Appeal Number: EA/2021/0168

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

Philip Swift

Appellant:

And

The Information Commissioner

Respondent:

Date and type of Hearing: 31 January 2022. - Hearing on the papers.

Panel: Brian Kennedy QC, Marion Saunders and Paul Taylor.

Date of Decision: - 31 January 2022.

Result: The Tribunal refuses the Appeal.

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 25 June 2021 (reference IC-66423-Z2L3), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal and the Commissioner's decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns a complaint made against the Information Commissioner and their reliance on section 14(1) of the FOIA to refuse the complainant's request.

[3] The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. The Commissioner is under a duty to make a formal determination of a complaint made against her in her capacity as a public authority. The term "the ICO" refers to the Information Commissioner dealing with the request, and the Commissioner refers to the Information Commissioner dealing with the complaint.

History and Chronology:

24 August 2020 The complainant wrote to the ICO and requested the following information:

"This request results from repeated references by the ICO to a 40- day rule for an Authority [sic] to complete an Internal Review(IR) in contradiction to the 20-day 'reasonable' period and seemingly the ability of a Public Authority to take 40 days without explanation. For example, as can be found here:
https://www.whatdotheyknow.com/request/c...
1. In how many has the Authority, Highways England, undertaken an IR within 20 working days or less [sic]
2. With regard to those outside 20 working days, what explanation was provided by the authority?
3. Please provide me with an (anonymised) spread sheet of the complaints you have received about the Highways England form [sic] 01/01/2017 to the present detailing:
a. Date of original FOIA request

b. Date of Authority response
c. Date of the IR request
d. Date of the IR response
e. Date of the ICO
f. ICO reference
g. Date ICO responded to the complainant
h. Date ICO wrote to the Authority

i. Date ICO received a reply from the Authority j. Present position "If there are other dates held, these would be appreciated
4. With regard to the 20-day period for an IR, I ask to be provided: a. The ICO policy with regard to this – the monitoring, enforcement and complaints about Authorities failing to respond within 20 working days
b. The enquiries the ICO makes of an Authority when they fail to complete and [sic] IR within 20 working days "I am seeking to understand the '20-day rule for an IR' as it appears this is not the period to which the ICO works, an Authority has carte blanche to respond and the 20 days stipulation is misleading, unrealistic and not enforced.
"Any information to the contrary would also be appreciated."
"'... significant or repeated unreasonable delays in dealing with internal reviews by public authorities are monitored and where appropriate further action may be taken.'
https://www.whatdotheyknow.com/request/i...
5. What is considered 'significant' and what is considered 'repeated' (how many occasions)
6. what Authorities have had action taken against them for repeated unreasonable delays
7. What action is available to the ICO
8. what action has been taken against Highways England "It appears there is no monitoring, that the 20 days is unenforced and that the reasons given are not considered by the ICO. I

would welcome any information that contradicts this appearance."

22 September 2020 The ICO responded to the complainant citing section 14(1) of the FOIA in their refusal.

26 October 2020 Following an internal review, the ICO wrote to the complainant and upheld its original position.

26 October 2020 The complainant contacted the Commissioner to complain about how his request for information had been handled.

Relevant Law:

S1 FOIA 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.

S14 FOIA 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.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious. Dransfield also considered four broad issues at paragraph [45]:

"(1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "…adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."

In *Craven v ICO & Department for Energy and Climate Change* [2015] EWCA Civ 454 the Court of Appeal accepted *"there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request."* at [85].

In *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 208 (AAC), in which the Upper Tribunal stated, having considered the relevant case law:

"The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A

substantial public interest underlying the request for information does not necessarily trump a resources argument."

In *CP v Information Commissioner* [2016] UKUT 0427 (AAC) the Upper Tribunal stated that:

"In this case and in others where past dealings are of relevance, I find that an appropriately detailed evidential foundation addressing the course of dealings between the requestor and the public authority is a necessary part of that assessment. A compendious and exhaustive chronology exhibiting numerous items of correspondence is not required but there must be some evidence, particularly from the IC, about the past course of dealings between the requestor and the public authority which also explains and contextualises them". (at [34]).

Commissioner's Decision Notice:

[4] In reaching her conclusion, the Commissioner referred to her earlier DN (IC-72969-D6J4), which related to a similar request from the same Appellant she considered that all factors outlined there are equally relevant to the context in which the present request was made. The Commissioner, when considering the internal review, reiterated that the ICO had already informed the complainant that there is no statutory time limit under the FOIA for a public authority to complete an internal review. The Commissioner referred to the FOIA Code of Practice alongside her own published guidance for the purposes of arguing that neither document requires an explanation if it wishes to take in excess of 20 working days to complete an internal review. The Commissioner further illustrated (see Paragraphs 41 – 43 of the DN), how the impugned request required disproportionate time and resources in the process of dealing with a complaint by highlighting the needlessly antagonistic approach that can be, and was taken in dealing with this request. The Commissioner stated that the Appellant continues to show disregard for the ICO's letter to him and further that a reasonable person would have responded by providing a fresh link that they had verified. The Commissioner contended that dealing with such

correspondence places an unnecessary and disproportionate burden upon the ICO.

[5] The Commissioner considered the Appellant's submission and took the view that it is not clear from anything submitted by the Appellant why Highways England Ltd ("HE") would be any more likely to hold information if it completed more of its internal reviews on time or if the ICO intervened more frequently. Further, it is not clear why the Appellant considers it so unreasonable that HE might need up to 40 working days in which to complete a review.

[6] The Commissioner accepted the ICO's argument that, in making this request, the complainant is merely seeking to vent his displeasure at the way the ICO has dealt with his previous complaints.

[7] The Commissioner accepted that whilst there is always some value in information showing how regulators conduct themselves, this particular request, however, focused narrowly on the ICO's interactions with HE, which would considerably reduce its value.

[8] The Commissioner was not convinced that this request has any wider public value and is satisfied that the request was vexatious.

Appellant's Ground of Appeal:

[9] The Appellant's Grounds of Appeal ('the Grounds') are summarised as follows:

(a) The purpose of the Appellant's request is to understand the application of the FOIA in respect of internal reviews and the ICO's approach to internal reviews; and

(b) The Commissioner's Senior Case Officer ('SCO') who investigated the Appellant's complaint provided him with some of the requested information verbally on the telephone in contrast to the DN which is a biased attack on the Appellant's conduct and ignores the Appellant's submissions and evidence.

The Commissioner's Response:

[10] The Commissioner resisted the appeal and relied on her DN for her findings. However, in response to the Appellant's Grounds of Appeal, the Commissioner made the following contentions.

[11] In response to Ground 1: The purpose of the request, the Commissioner citied the Upper Tribunal in *Dransfield UT,* to argue that the Appellant's request is clearly vexatious in the wider context of his dealings with the ICO. Further, that it is clear from the Appellant's conversation with the SCO and his submissions dated 26 May 2021, that he is concerned about the conduct of HE specifically and the ICO's approach to his previous complaints against HE. See for reference DN §§45-55. The Commissioner submitted as the Appellant had 80 section 50 complaints, 21 information requests and several related reviews, data protection complaints and a criminal allegation under section 77 FOIA, that an undue and disproportionate burden is placed on the ICO's scarce resources as held in *Dransfield UT*. Therefore, the Appellant's request represents a manifestly unjustified, inappropriate or improper use of FOIA in accordance with *Dransfield UT* ([43]).

[12] In response to Ground 2: The Commissioner's investigation and the DN, the Commissioner noted, as a preliminary point, that the Appellant did not inform the SCO prior to his recording of the Telephone Conversation. Further, the Commissioner submitted that the ICO was entitled to rely on section 14(1) FOIA to refuse his request.

[13] The Commissioner held that the FOIA is not a mechanism by which a person can require a public body to neither answer questions nor create new information to respond to a request. The Commissioner noted that at no point did the SCO state or imply that the Telephone Conversation was a substitute for the ICO's refusal notice. The Commissioner stated that the DN rightly addresses matters beyond those raised during one telephone conversation with one of the parties. Additionally, the DN represents the views of both parties.

[14] The Commissioner averred that the Tribunal has no jurisdiction over what is or is not included in the body of a DN pursuant to section 58 FOIA, any appeal to the Tribunal under section 57 FOIA is against the outcome of a DN. Further, that the outcome sought by the Appellant (i.e. a brief, documented response to the points he raised) is not within the Tribunal's gift pursuant to section 58 FOIA. The Commissioner maintained that the request was vexatious for the purposes of section 14(1) FOIA and therefore should be struck out.

Appellant's Response:

[15] The Appellant contended that a Public Authority could take as long as they want to complete an internal review and no explanation is required as the FOIA is "a sieve and this is one of its holes". The Appellant alleged that he is being subjected to discrimination and intimidation given that he has previously been successful in an appeal against HE. The Appellant requested a review of the ICO and their conduct, especially on their contention that he is vexatious. The Appellant stated that he is not vexatious and that this allegation "*manifestly wrong*".

[16] The Appellant hoped that the ICO would reconsider its stance and disclose the requested information. The Appellant was surprised that the Commissioner opposed the appeal given the submissions put forward, and the conversation with the SCO in which part of the request was addressed verbally.

[17] The Appellant referred to DN IC-72969-D6J4 and reiterated his contention that the ICO must review their conduct toward him in relation to their use of 'vexatious' and alleged bullying.

[18] The Appellant claimed that whilst an authority cannot be deemed vexatious, it appears that their conduct can go unchecked. The Appellant averred that HE has "*made a mockery of the FOIA and the ICO*".

[19] The Appellant referred to *Swift v Information Commissioner and Highways England* EA/2018/0088 and argued that the ICO has failed to address the

wrongdoing on their part and on the part of the Public Authority. The Appellant provided a detailed history of his experiences with the ICO to assist the Tribunal and to explain his genuine concern. The Appellant questioned why the ICO permitted the acts of the Public Authority and why he was not been believed in this instance.

The Commissioner's Final Submissions:

[20] The Commissioner maintained the position in her DN and in her Response. In relation to the Appellant's statement that the ICO is "*undertaking no monitoring"*, the Commissioner submitted that the announcement that ICO's formal FOI monitoring programme was placed on hold, post-dates the Request in this appeal (i.e. 24 August 2020) and the DN. Therefore, the Tribunal should not be concerned with any reference, by the Appellant to other events which post-date the Request at issue in this appeal. The formal powers, held by the ICO, under section 48(1) FOIA are exercised where appropriate despite formal FOI monitoring being placed on hold.

[21] In relation to *Swift v Information Commissioner and Highways England* EA/2018/0088, the Commissioner strongly refuted the allegation that she colluded with HE to withhold information to which he was entitled under FOIA.

[22] The Commissioner highlighted that the Appellant withdrew two of his appeals EA/2009/0120 and EA/2021/0259. Further, six appeals were dismissed (EA/2018/0104, EA/2019/0119, EA/2020/0321, EA/2020/0322, EA/2021/0048, EA/2021/0056), one was refused (EA/2018/0081) and one had no right of appeal (EA/2021/0236). Therefore, the Tribunal's previous decisions in the Appellant's appeals do not suggest a structural failing on behalf of the ICO.

[23] The Commissioner refuted the Appellant's understanding of the ICO's position on internal review under FOIA. The correct position is as follows (§24 DN):

*"By way of context, the '20 working days' referred to in the Appellant's request is cited in the FOIA Code of Practice, issued under section 45 FOIA by the Cabinet Office on 4 July 2018 ('the **Code**'). The Code recognises that public authorities "may need longer than 20 working days" to complete internal reviews when the issues involved are complex. Similarly, the Commissioner's published guidance titled "Request handling, Freedom of Information FAQs", states that internal reviews should usually be completed "within 20 working days" although there may be circumstances where an "additional 20 working days", or a longer extension is necessary. Neither the Commissioner's guidance nor the Code are binding on public authorities. Ultimately, public authorities are not obliged to conduct an internal review in respect of an information request they have received under FOIA"*

The Appellant's Final Submission:

[24] The Appellant maintained that he is not vexatious. The Appellant raised his concerns about the conduct of the Public Authority and the ICO. In relation to the internal review stage the Appellant stated that his genuine belief was that a Public Authority had 20 working days to respond. The Appellant was concerned with the ICO's conduct and their application of the FOIA.

[25] The Appellant relied upon *Swift v Information Commissioner and Highways England* EA/2018/0088 for the purposes of explaining that he was found not to be vexatious and whilst he has been unsuccessful in other cases, the Appellant contended that this is not necessarily a failing.

[26] The Appellant contended that the FOIA is "*not fit for purpose"* and made reference to an article from the Guardian for the purposes of arguing the same. The Appellant alleged that the ICO has repeatedly failed to investigate his allegations and has avoided taking any action. The Appellant argued that the ICO favours the Public Authority and contended that the ICO should be aware of the requisite standard to be applied in cases such as a section 77 complaint. The Appellant refers to section 77 FOIA – Offence of altering etc. records with intent to prevent disclosure which states as follows:

"(1)Where—

(a)a request for information has been made to a public authority, and

*(b)under section 1 of this Act **F1**... the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,*

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2)Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3)A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4)No proceedings for an offence under this section shall be instituted—

(a)in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b)in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland."

[27] The Appellant argued that there is no deterrent to a Public Authority, as the ICO will not hold them accountable. The Appellant maintained that this is due to the ICO's lack of interest in upholding their role as a regulator. The Appellant stated that the ICO fails to keep appropriate records and release information in accordance with the FOIA. The Appellant refuted the contention that he has no compelling case and further argued that the ICO provide no avenue for appeal, save for the Parliamentary Ombudsman. The Appellant referred to complaints progressed about ICO staff to the Parliamentary Ombudsman and provided his submission that the ICO should be reformed.

REASONS:

Case Management Directions:

[28] The parties have enjoyed the benefit of a number of extremely helpful Case management Directions and interim Rulings and we will now refer to these important landmarks;

a) In a Decision dated 23 September 2021 the Tribunal refused an application by the Respondent to Strike Out the Appeal on the grounds it has no reasonable prospects of success. The ruling given was that the overall challenge to the Respondent's decision Ref IC-66423-Z2L3 will proceed, but because the remedy the Appellant seeks cannot be provided by the Tribunal, that aspect of is struck out as having no reasonable prospects of success pursuant to rule 8(3)(c) of the Tribunals rules, At paragraph 6 of that Ruling the Tribunal further identified the sole issue for further consideration as; *"Whether the Commissioner's decision of 25 June 2021 in her decision notice reference IC-66423-Z2L3 was in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently "*. We note the Appellant has agreed with this direction as referred to at Paragraph 11 in the Respondents Final submissions dated 25 November 2021.

b) In Case Management Directions dated 6 July 2021, the Tribunal provided clear and succinct directions at Paragraph 9, which have not been compiled with. Inter-alia, the Appellant has breached these directions in that the Appellant has provided 33 pages rather than the maximum of 8 sides as directed. Further we find much of the Appellants earlier submissions are reiterated and many are irrelevant. This does have a bearing in our deliberations in relation to the generally obsessive nature of the request.

c) In Case Management Directions dated 25 November 2021 at paragraph 4 therein, where the Tribunal inter-alia directed; *The Commissioner was entitled to consider the purpose and value of the Request at the time it was made and*

she maintains the position in her Response at paragraphs 38 – 41. For the same reasons the Tribunal should not be concerned with the Appellant's reference to other requests, received by the ICO, which post-date the Request at issue in this appeal." and at paragraph 7 therein; "*The Tribunal conducts a full rehearing on the merits and is entitled to review evidence and submissions that were not before the Commissioner during her investigation."*

d) Finally we note in the Respondents Final Submissions dated 25 November 2021, at Paragraph 11 therein, the reference to the Appellants email dated 16 November 2021 (13.02) which we have read and deliberated upon and note the reiteration of previous submissions from the Appellant reflecting what in our view is the obsessive nature of the Request.

The Merits of the Appeal:

[29] We note, accept, endorse and adopt the Respondents position and reasoning in Paragraphs 27 to 35 of the DN. We find no error of Law or fault in the exercise of her discretion therein.

[30] We further note, accept, endorse and adopt the Respondents position and reasoning in Paragraphs 38 – 41 of the DN. We find no error of Law or fault in the exercise of her discretion therein.

[31] We note the similarity in the requests of 24 August 2020 and 01 September 2020 and accept the significance in the assertion that this is relevant to the principles set out in the Dransfield case and find that the papers before us demonstrate the overriding value or purpose in terms of the objective public interest in the information sought of the Request is to irritate and aggravate the Public Authority. We find the impugned Request to be obsessive for the reasons identified by the Respondent and on our close and careful deliberation of the background to the request and the papers before us. We remind ourselves that even if the public interest in the request has particular merits, (as can and has been argued and acknowledged by the Respondent), this cannot act as trump card so as to tip the balance against a finding that the request in a holistic sense is in fact vexatious. This is even before the time

and resources that would be entailed in considering any identifiable information held within the scope of the impugned request. This would not be inconsiderable and another matter we take into consideration in our deliberations. Taking the holistic view, we find that the considerable history of the Appellants dealings with the Respondent Public Authority plays a significant part in our deliberations and determination on the issues in question herein.

[32] The appellant has failed to persuade us, or provide evidence, to support his derogatory comments against the Respondent and we cannot uphold those allegations, which we find support our holistic assessment of the impugned request as being vexatious. The Tribunal again recognise and accept that the remedy sought by the Appellant in relation to reform of, or the conduct as complained of in relation to the Public Authority is not within our jurisdiction.

[33] The Appellant clearly believes he has been wrongly labelled “vexatious”. It is important to note that when considering the exemption provided by s.14 (1), it is the request, which is regarded as vexatious, rather than the Appellant.

[34] In all the circumstances and for the reasons above we unanimously find the request to be vexatious and find the DN was in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, we are not persuaded that there are sufficient grounds to establish that the Respondent ought to have exercised her discretion differently

[35] Accordingly we dismiss this appeal.

Brian Kennedy QC 31 January 2022.
Promulgated 01 February 2022