold for applying s. 14 FOIA on the grounds that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the public authority. In relation to "fishing expeditions", the Guidance states at paragraph 84 that authorities must take care to differentiate between broad requests which rely upon pot luck to reveal something of interest and those where the requester is following a genuine line of inquiry.

22. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

23. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

24. The Department relied on the evidence of Mr Brian Saunders, who is the Deputy Director of the Department's Structured Finance (Private Finance Initiative

and Transactions Branch), within the Commercial Division. He had signed a witness statement dated 27 April 2017 in which he stated that "*…the Department's view (which I share) is that Mr Ryan is trying to prove a conspiracy theory of his own…*". At the hearing, Ms Callaghan on behalf of the Department informed the Tribunal that that part of Mr Saunders' statement was no longer relied upon by the Department. The Tribunal was grateful for that clarification, but took the view that for a public authority to include such a statement about a requester/litigant in person in its witness evidence risked breaching the overriding objective by making it uncomfortable for that party to participate in the proceedings. Ms Callaghan agreed that the witness statement should not have been filed in that format and that the Department should make a written apology to Mr Ryan. We trust it has done so but have not seen a copy.

25. Mr Saunders' evidence was that the Private Finance Unit had ceased to exist in 2009, when its functions were subsumed within the Department's Commercial Division. He stated that his current role (and the role he had performed as a contractor prior to 2016) is the contemporary equivalent of the role of Deputy Director, PFU referred to in the request. His line manager until February 2017 had been Mr Pat Mills, the Director of the Commercial Division. Mr Mills had now retired. The Department had therefore interpreted Mr Ryan's request as one for the diaries of himself and Mr Mills over the 18-month period referred to in the request.

26. Mr Saunders' evidence was that the Department had encouraged Mr Ryan to make a new, less onerous request or to narrow the scope of his original request but that he had not done so. The disputed information is held in the form of two Microsoft Outlook calendars, which can be viewed in weekly or daily formats. However, in order to see the details of any entry (for example the names of attendees or the location of a meeting) it was necessary to open up each entry. The Department had provided in the closed bundle, a sample of entries to demonstrate this system. In a randomly selected 8-week period, there had been between 5 and 22 entries per week for himself (an average of 13) and between 45 and 67 entries for Mr Mills (an average of 52). The entries related to personal appointments, meetings, conference calls, appointments and reminders. The level of detail included in each entry varied, for example an internal meeting would not have location details whereas an external meeting would have them. Entries relating to conference calls included dial-in details. Some of the entries had e-mail correspondence embedded within them.

27. Mr Saunders estimated that there were 390 pages for each diary and with 10 entries per page for diary two and 5 entries per page for diary one, it would take 3 minutes to review each entry, giving a total of 292.5 hours. In addition, he estimated that it would take 3 minutes to print and apply redactions to each page and 30 seconds per page to re-scan the redacted page. This gave an estimated total time of 338 hours to prepare the information for disclosure in redacted form. Mr Saunders had conducted a dry-run exercise to check his estimate (described in more detail in his closed evidence). He acknowledged that about 25% of his diary entries concerned recurring appointments, which would require less work to consider and prepare. Mr Ryan had suggested in correspondence some different approaches to producing the calendars, but these had not been accepted by the Department.

28. Mr Saunders' evidence was that the Department had made clear to Mr Ryan that its officials had not met the persons described in the information request during the relevant period. However, as confirmed in information that had been released to Mr Ryan, he had also confirmed that he "*sees Infra Red and all the other major PFI shareholder institutions and advisers on a regular basis*". He explained that Infra Red is a fund management company which holds an investment in Peterborough (Progress Health) plc which is the counter-party to the PFI contract with Peterborough and Stamford Hospitals NHS Foundation Trust. Mr Saunders' evidence was that these meetings are held to discuss a broad range of generic PFI issues and that specific issues relating to Peterborough had not been discussed, although there were no minutes of such meetings. Mr Saunders explained that some employees of Infra Red are also directors of Peterborough (Progress Health) plc and, although he did meet with an employee of Infra Red at least once in the relevant 18-month period, he did not know if that person was also a director of Peterborough (Progress Health) plc. There are no minutes of that meeting either. Mr Saunders also acknowledged that he had held one-to-one telephone conversations with employees of Peterborough and Stamford NHS Foundation Trust during the relevant period. There are no minutes of these conversations but he recalls that they did discuss fire safety issues at the Trust.

29. As to the value of the request, Mr Saunders' evidence was that the Department had already satisfied the principle motivation behind it, which was to discover what communications took place between the Department and various other parties. He discounted any wider public interest in the requested information. He acknowledged that there had been some construction problems concerning "fire-stopping" but stated that the Department is not a party to any PFI contract so can only offer general advice and support to NHS Trusts, which remain responsible for contract management.

30. In Mr Saunders' oral evidence, he confirmed that the Department had been in touch with Mr Mills, who had confirmed he would be happy to assist in reviewing his diary entries in the relevant period.

31. Mr Paines asked Mr Saunders in open session about the methodology behind the sample of diary entries he had used for his dry run exercise. Mr Saunders said it was a "random" sample, and he doubted that it was representative of his diary entries for the whole 18 months. He said that other people had selected the period and done the mathematical calculations for him, he had not done it himself.

32. In commenting on Mr Ryan's suggestion of creating a CSV file and conducting a word search in order to select material for redaction, he said that it would not prevent him having personally to interrogate every diary entry. Mr Paines put to Mr Saunders that if he were to consider his own diary only then it would take him 22.26 hours, which was not a grossly oppressive burden. Mr Saunders replied that he did not know what to say. Mr Saunders accepted that he could cut the time taken to redact the diaries by drafting a standard request to be sent to the parties mentioned.

33. In respect of the value of the request, Mr Saunders accepted that Mr Ryan's interests were wider than the Peterborough issue and that the PFI was a matter of serious public interest. He no longer suggested that Mr Ryan was trying to prove a

conspiracy theory. In cross-examination by Mr Paines in the closed session (but this answer could have been given in open session so we record it here), Mr Saunders said that he did not know what information Mr Ryan already holds about PFI so was not in as good a position as Mr Ryan to judge the utility of the information he had requested.

34. In cross-examination by Mr Ryan, Mr Saunders said that he did not know how many hospitals had fire safety defects. He said we would guess that it was ten. He said that he had been made aware of the fire safety issue a few years ago and that the Department had issued a fire safety alert to all NHS Trusts in October 2014.

35. Mr Saunders emphasised that each Trust is responsible for its own estate and contracts and that the Department did not become involved. Mr Ryan referred Mr Saunders to the disclosed e mail correspondence between someone in the PFU and the Director of Estates at Peterborough and Stamford Hospitals NHS Foundation Trust in 2014, in which the PFU is informed of the fire safety problems that had resulted in the Trust declaring the building unavailable under the PFI contract. The e mail concludes "*I will await your directions on any actions if any the PFU requires from the Trust"*. Mr Ryan characterised this e-mail as "supplicant". It appeared that a telephone conference call had been arranged in response to this e mail. Mr Saunders said that the Trust had thought the Department should be aware, but that the Department couldn't tell the Trust what to do. In relation to Mr Ryan's suggestion that the Department had put pressure on another Trust to resolve a similar issue, Mr Saunders said that was a very serious allegation and that he would be astonished if it were true.

36. In closed evidence, Mr Saunders took the Tribunal though the diary extracts produced, showing a high-level weekly summary and then drilling down into the embedded information.

37. Mr Ryan filed a witness statement in which he described his concerns over public expenditure and public safety in relation to the Private Finance Initiative. He referred to a recent "File on Four" BBC radio programme and exhibited a less recent Special Report by Paul Foot from Private Eye, as indicating wider public concern about public safety and PFI.

38. Mr Ryan expressed the view that it is a dereliction of duty for the Department to leave individual NHS Trusts to handle similar disputes individually, rather than dealing with the "20 or more" instances of fire safety issues as a class. He said that it is impossible to hold a public debate about the merits of government policy on PFI without access to information and he regarded much of the information in the public domain as insufficient and/or misleading. As an example, he said the fire safety problems at Peterborough had come to public attention only because a financial ratings agency had issued a warning to investors. He said he had identified 12 hospitals with problems, so had decided to take the approach of using FOIA to try to gain an in-depth understanding of the issues at one of them rather than investigating them all at once. He described his approach as standard journalistic practice and that "*ultimately, journalism is a game of working out who knew what and when*".

39. Having seen Mr Saunders' written evidence, Mr Ryan questioned whether the Department had selected the appropriate officials' diaries. He said he had sent a scoping request prior to the one which is the subject of this appeal (exhibited to his witness statement) to try to identify the relevant officials more accurately, and had explained in the request itself that he was requesting advice and assistance under s. 16 FOIA. He now suspected that Mr Masterson, rather than Mr Mills, was the relevant official in addition to Mr Saunders.

40. Mr Ryan did not accept that the request was vexatious within the meaning of s. 14 FOIA. He reiterated that there was a public interest motive for making the request, that the information sought was valuable and that he had not caused any distress to the Department or its staff. He described the Department as choosing the most "backward" method of analysing the data in order to inflate its own processing time. Mr Ryan's evidence was that he had had no idea that there would be embedded information in the diaries and that, in any event, he had not asked for it to be disclosed. He said that if the Department had explained this to him he would have reached an agreement with it but he was not offered the opportunity. In describing the motive behind the particular terms of his request, he stated:

> *"The main objectives of the request are to clarify the two main roles of the PFU, how it deals with NHS Trusts and how it deals with contractors. Neither of these are clear from the outside and both have a huge impact on the way the Department works.*
>
> *…I would hope that by seeing the extent (number and frequency of meetings with different Trusts) to which the PFU gets involved in local issues would help to clarify this relationship. Seeing which Trusts in particular are in regular contact would also indicate which PFI projects are particularly problematic - information which the Department has jealously protected to date.*
>
> *A similar goal exists with the PFU's contacts with contractors and businesses. It would be valuable to know whether the public or private sectors get more face-time with this key Department…".*

41. Mr Ryan rejected the Department's concerns about his requested PDF format and the risk that he could "hack" the redacted information by retrieving the underlying data. He suggested an alternative approach which he said would not present a risk. In relation to the preparation of the diaries for redaction/disclosure, Mr Ryan's evidence was that by converting the diaries to a CSV file (a type of EXCEL spreadsheet) it could be redacted using electronic sorting and filtering tools. This would, in Mr Ryan's view, significantly reduce Mr Saunders' time estimate.

42. In his oral evidence, Mr Ryan set out his understanding of the relationship between the Trusts and the Department. He said that the Department signs off the PFI contract at the procurement stage, then the Trust and PFI Contractor were responsible for performance of the contract. However, he thought that the Department could have provided advice to the twenty or so (in his estimate) Trusts with fire safety problems and encouraged a pooling of resources to achieve a decent settlement, but had chosen

not to do so. He said that none of the Trusts had chosen PFI, he thought they had been presented with only one option by the Department. He thought there would be a scandal if the extent of the problem were uncovered, as large institutional investors such as pension funds had supported PFI.

43. In cross-examination by Ms Callaghan, Mr Ryan said that he had made a number of FOIA requests to Trusts then decided to focus on the Department. He described his request for the diaries as iterative, as when he knew what meetings had taken place he could ask the Trust for details. He described the diaries as "an index of the information potentially available". When asked about his estimate that there were twenty trusts affected, he said that this was the figure the BBC File on Four programme had come up with. He noted that was twice the figure Mr Saunders had mentioned.

Submissions

44. The Department's case was that Mr Ryan's request was vexatious because (i) there was no serious purpose to it and no value to the requested information and (ii) the burden of complying with it was excessive. Ms Callaghan explained that she relied on each limb of that argument independently and also on the two in concert. She invited the Tribunal to find that there was a disproportionate relationship between the negative value of the request and the positive burden of complying with it.

45. Ms Callaghan drew the Tribunal's attention to paragraph 10 of the Upper Tribunal's Decision in *Dransfield* (see paragraphs 16 to 19 above) which makes clear that the purpose of s. 14 FOIA is to protect the public authority. She noted that the ICO's Guidance makes clear that s. 14 FOIA is not reserved only for "extreme" cases.

46. Ms Callaghan drew the Tribunal's attention to paragraph 68 of the Court of Appeal's judgment in *Dransfield,* (see paragraph 20 above). She submitted that this phrase is to be interpreted as a reference to the value of the information itself, rather than the value of the request. She relied on paragraph 38 of the Upper Tribunal's Decision in *Dransfield* (see paragraph 18 above) as requiring an assessment of the objective public interest in the information sought.

47. Ms Callaghan accepted that Mr Ryan had a serious purpose generally in looking into PFI, but did not accept that there was a connection between the information actually sought and his wider serious research. She noted that the request for the diaries was not restricted to certain subject-matter (e.g. meetings on fire safety issues) so that the request made was "broad and unfocussed", and there was negligible value in that information because it would not held Mr Ryan with his wider research.

48. With regard to the time for the assessment of value or purpose, Ms Callaghan submitted that whilst it would usually be considered as at the time of the request, the Tribunal was entitled to take into account the totality of the evidence before it and this indicated that there was no value in the request for Mr Mills' diary. She rejected Mr Ryan's account of needing the smaller pieces of the jigsaw to build the whole picture and submitted that he could make focussed requests to Trusts without the information

gleaned from the diaries. She characterised Mr Ryan's approach as a "fishing expedition".

49. Whilst inviting the Tribunal to uphold the Department's application of s. 14 FOIA in relation to lack of value or purpose alone, she also invited the Tribunal to consider the burdensome nature of compliance with the request. Following the evidence, she submitted that the Department's revised estimate was that it would take 75 hours to review both diaries. She submitted that 75 hours of Senior Civil Servant time was disproportionate to the negligible value of the request, which led to the application of s. 14 FOIA. She estimated a further 17 hours would be required to make the redactions, but even if that were an over-estimate, she asked the Tribunal to consider that 80 hours is two working weeks.

50. The Information Commissioner's case was that there is a high bar for a public authority to meet in claiming vexatiousness and, whilst vexatiousness could be found on the facts in any case, it was noticeable in this appeal that the indicia of vexatiousness as set out by Upper Tribunal Judge Wikeley in *Dransfield* were absent. Mr Paines invited the Tribunal to assess the value of the request, not of the information sought. He characterised the Department's approach as seeking to rely on its own valuation of the information sought, and submitted that this was an impermissible approach.

51. In relation to the comparison with the time frame for applying s. 12 FOIA, Mr Paines reminded the Tribunal that the Fees regulations do not cover the costs of applying an exemption and that they allowed 24 hours for merely locating the information. He asked the Tribunal to consider the legislative approach in the context of Ms Callaghan's argument as to disproportionality.

52. Mr Paines also drew the Tribunal's attention to paragraph 38 of the Upper Tribunal's Decision in *Dransfield* (see paragraph 18 above) as showing that the purpose or value of the request may not be obvious from the outset and that the public authority should not jump to conclusions. In commenting on the Court of Appeal's judgment (paragraphs 68 and 72, set out at paragraph 20 above), he submitted that a burden on resources was not a short-cut to meeting the high bar for establishing vexatiousness. He submitted that Mr Ryan's request (see paragraph 3 above) had set out in great detail the reason why he was asking for the information and had placed the request for the diaries on context. He submitted that the request was obviously linked to Mr Ryan's serious purpose. He invited the Tribunal to reject Ms Callaghan's approach which, he said, sought to alter the focus of the test so that the public authority itself would take on the task of considering whether the information was useful. He suggested that an approach which involved the public authority second-guessing the value of a request took us a long way from the case law.

53. Turning to the Department's time estimate for complying with the request, Mr Paines noted that it had reduced from the 338 hours mentioned in the Notice of Appeal to the 75 hours mentioned in Ms Callaghan's submissions. He submitted that, whilst a request could be considered vexatious in relation to the costs of compliance alone, the Tribunal should bear in mind that in circumstances where the s. 12 FOIA

regime allows 24 hours for searching for the information alone, a period of 75 hours for redacting the information cannot be considered grossly excessive.

54. In relation to Mr Mills' diary, Mr Paines noted that the Department had first raised s. 14 in October 2016 which was before Mr Mills had retired. Whilst his recent retirement may cause practical difficulties, it was submitted that this was not relevant to the legal test the Tribunal must apply.

55. Mr Paines invited the Tribunal to find that neither limb of Ms Callaghan's argument met the high bar that it is incumbent upon a public authority to meet before relying on s. 14 FOIA.

56. Mr Ryan concluded by stating that no one knew what was in his head or on his computer about PFI. It would therefore be impossible for the Department to assess the value of the information he had requested. He reminded the Tribunal that the Department had interpreted his request for him without assisting him to refine it, despite his scoping e-mail. He complained that the Department's policy was not to speak to requesters on the telephone.

57. Mr Ryan confirmed that he had not requested the attachments to the diaries or the extra material embedded in them. He said he did not know that information existed before he saw the Department's Grounds of Appeal and that it would be unfair to find that his request was burdensome in relation to information that he had not requested and had not known to have existed. He reminded the Tribunal that it was the Department which had suggested that Mr Mills' diary was within the scope of his request and that if that was wrong then it was not his fault.

Conclusion

58. It was accepted by all parties in this appeal that the Department had to meet a high bar in order to establish that Mr Ryan's request was vexatious. The question for the Tribunal was whether the Department had met this standard. The Department did not rely on all the indicia of vexatiousness identified by the Upper Tribunal and summarised at paragraph 16 above. It relied only on the alleged lack of serious purpose or value to the request and the burdensome nature of complying with it. Accordingly, we consider only those factors below.

59. We are satisfied that Mr Ryan's area of research is on a subject which attracts public interest and that it has a serious purpose and value. The Department accepted this, but argued that there was no connection between the information request and this serious purpose. Having considered Mr Ryan's written and oral evidence, we reject this submission. We were satisfied on the basis of Mr Ryan's evidence that he had taken a serious, journalistic approach to his subject and that he was legitimately engaged in a process of pulling together information from a variety of sources from which to form a bigger picture. Mr Saunders accepted in his evidence that the public authority could not itself judge the value and purpose of Mr Ryan's request without knowing how it related to his wider research.

60. We have had regard to the guidance from the Upper Tribunal about the risk of a public authority itself jumping to conclusions about the value or purpose of a request. We find that this is a case in which the value or purpose was not self-evident. Having now considered all the evidence, we are satisfied that the request did have a serious value and purpose for the requester. On an objective basis, we consider that a reasonable person would conclude that there was a serious purpose and value to the information Mr Ryan was attempting to assemble. We do not accept that this was a case of Mr Ryan embarking on a "fishing expedition" where he relied on pot luck but rather one of journalistic endeavour by a process of iteration. Accordingly, we reject the first limb of the Department's case.

61. Turning to the burden of compliance, we accept that the resources of the Department would be impacted to a considerable degree by compliance this request. We note that the Information Commissioner has already found that s. 12 FOIA was not applicable.

62. Having considered it carefully, we found that the Department's evidence on this point did not provide a firm foundation for us to reach a settled view as to the true scale of this impact. Firstly, the diary sampling exercise was in our view unsatisfactory because Mr Saunders had not chosen the sample himself and was unable to say that it was representative of the 18 month period covered by the request. Secondly, by the close of the Department's case the estimate had dropped from around 300 hours to less than 100, suggesting that its methodology was flawed. Thirdly, Mr Saunders had not considered some rather obvious labour-saving possibilities such as preparing a standard e-mail to those affected seeking their views on redaction. Fourthly, the Department had made a rod for its own back by assuming (without speaking to Mr Ryan) that the scope of the request included all the embedded information which he had not known was there and had included this within its estimated time for redacting the information. In all the circumstances, we found the Department's evidence of the burden of compliance insufficient to satisfy us on the balance of probabilities that it fell into the grossly oppressive category claimed.

63. Having reached these conclusions, we now dismiss this appeal. The Decision Notice stands, so (unless there is to be an appeal to the Upper Tribunal) the Department must comply with the request without relying on s. 14 FOIA. It may, of course, seek to rely on an exemption at that stage.

64. We have reached the same conclusion about both Mr Saunders' and Mr Mills' diaries, although we did not have the benefit of hearing from Mr Mills. We sympathise with Mr Ryan's unwillingness to abandon Mr Mills' diary when it was the Department itself which identified this information as falling within the scope of the request. It may be that the Department can discuss this matter further with Mr Ryan in an effort to reach an agreed way forward.

Postscript

65. It may be helpful for the Department to engage with Mr Ryan further about the scope of his request. His evidence was that he had not sought the information

embedded in the diaries, as he did not even know it existed. We also regarded the embedded information as falling outside the scope of his request. This presumably means that it could simply be deleted in its entirety, which would take less time than redacting it. It may be helpful for the Department to take the approach of disclosing the top-level weekly view diaries which were before the Tribunal (redacted as necessary) and then give Mr Ryan the opportunity to request further information about any particular entries.

(Signed)

ALISON MCKENNA **DATE: 18 July 2017**

PRINCIPAL JUDGE