**Appeal number: EA/2019/0411**

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

| | |
|---|---|
| **MARK DOYLE** | **Appellant** |
| **- and -** | |
| **THE INFORMATION COMMISSIONER** | **Respondent** |

**TRIBUNAL:** **JUDGE CL GOODMAN**
**ROSALIND TATAM**
**STEPHEN SHAW**

**Remote hearing by video on 7 December 2021**
**The Appellant appeared in person**
**The Respondent did not appear**

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**<u>CORRECTED</u> DECISION**

**The original version of this Decision has been corrected. The incorrect reference was used in the original version for the Commissioner's Decision Notice in paragraphs 1, 7, 28 and 29.**

1. The appeal is allowed. Decision Notice FS50803416 and FS50803417 is not in accordance with the law.

2. The Tribunal substitutes the following Decision Notice:

*1. The London Borough of Hillingdon was not entitled to refuse Mr Doyle's request for information made on 2 October 2018 and added to on 3 October 2018 on the grounds that the request was vexatious under section 14(1) of the Freedom of Information Act 2000 (FOIA).*

*2. To ensure compliance with FOIA, the London Borough of Hillingdon must issue a fresh response to the request which does not rely on section 14(1) FOIA.*

*3. The London Borough of Hillingdon must take this step within 35 calendar days of the date of promulgation of this Decision Notice.*

3. This was a majority decision. The reasons of both the majority and minority members are set out below.

**REASONS**

4. The Appellant made a request for information to the London Borough of Hillingdon ("the Council") on 2 October 2018 on behalf of his father, Mr D.J. Doyle. On 3 October 2018, he added to the Request.

5. On 5 October, he made a second request for information to the Council.

6. The Council refused both requests on 21 December 2018, after intervention by the Information Commissioner ("the Commissioner"), relying upon section 14(1) of the Freedom of Information Act 2000 ("FOIA"), on the grounds that the requests were vexatious. The Appellant complained to the Commissioner.

7. The Commissioner issued a single Decision Notice with two reference numbers (FS50803416 and FS50803417) on 8 October 2019, finding that both requests were vexatious and that the Council was entitled to rely on section 14(1) FOIA.

8. The Information Commissioner found that the Council had contravened its obligations under sections 1, 10 and 17 FOIA by failing to respond in a timely manner to the requests. This was not challenged by the Council.

9. The Appellant appealed the Decision Notice to the First-tier Tribunal on 4 November 2019. The Commissioner did not take issue with the fact that the appeal had been made by the Appellant in his own right and not on behalf of his father.

10. The Appellant subsequently withdrew his appeal, stating that he now had the requested information, in respect of the second request. The Commissioner did not object and the Tribunal consented to the withdrawal in Case Management Directions dated 20 March 2020 (page B71). His appeal continued in respect of the first request.

11. The background to the request is summarised below. References to page numbers in this Decision are to pages of the appeal bundle. The bundle consisted of 206 paginated pages plus an email from the Appellant dated 18 October 2021 and attachments.

*Background*

12. The Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 ("the Regulations") prescribe the procedure to be followed by local authorities in England and Wales when making traffic and parking Orders under the Road Traffic Regulation Act 1984 ("the Act"). Regulation 7 provides for the display and publication of notices of proposals for the making of Orders, including on relevant streets, in local newspapers and in the London Gazette. Notices published in the London Gazette under Regulation 7 are known as "1501 Notices".

13. In February 2017, the Council introduced a new Parking Scheme on a residential road in Hayes where the Appellant's father lived ("the Scheme"). The Council published its proposals and undertook a consultation process before introducing the Scheme. The Appellant's father and brother submitted written notices of objection to the Scheme.

14. On 8 February 2017, the Appellant submitted a 28 page complaint to the Council about the introduction of the Scheme entitled "*Cease and Desist Notice with Formal and Detailed Complaint*". He copied the document to various MPs, Ministers, Select Committees and the Mayor of London. The Appellant claimed that the Council had failed to follow the appropriate statutory procedures and that the introduction of the Scheme would be unlawful.

15. The Tribunal did not have before it a copy of the complaint. The Appellant states (at paragraph 18 of his Response) that one of the issues identified in his complaint was that the Council's 1501 notices were invalid because they did not refer to the relevant statutory provisions and stated that the Council "*intends to make*" an Order rather than "*proposes to make*". The Appellant complained that this language was legally incorrect and that most local authorities use "*propose to make*" in their 1501 notices. He attached a spreadsheet analysing the wording used by different authorities based on a search of the London Gazette from 1998 to 2017.

16. On 16 February 2017, the Borough Solicitor responded to the Appellant's complaint in robust terms: "*I wish to make it absolutely clear at the outset that I consider that the Council has fully complied with the terms of the Regulations"* (page D162). The Borough Solicitor went on: "*I can assure you that the [Scheme] will come into force on 27 February 2017. Your purported Notice of Cease and Desist has no lawful basis whatsoever and the Council therefore refuses to acknowledge or accept it*". After advising Mr Doyle to seek legal advice if he wished to challenge the validity of the Scheme, the Borough Solicitor concluded: "*I do not wish to become embroiled in an exchange of emails with yourself and as far as I am concerned, the matter is now closed".*

17. According to the Council (and this was not disputed by the Appellant), the Appellant then complained to the Leader and Deputy Leader of the Council about the stance of the Borough Solicitor and wrote to the Council's parking contractors about the alleged illegality of its parking schemes (his letter was headed: "*Hillingdon Council Dead Parrot Parking Schemes*").

18. According to the Appellant (and this was not disputed by the Council), there was no further communication between him and the Council until May 2018. The Council stated that the validity of the Order establishing the Scheme could have been challenged by application to the High Court within 6 weeks under paragraph 35 of Schedule 9 to the Act – but no such application was made by the Appellant or anyone else.

19. Between May and November 2018, the Appellant made 5 requests for information from the Council under FOIA.

20. In his first request on 29 May 2018, the Appellant requested information about the number of parking tickets issued and paid under the Scheme, the number of permits issued, and the cost and financial benefits of the Scheme. The Council disclosed some information and the Appellant complained to the Commissioner. The Commissioner investigated and the Council provided further information on 21 December 2018. On 9 April 2019, the Commissioner decided that the Council did not hold any further information. An appeal from the Appellant against the Commissioner's decision was refused by a Tribunal on the papers on 29 February 2020 (EA/2019/0167).

21. In August 2018, the Appellant noticed that the Council had changed the wording used in its 1501 Notices about Orders to be made under the Act from "*intends to make*" to "*proposes to make*". He established through searches of the London Gazette that the wording had been changed from April 2017.

*The Request*

22. On 2 October 2018, the Appellant made the following request for information from the Council on behalf of his father ("the Request"):

“*For the period between January 1998* to March 2017 Hillingdon Council used the standard term of "intends to make" in relation to Road Traffic Orders in over 620 legally required notices. These notices were all published in the 1501 section of the London Gazette and should reflect the on street notices put up in that period as well as reflecting the orders citing the relative act and sections that are eventually made relating to those notices.*

“*From April 2017 more than 40 notices by the London Borough of Hillingdon have been published in the same 1501 section omitting the phrase "intends to make" and instead substituted it with the term "proposes to make". As this is clearly a required legal term, the change indicates a change of internal policy affecting these notices as no legislation changes have been made requiring the use of this term regarding proposal notices since 1996.*

“*Therefore, I would ask for the following information under the freedom of information act.*

*“1. Which member or members of the executive and or political leadership made the decision to change the standard term from "Intends to make" to "Proposes to make"*

*“2. As this is a significant change it would require a meeting that should include the input of at least the relative cabinet member, deputy CEO whose named on those notices and and Head of Legal/Borough Solicitor who is ultimately responsible for legal compliance. Did any such meeting take place and who attended. Please supply the minutes*

*“3. If no policy meeting took place, there would have been internal consultation regarding this significant policy change, please supply the relative internal communications and or minutes of the associated meetings relating to this policy change.*

*“Please note that if you require clarification, please do so to avoid misunderstanding and avoidable complaint to the ICO.*

*“*Notices published prior to Jan 1998 has to be manually searched*”

23. On 3 October 2018, the Appellant asked for *“one more question to be added to this request which is most important*”:

“*Why was the term "Intends to make" in the 1501 notices changed to "Proposes to make*"

“*The following does need to be taken into account. The Borough Solicitors and Deputy CEO's written affirmation that the term was legally acceptable and*

*compliant PRIOR TO that significant change and backed up by the Council Leader [named individual 1] in writing with the statement 'For the avoidance of doubt I have absolute faith in the professional ability of both [named individual 2] the Deputy Chief Executive and [named individual 3] the Borough Solicitor'*".

24. On 5 October 2018, the Appellant made a second request for information about the procedure for making complaints against the Deputy CEO, Borough Solicitor and Council Leader for, inter alia, negligence and failure to declare conflicts of interest in relation to the change of wording of the 1501 notices. The full text of the second request is at page 3 of the Decision Notice.

25. The Council initially responded saying that the Appellant's dissatisfaction with the Scheme could not be dealt with under FOIA. The Appellant complained to the Commissioner. The Council then wrote to the Appellant on 21 December 2018, refusing to comply with the requests on the grounds that they were vexatious under section 14(1) FOIA, saying "*This is because, despite being advised to seek legal advice (which is the only basis for challenging the Order) you would rather make FOI requests to try and resurrect 2 matters that have already been dealt with by the Council*".

26. The Appellant complained to the Commissioner. In a letter to the Commissioner dated 23 July 2019, the Council summarised its position as follows:

> "*looked at objectively the requests have no serious purpose; Mr Doyle has never intended to challenge the Council's Order in Court and the Council's residents have no interest in whether the Council uses a particular verb in its statutory notices – they expect the Council to deal with parking issues in accordance with the law and in the wider public interest".*

27. The Council submitted that the change in wording was not legally significant, observing that according to its office dictionary, "*proposes*" means "*to intend to do something*".

*The Decision Notice*

28. The Commissioner issued Decision Notice FS50803416 and FS50803417 in respect of both requests on 8 October 2019. She had considered the two requests individually but not separately. She concluded that the Council was entitled to rely on section 14(1) in relation to both requests because neither had any serious purpose. In reaching this view, the Commissioner took into account that the Appellant had not challenged the validity of the Scheme in the High Court and that his focus in communication with the Commissioner had been his concerns about certain Council officials and not parking enforcement. She found that while his concerns remain unassuaged, she "*does not consider in the circumstances of this case, that these concerns are sufficiently evidenced that the Council is not entitled to*

*rely on section 14(1)*". She noted that the online Oxford English dictionary defines "*propose*" as "*intend to do something*".

29. The Appellant appealed Decision Notice FS50803416 and FS50803417 to the Tribunal.

*The Appeal*

30. In his Notice of Appeal and 29-page Response, the Appellant:

(1) complained about the way in which the Commissioner had dealt with his complaint, including that both requests had been dealt with in a single Decision Notice;

(2) complained about the way in which the Council had dealt with his requests for information, and in particular, that there was a conflict of interest because the Deputy Borough Solicitor was responsible both for compliance with the Regulations and requests for information under FOIA;

(3) submitted that the change in wording on the 1501 notices was legally significant and that the Council's use of incorrect terminology for at least 20 years potentially invalidated millions of Penalty Charge Notices (PCNs) and over £35 million in parking fines;

(4) submitted that the interpretation of the terms "intend" and "propose" must be based on the Regulations and the Act, not a dictionary. The words were not synonyms: according to the Appellant, a "proposal" connotes a process of consultation, whereas "intent" or "intends" indicates a determined course of action which will take place without consultation;

(5) submitted that the Request concerned the wording of multiple 1501 notices, and not only those relating to the Scheme. The right to challenge the Scheme by application to the High Court was therefore not relevant, and in any event, far beyond his father's means; and

(6) submitted that the Request did not impose an unreasonable burden on the Council. It was one of only 5 requests made by the Appellant between May and November 2018, it was straightforward and for an insubstantial amount of information. The Council were using section 14(1) inappropriately in retaliation for his February 2017 complaint.

31. At paragraph 49, the Appellant summarised the aim of the Request as being "*to ascertain why the wording was changed while that action was contrary to clear statements made prior to those changes being made and the implications of that change of wording*". He said that the requested information might provide evidence of errors and maladministration at the Council.

32. In her Response, the Commissioner maintained that the Request did not have any serious purpose. The change in wording of the 1501 notices was not significant and had no legal effect, and thus there was nothing to suggest maladministration or corruption. The Commissioner submitted that the Appellant was "*motivated by strongly held views about some members of Council staff and his underlying grievance*" (paragraph 16). The Commissioner addressed each of the Appellant's grounds of appeal. She said at paragraph 22 that "*the Commissioner does not say that the Appellant's course of conduct has been particularly burdensome*" but that it was relevant that the Appellant had "*repeatedly used his rights under FOIA despite the availability of obviously more appropriate alternative routes of challenge*" under administrative law and/or road traffic legislation.

33. The Council was not a party to the appeal and made no submissions.

*The Hearing of the Appeal*

34. The hearing was conducted by video on 7 December 2021. The Appellant attended and represented himself. The Commissioner did not wish to attend or be represented.

35. The Tribunal and Appellant were able to hear and see each other throughout. The Appellant did not request any specific reasonable adjustments but took a few minutes to stand and stretch after an hour.

36. The Appellant did not make formal submissions, relying on his submissions in the bundle and his Addendum of 20 November 2021, but invited the Tribunal to ask questions about his appeal. He explained that he regularly made requests for information under FOIA from different organisations, on his own behalf and for other people for the purposes of research.

37. The Appellant said that if the requested information was provided, he would use it to determine whether there had been any impropriety at the Council in relation to the decision to change the wording of the 1501 notices. He acknowledged that it was unlikely that historic PCNs would be overturned or refunded as a result; however, there might other avenues to complain about maladminstration, for example, by asking the Council's Head of Democratic Services to appoint an independent person to investigate.

38. The Appellant acknowledged that the Request was potentially "confrontational" – but only because it would be dealt with by the same person, the Deputy Borough Solicitor, who was responsible for the wording of the 1501 notices. He "partially" accepted that, as submitted by the Commissioner in her Response, his focus was "*concerns about certain officials at the Council rather than concerns about parking enforcement*" – but only in relation to the second request. The Appellant objected to how the two requests had been conflated.

39. The Appellant felt that his requests for information had been dealt with unfairly because of the history between himself and the Deputy Borough Solicitor. He expressed the view that requests for information under FOIA should not be dealt with by lawyers because "*lawyers don't like to be questioned*". He had requested the information again in June 2021 (page B131) in what he regarded as a "non-confrontational" way, and had again been refused on the basis of section 14(1) (he has also appealed this decision), whereas a request from a third party for similar information had been answered (page B123).

*The Law*

40. Section 1 of FOIA provides a general right of access to information held by public authorities. The right is subject to other provisions of FOIA, including section 14.

41. Section 14(1) of FOIA provides that:

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

42. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal said that the purpose of section 14 was to protect the resources of public authorities from being squandered on the disproportionate use of FOIA. The word "vexatious" connoted "*manifestly unjustified, inappropriate or improper use of a formal procedure*" [paragraph 27]. 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.

43. The Upper Tribunal stressed the importance of taking a holistic and broad approach. In relation to "burden", the Upper Tribunal observed at paragraph 29 that "*present burden may be inextricably linked with the previous course of dealings*". In relation to "value or serious purpose", the Upper Tribunal said that "*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*" [paragraph 38].

44. 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*". Arden LJ observed 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*" [paragraph 68].

45. A request arising from a genuine public interest concern may become "*vexatious by drift*" where that proper purpose is "*overshadowed and extinguished*" by the improper pursuit of a longstanding grievance against the public authority (*Oxford Phoenix v Information Commissioner* [2018] UKUT 192 (AAC)). Public interest is not a trump card (*CP v Information Commissioner* [2016] UKUT 0427 (AAC)).

46. In considering an appeal, the Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made. 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.

47. The powers of the Tribunal in determining this appeal are set out in section 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."*

*Conclusion*

48. In considering whether it was lawful for the Council to refuse to provide the requested information under section 14(1) FOIA, the Tribunal had regard to the guidance from the Upper Tribunal and the Court of Appeal set out at paragraphs 40 to 45 above. While taking a holistic approach, the Tribunal considered the question of vexatiousness in particular as at the date of that refusal, 21 December 2018.

49. The Tribunal makes no decision in relation to the validity of notices issued by the Council under the Regulations before 2017. We noted that Regulation 7 does use the term "notice of proposals" rather than "notice of intent". Nevertheless, we doubted that the use of "intends" or "proposes" was legally significant or grounds to

challenge the validity of an Order made by the Council. We doubted the Appellant's interpretation of "intends" as implying a lack of consultation and noted that the Council had invited and received objections to its "notice of intent" in relation to the Scheme. As a result, we found it highly unlikely that there could be any corruption or maladministration by Council officials in connection with the change of wording.

50. As noted above, the Tribunal did not reach a unanimous decision on this appeal. The reasons for both the majority and minority decisions are set out below.

*The Majority Decision*

51. A majority of the Tribunal took as its starting point that FOIA is "motive blind". The right to information under section 1 does not depend upon the requester having a serious purpose and as noted by the Upper Tribunal in *Dransfield:* "*a lack of apparent objective value cannot alone provide a basis for refusal under section 14*". The majority were concerned that the Commissioner had relied almost exclusively on the alleged lack of serious purpose, inviting the Tribunal to find in the Conclusion to her Response that "*the Requests were vexatious, having no serious purpose*".

52. Furthermore, the majority did not accept that the request had no serious purpose. The Request was for minutes and communications relating to a decision to change the wording of the Council's 1501 notices. We found that this information was unlikely to be of value to the public or even a section of the public. However, applying the words of Arden LJ in *Dransfield*, we found that there was a reasonable foundation for thinking that it would be of value to the Appellant. The Appellant is interested in the wording of the notices and it would be of value to him to see minutes and communications, if any exist, about the change. It was not unreasonable for him to conclude that the change, made two months after he had drawn the inconsistency in the Council's approach to its attention, was the result of his complaint. While the change is not legally significant and unlikely to demonstrate maladministration, it would objectively be of value for the Appellant to see information about the decisions leading to that change. The Request was not inane or frivolous.

53. The majority took into account the other criteria identified by the Upper Tribunal in *Dransfield*. We accepted that the Appellant was motivated, at least in part, by his previous dealings with certain officials at the Council and by a sense of outrage that the Council had changed the wording of the 1501 notices, despite rejecting his complaint about that wording out of hand.

54. The majority found it unlikely that it would take the Council long to respond to the Request itself, noting that some aspects of the Request would not be covered by FOIA. The Council had stated in response to another request that: "*There have been no changes to the Council policy in regard to the publication of permanent traffic orders during the specified period*...". The majority took into account the previous dealings between the Council and the Appellant. However, neither the Council nor

the Commissioner had produced any evidence of the time taken to deal with the Appellant's other requests for information, complaints and communications. The Appellant had not communicated with the Council at all between February 2017 and May 2018 and that there had been only 4 other requests in the 6 months between May and November 2018. If evidence had been produced about the burden of the previous course of dealings, this might have weighed more heavily against the limited public interest in the requested information, but the Commissioner had expressly conceded that the Appellant's course of conduct had not been "*particularly burdensome*".

55. The Council and the Commissioner also did not identify any harassment of or distress to the Council's staff, nor drawn to the Tribunal's attention instances of abusive, aggressive or accusatory language. Public officials, especially at a senior level, must expect a certain level of challenge. As noted by the Upper Tribunal in *Dransfield* (paragraph 25) requests which are annoying, and irritating are not necessarily vexatious.

56. The majority found that while other routes existed for the Appellant to challenge the validity of the Scheme, it was not manifestly unjustified, inappropriate or improper for the Appellant to use FOIA to obtain records relating to the decision to change the wording of the 1501 notices, if he was considering making a complaint about that decision.

57. Taking into account all the circumstances and Arden LJ's view that the hurdle of vexatiousness is a high one, the majority concluded that on the evidence before us and for the reasons given above, the Request was not vexatious under s.14(1) FOIA.

*The minority views*

58. The minority member concluded that there could be no serious purpose to the Request, given the Tribunal's findings that the change in wording was legally insignificant (and was in any event changed in April 2017 to the wording which the Appellant believed was correct) and highly unlikely to demonstrate maladministration. The matter being pursued by the Appellant was trivial and frivolous. The sole purpose of the Request was to waste the Council's resources and pursue a personal grudge against the Council and its officials, despite the Appellant's protestations otherwise.

59. While the burden of responding to the Request itself might not be large, the minority found that it was clear from the wording of the Request as a whole that it was inextricably linked to the previous course of dealings between the Appellant and the Council and an attempt to reopen a matter which had been closed. It was an example of "vexatiousness by drift" where any proper purpose in challenging the validity of the Scheme in February 2017 had been "*overshadowed and extinguished by the improper pursuit of a longstanding grievance*" (see paragraph 39 above). The

intemperate and accusatory language used by the Appellant in his February 2017 complaint and later communications with the Council and the Commissioner, in his submissions to the Tribunal (November 2021) and in his actions in February 2017 in copying correspondence to multiple recipients, bore all the hallmarks of a campaign driven by a personal grudge against the Council and certain officials. The minority view was that the Appellant would not be satisfied even if the requested information was provided and would continue to use FOIA to "fish" for information (as he had in June 2021, see paragraph 39 above) until he had identified some wrongdoing, however trivial, by those officials.

60. The minority found that the Appellant views any information provided by the Council with suspicion, perhaps as the result of a particular issue he had pursued with Transport for London. Although there had been only a small number of other FOIA requests from the Appellant to the Council, that of 29 May 2018 (referred to in the Decision, paragraph 18, and his appeal to the Tribunal EA/2019/0167) had entailed a quite significant use of resources by the Council.

61. Taking into account all the circumstances and Arden LJ's view that the hurdle of vexatiousness is a high one, the minority concluded on the evidence before it and for the reasons given above, that the Request was vexatious under s.14(1) FOIA.

**(Signed)**

**MS CL GOODMAN** **DATE: 15/12/2021**

**DISTRICT TRIBUNAL JUDGE**

Promulgation date 22 December 2021

Amended on by Judge Goodman on 18th January 2022