First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2021/0064

Decided without a hearing
On 17 September 2021

Before

JUDGE HAZEL OLIVER
PIETER DE WAAL
DAVID WILKINSON

Between

MR M BOYCE

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 5 February 2021 (IC-46031-R5Z7, the "Decision Notice). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information requested from the Office of the Information Commissioner ("ICO") about caseworkers who had dealt with specific FOIA complaints.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 9 April 2020, the appellant contacted the ICO through the *whatdotheyknow.com* website and requested the following information (the "Request"):

> "*please provide an anonymised identifier for each caseworker for the following decision notices:*
> *FS50856403 20 December 2019*
> *FS50807165 6 September 2019*
> *FS50794284 7 July 2019*
> *FS50821780 1 July 2019*
> *FS50789890 17 January 2019*
> *FS50788785 14 January 2019*
> *FS50745784 1 October 2018*"

4. The ICO responded on 24 July 2020 and denied holding the requested information. The appellant requested an internal review on the same day, arguing that the requested information could easily be created and that the ICO should have provided him with advice and assistance. The ICO sent the outcome of its internal review on 10 August 2020 and upheld its original position.

5. The appellant originally complained to the Commissioner on 7 July 2020 and the matter was accepted for investigation after the internal review response had been provided. The Commissioner contacted the ICO giving a preliminary view that they held the building blocks required to produce the information. The ICO issued a fresh refusal notice on 12 January 2021 which refused the Request as vexatious. The Commissioner allowed the appellant to make a further submission before making her decision.

6. The Commissioner decided that the Request was vexatious and therefore the ICO was entitled to rely on section 14(1) FOIA to refuse it. This was on the basis of behaviour towards another public authority in relation to FOIA requests (the Parliamentary and Health Services Ombudsman, "PHSO"), which indicated that a response would not resolve anything. Prolonging the correspondence would be futile and potentially detrimental to ICO staff, and the requested information has very limited relevance to the underlying matter.

The Appeal and Responses

7. The appellant appealed on 1 March 2021. His grounds of appeal are:

a. The Commissioner is regarding him as vexatious (rather than the Request).
b. There is no mention of the burden placed on the ICO.
c. He does not have an impermissible motive, and is entitled to use the *whatdotheyknow.com* website to share information and views with the wider public.
d. There is a value and serious purpose to the Request – discovering if there is a pattern in the divergence of approach in different ICO decisions in relation to section 42 FOIA.
e. He has been critical of the ICO and accused them of acting unlawfully, but this is demonstrably true.

8. The Commissioner's response maintains that the Decision Notice was correct. It is a lengthy response which sets out the full background to the Request. In response to the appellant's points of appeal it is said that:

a. It is entirely appropriate to consider the wider relevant course of dealings between the appellant and PHSO as an example of "vexatiousness by drift" and as part of a holistic assessment of the Request.
b. There is minimal purpose and value in this Request – public versions of the decision notices with named signatories are available. Targeting case officers is a vehicle for the appellant to continue to vent his original grievance about the PHSO's reliance on section 42, and the Commissioner has explained that differences in terminology in decision notices does not mean that different tests have been applied.
c. The tone of the appellant's correspondence often demonstrates derogatory and demeaning language towards the ICO, and being constantly accused of acting unlawfully in the absence of evidence is beyond the level of robust criticism that a public authority should expect. This supports the position that the appellant's motive is primarily to continue the harassment of ICO staff and repeat his dissatisfaction with, and criticism of, the ICO.

9. The appellant submitted a reply which disagrees how the Commissioner has categorised the history of the Request, disputes the use of "vexatiousness by drift", and says he has extensive evidence that the ICO is sometimes acting unlawfully. He says that the Request has serious purpose and value, and he is not interested in targeting anyone.

Applicable law

10. The relevant provisions of FOIA are as follows.

> ***1 General right of access to information held by public authorities.***
> *(1) Any person making a request for information to a public authority is entitled—*
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> *(b) if that is the case, to have that information communicated to him.*
> ……
> ***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.*

11. There is no further guidance on the meaning of "vexatious" in the legislation. The leading guidance is contained in the Upper Tribunal ("UT") decision in ***Information Commissioner v Dransfield*** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal ("CA") in ***Dransfield v Information Commissioner and another & Craven v Information Commissioner and another*** [2015] EWCA Civ 454 (CA).

12. As noted by Arden LJ in her judgment in the CA in ***Dransfield***, the hurdle of showing a request is vexatious is a high one: "…*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." (para 68).

13. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*." (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

14. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. *"…the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor*." (para 29).

b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority*." (para 34).

c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).

d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive*." (para 39).

15. Overall, the purpose of section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" (UT para 10), subject always to the high standard of vexatiousness being met.

Issues and evidence

16. The issue in this case is whether the ICO was entitled to rely on section 14(1) FOIA to refuse to respond to the Request on the grounds it was vexatious.

17. We had an agreed bundle of open documents which included the appeal, Commissioner's response and appellant's reply.

Discussion and Conclusions

18. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

19. There is a relatively lengthy background to the Request, which can be summarised as follows:

a. The appellant had a claim for working tax credit which was not handled correctly by HMRC. This was later corrected by the Tax Credits Office.

b. The appellant appealed to the Adjudicator's Office. He was unhappy with the way the Adjudicator's Office dealt with his complaints about differing advice in HMRC documents about backdating of working tax credit claims. He says their report is fundamentally flawed and incorrect.

c. The appellant complained to the PHSO. The PHSO rejected his complaint. He requested a review, and was told the PHSO would take at least 12-16 weeks to decide whether to conduct a review.

d. The appellant made an application for judicial review in relation to the PHSO on 19 January 2018. This was refused on the papers on 21 February 2018. The appellant says that the High Court failed to consider all of the evidence.

e. The appellant submitted a series of requests to the PHSO under FOIA in relation to their review process. This included a request on 31 July 2018, which the PHSO refused under section 42(1) FOIA (legal professional privilege). The Commissioner upheld the PHSO's application of the exemption as the public interest in maintaining privilege was greater than the public interest in disclosure. The appellant appealed this decision in EA/2019/0032. The Tribunal's decision also upheld application of the legal professional privilege exemption.

f. On 12 October 2018 the appellant made a further request to the PHSO. They refused to reply on the grounds it was vexatious. The Commissioner also found that the request was vexatious. The appellant appealed this decision in EA/2019/0334. The Tribunal also found that the request was vexatious based on motive, value and purpose of the request, and harassment and distress to staff. The appellant says that the Tribunal did not have all the evidence and accuses the ICO of attempting to pervert the course of justice by inviting this Tribunal to consider its analysis and conclusions.

g. On 8 April 2019 the appellant made a request to the ICO asking them to confirm or deny whether they received external legal advice from the PHSO in relation to their investigation into the legal status of PHSO reviews. The ICO had previously refused

to confirm or deny this during proceedings in EA/2019/0032. On 1 May 2019 the ICO confirmed that no such information was held in relation to their investigation.

h. On 13 July 2019 the appellant submitted a request to the ICO entitled "Unfair schizophrenia within the ICO" which asked for records where "extreme exceptionality" is mentioned in relation to the section 42 legal privilege exemption. The ICO replied that no information was held, and provided advice and assistance by referring to the ICO guidance on this issue, published decision notices and Tribunal decisions. This was upheld on internal review.

i. The current Request was submitted on 9 April 2020.

j. On 3 July 2020 the appellant submitted a request to the ICO for recorded information about arrangements to protect ICO staff during the pandemic, in light of these arrangements affecting the ability to respond to FOIA requests on time. The ICO withheld information under section 12 FOIA (cost of compliance), but provided advice and assistance on 30 July 2020 by explaining the ICO offices are closed and staff continue to work from home, and those with caring responsibilities may be working reduced or flexible hours.

k. The ICO responded to the current Request on 24 July 2020 giving the response that no information was held.

l. On 15 August 2020 the appellant submitted a request to the ICO for the number of ICO caseworkers that had been working reduced hours due to caring responsibilities during the pandemic. The ICO provided relevant statistics on 11 September 2020.

m. The ICO first relied on vexatiousness in relation to the current Request on 12 January 2021.

20. The Commissioner has relied on this extensive background as showing "vexatiousness by drift", based on an argument that the appellant has unreasonably persisted with a campaign against PHSO and has now moved on to the ICO. The appellant takes issue with this because he says his original complaints about what happened with working tax credits advice and the decision of the Adjudicator's Office were fully justified, he wants this Tribunal to consider all the evidence, and he is following a logical trajectory of investigation.

21. Our view is that the Commissioners' argument about vexatiousness by drift needs to be approached with care. It is well established that the wider course of dealings between the parties themselves forms part of the holistic assessment of whether a request is vexatious. However, it is a significant step further to take account of the course of dealings with a different public authority. We note that there is a link between this Request and previous requests and dealings with the PHSO. But, the fact the appellant has been found to be pursuing a campaign against the PHSO does not mean that a different request to the ICO about its approach to a particular legal exemption should be regarded as vexatious. We have therefore focussed in our decision on the course of dealings between the appellant and the ICO.

22. **The burden imposed on the public authority by the request.** As noted by the appellant, the Commissioner has not addressed this point in any detail. The burden of responding to this

Request is not a large one, as the appellant is asking for a limited set of information which is likely to be readily available. However, this is only one of the relevant considerations.

23. **The motive of the requester.** Although FOIA is generally motive-blind, we can take account of the wider course of dealings between the parties in deciding whether a particular request is vexatious. We have focussed on dealings with the ICO rather than separate dealings with the PHSO. The appellant has submitted five requests to the ICO between April 2019 and August 2020. The appellant has a personal grievance about how the Commissioner deals with the legal privilege exemption in section 42 FOIA. However, as discussed further below in relation to the value and the purpose of the request, this grievance will not be resolved by provision of the information he has requested.

24. We note that the appellant was sent a detailed letter by the Commissioner on 2 February 2021, which sets out the writer's views on the public interest test under section 42, based on his experience as a case officer. This agrees that there has been an inconsistency in which the public interest test has been described, but explains why it is not clear that this means the test has been inconsistently applied. The appellant did not accept this explanation, and insisted on the matter proceeding to a decision notice. This is an example of the appellant's obsessive approach to this issue. He is not willing to accept reasoned explanations that do not concur with his own views. We also note the appellant's response to the case officer's initial letter (confirming that he was undertaking the investigation) was: "I expect the ICO to perform a complete whitewash of an investigation" (17 November 2020, page E144 open bundle). The appellant appears to be pursuing a personal vendetta and grievance against the ICO and is deliberately attempting to cause disruption with requests for information which have no obvious value or purpose.

25. We have also taken account of the appellant's later requests to the ICO about information on working arrangements during the pandemic. Although these were sent after the current Request, they provide further evidence of the appellant's underlying motive. The appellant was questioning the ICO's position that the Covid-19 pandemic had caused difficulties with responding to FOIA requests on time. He did not accept the advice and assistance provided, and insisted on obtaining statistics on those working reduced hours due to caring responsibilities. Again, these repeated requests seem deliberately designed to cause disruption to the ICO during the very difficult time of the pandemic.

26. **The value or serious purpose of the request.** We do not see how the Request has any real value or serious purpose. The appellant has access to the public records of the ICO's decision notices which show the signature of the person who has approved and takes responsibility for a decision. The ICO has explained that case officer decisions will either be signed off by a Group Manager, or a senior case officer after review. The person who signs off the decision is responsible for the decision notice. The appellant alleges inconsistency in how the public interest test is described in ICO decisions on section 42, and alleges the ICO is breaking the law. If there is a pattern of inconsistency, this would be shown in the public decisions including the names of the signatories. As noted in paragraph 24 above, the Commissioner has also provided a reasoned explanation about how the test is applied. It is unclear what, if anything, the anonymised details of individual case officers would add – unless the appellant is seeking to target individual case officers in some way.

27. **Any harassment of, or distress caused to, the public authority's staff.** We have seen that the appellant has used strong critical language about the ICO in multiple posts to a public

website, using accusatory language and making accusations of breaking the law. This is not a case where the appellant has targeted named individuals, and we have not received direct evidence about harassment or distress to individuals. It is also right that public authorities can be held to account through public criticism. However, the appellant is persistent in making serious accusations that the ICO is deliberately breaking the law. He says it is true, but there is no evidence of this. The serious accusations underlying this Request are likely to have a disproportionate effect on staff members, taking into account that he is targeting individual case officers' decisions, and the very limited value of the information being requested.

28. Taking all of the above matters into account, we have considered whether there is a lack of proportionality in this Request, and whether the resources of the ICO would be squandered on disproportionate use of FOIA. We find that the Request does lack proportionality, taking into account its lack of value or serious purpose. Although the burden of answering this one request would not be high, there is a pattern of behaviour by the appellant towards the ICO which indicates a motive to cause deliberate disruption, and potentially distress to individual caseworkers who would have their work publicly criticised. This indicates that responding to this Request would amount to a misuse of FOIA and be a disproportionate use of FOIA. Based on the course of dealings between the parties, we also believe this would not be the end of the matter, and the appellant would continue to send related new requests to the ICO. The appellant says in his appeal that he will not make any further requests on the same subject matter, but there is a clear pattern of repeated requests which indicates that he is likely to send further requests on related topics or on new topics which would be similarly disruptive and lack value or purpose.

29. Having taken account of all the relevant circumstances, we find that the high hurdle of vexatiousness has been reached in this case, and the ICO was entitled to rely on section 14(1) FOIA to refuse to reply to the Request.

30. We dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 11 October 2021

Promulgated: 13 October 2021