NCN: [2023] UKFTT 00381 (GRC) Case Reference: EA/2022/0091

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by CVP
Heard on: 6 December 2022
Decision given on: 19 April 2023

Before

JUDGE NEVILLE
MS R EDWARDS
MS J MURPHY

Between

MR JARED O'MARA

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) SOUTH YORKSHIRE POLICE

Respondents

Representation:
For the Appellant: Mr O'Mara in person
For the First Respondent: Written representations only
For the Second Respondent: Mr Ketteringham, solicitor

Decision: The appeal is allowed.

Substituted Decision Notice: Within 35 days of the date of this decision, South Yorkshire Police must issue a fresh response to the request that does not rely on section 14 of the Freedom of Information Act 2000.

REASONS

Introduction

1. On 31 March 2021, Mr O'Mara made the following request for information to South Yorkshire Police ("SYP"):

> *I would like to place a Freedom of Information Request for all information you hold on the Police and Crime Act 2017 in relation to charging referrals made by the police*

© CROWN COPYRIGHT 2023

after a suspect's relevant bail period has expired and where the suspect then accordingly defaults to Release Under Investigation by way of police decision.

Please do not process any of my personal data in relation to this request.

Please also do not designate my request as being Vexatious as this information holds huge value to the general public".

2. Having had no reply, on 4 May 2021 Mr O'Mara complained to the Commissioner. After some delay concerned with the correct provision of documents, on 8 June 2021 the Commissioner contacted SYP requiring that a response be given to Mr O'Mara within 10 working days. SYP then took until 2 July 2021 to issue its response, which was that it refused to comply with the request because it considered it to be vexatious. There then followed a significant exchange of correspondence between the three parties until, on 24 March 2022, the Commissioner issued a Decision Notice (https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020008/ic-104057-j8h6.pdf) concluding that SYP had indeed been entitled to refuse the request on that basis.

The Decision Notice

3. The Commissioner agreed with SYP that the request was vexatious. SYP's initial response to the Commissioner following Mr O'Mara's complaint was sent by its Data Protection Officer, Ms Amanda Winder. The factors relied upon in her letter can be summarised as follows:

    a. This was Mr O'Mara's "51st request received into [SYP's FOI] department, his 27th FOI request";

    b. Overlapping requests for the same or similar information would often be received before SYP had a chance to respond to earlier requests – a table was provided setting them out;

    c. He had previously complained to the Commissioner about other vexatious requests, which SYP had reopened "out of goodwill";

    d. He had made unfounded accusations about SYP and others, for example accusing Ms Winder as Data Protection Officer of "acting in a criminal, fraudulent and corrupt manner" which was unfounded and upsetting;

    e. SYP believed that Mr O'Mara acted out of a deliberate intention to cause disruption and annoyance to that organisation;

    f. The present request was similar to four other specified requests.

4. Ms Winder also stated that dealing with Mr O'Mara's requests was burdensome to SYP, which in 2020 had to deal with some 1,400 FOIA requests with only 2 full-time FOI Compliance Clerks. From January to September 2020, 26 of them were from Mr O'Mara. While this was only 3 requests per month, this did not reflect the "constant barrage of emails" that accompanied them. She characterised them as follows:

    "Mr O'Mara's emails will often contain multiple requests covering FOI, SAR and complaints, he will use the scattergun approach by directing the email to a number of

individuals and departments. Following the first email he will then send additional ones with other pieces of information included / attached, then he sends multiple chasers abruptly telling us when we will respond to him, these often contain threats to report SYP / me to the ICO and other bodies such as Action Fraud."

5. While Ms Winder confirmed that the burden of complying with the request would not be overburdensome if it were taken in isolation without regard to the requester, in this case the relevant impact would be "the onslaught of additional requests this would bring." In a further email, she stated that:

> *Unreasonable persistence and the frequent [overlapping] requests of such a confusing nature and layout make it a huge task to unravel what is actually being asked of FOI. Firstly we have to pull out the Subject Access element and send this part to the SAR Team. Secondly research all the earlier requests to try and see if this has been asked for before in a different way or actually forms part of an earlier response. The number of requests and time spent to unravel them are a definite burden on the authority. When a response has been sent out, we will receive an internal review request almost immediately and the requester will have added in more questions, causing more confusion and work.*

6. A table had been provided listing the various communications and requests. On 12 June 2020, in response to a previous request for detailed information on police training on computing and privacy laws, SYP had emailed Mr O'Mara to warn him that any future requests relating to the same subject may be treated as vexatious. This was intended to provide the notification which we mention at paragraph below.

7. The Decision Notice records Mr O'Mara having submitted to the Commissioner that the request did not repeat any previous request, and that disclosure of the information requested would be of "huge value to the general public".

8. The Commissioner largely agreed with SYP. He did accept that disclosure of the information requested was of genuine interest to Mr O'Mara and might also be of wider public interest. Nonetheless, the wider patter of interactions between Mr O'Mara and SYP showed that compliance with the request would place a disproportionate burden on SYP. Also relevant was the tone and language cited by SYP, which went beyond the level of criticism it was reasonable to expect the staff of a public authority to experience. While meeting the legal duty under FOIA might include "absorbing a certain level of disruption and annoyance", having balanced the purpose and value of the request against the detrimental effect on the public authority by considering all the relevant circumstances in a holistic way, the Commissioner concluded that the request ought properly to be seen as vexatious.

The appeal

9. In an appeal notice received by the Tribunal on 8 April 2022, Mr O'Mara exercised the right of appeal against the decision notice conferred by s.57 of the Freedom of Information Act 2000 ("FOIA"). In his Grounds of Appeal, Mr O'Mara disagreed that his request should be considered vexatious according to the relevant legal principles. As well as asking us to consider that issue for ourselves, his Grounds of Appeal assert two discrete errors of approach.

10. First, the wider behavioural pattern considered by the Commissioner included Subject Access Requests made by Mr O'Mara for his own data, pursuant to the Data Protection Act 2018. Mr O'Mara argues that these are irrelevant and that the assessment of vexatiousness ought only to consider requests made under the provisions of FOIA.

11. Second, the Grounds of Appeal contain the following:

> *Mr O'Mara has a generalised anxiety disorder and autism so medically proven symptoms of these disabilities use the wrong words and communicate in unorthodox ways such as sending lots of different emails and reminders. This is because autism is a communication impairment and anxiety makes people anxious and distressed if they are not having reasonable adjustments made for contact on a regular and timely basis from public bodies. In addition they have to e-mail multiple times to state things and send evidence as and when they remember things as autism and anxiety impair memory etc as well as communication.*

12. The grounds then claim this as disability discrimination according to the Equality Act 2010. Later on, Mr O'Mara enlarged this argument to include an asserted breach by SYP and the Commissioner of the Public Sector Equality Duty. He also clarified that he has been diagnosed with Level 2 Autism Spectrum Disorder, Generalised Anxiety Disorder and Cerebral Palsy. This is confirmed by a psychological report dated 21 April 2022 produced by Dr Carol Stott for the purpose of (what at the time of the hearing) were ongoing criminal proceedings. SYP has agreed that these diagnoses can be treated as common ground, while still reserving its position on the report's other conclusions.

13. There are two procedural issues that should be recorded. First, the case management stage of this appeal was far from easy for anyone. It is appropriate to illustrate this by extracts from two sets of case management directions made by Judge Neville, and they are annexed to this document. The first relates to the issues in the appeal, the parties' evidence and the steps taken by the Tribunal to ensure that Mr O'Mara's autism spectrum condition did not reduce his ability to effectively and fairly participate in the appeal. The second relates to an application by SYP to stay the proceedings as an abuse of process, in response to offensive and untrue allegations made by Mr O'Mara against SYP's solicitor Mr Ketteringham. The detail of the allegations need not be repeated. The striking out application was not pursued at the final hearing and Mr O'Mara confirmed that the Tribunal's written rules were helpful and that he would follow them. We express our thanks to both Mr Ketteringham and Mr O'Mara for their efforts in achieving a hearing that, in the event, was fair, productive and respectful on all sides.

14. Second, at the date of the hearing Mr O'Mara was facing widely reported criminal proceedings, alleging that he made fraudulent claims for expenses while the Member of Parliament for Sheffield Hallam. Mr O'Mara was found guilty on 8 February 2023 at Leeds Crown Court and the following day was sentenced to four years' imprisonment. SYP had argued that the ongoing prosecution was relevant to this appeal, and we shall deal with this issue in due course. The fact that Mr O'Mara was ultimately convicted, on the other hand, is <u>not</u> relevant to the issues we must decide.

15. As already noted, the final hearing proceeded according to the annexed case management directions. All participants connected by video. Mr O'Mara gave evidence and was cross-examined by Mr Ketteringham. Each gave closing submissions following which the Tribunal's decision was reserved.

Legal principles

16. Under s.1 of FOIA, any person making a request for information to a public authority is entitled to be informed in writing whether it holds information of the description specified in the request and, if it does, to have that information communicated. The duty imposed by s.1 on a public authority is subject to a number of exemptions.

17. One such exemption is contained at s.14(1), which provides that a public authority is not obliged to comply with a request if it is vexatious. For the principles that apply to deciding whether a request is vexatious, we first turn to Information Commissioner v Dransfield [2012] UKUT 440 (AAC). The Upper Tribunal emphasised that the request must be vexatious, not the requester. A request may be inconvenient, irritating, or burdensome to the public authority without necessarily being vexatious; holding public authorities to account by giving access to information is one of the purposes of the legislation. That creates a balancing exercise, where the distress, disruption, irritation or burden caused by a request that must be weighed against the justification for making it. It is important to adopt a holistic and broad approach that considers all the relevant factual circumstances. They are likely to fall under four headings: (a) the burden on the public authority and its staff; (b) the motive of the requester; (c) the value or serious purpose of the request; and (d) any harassment or distress. The Upper Tribunal gave more detailed guidance on each of those topics, to which we shall refer within our own analysis.

18. An appeal against the Upper Tribunal's decision in Dransfield was dismissed. In Dransfield v The Information Commissioner [2015] EWCA Civ 454, Arden LJ (as she then was) approved the Upper Tribunal's analysis and guidance subject to some clarification of her own. While the aim of s.14(1) might be to protect the authority's resources from being squandered on disproportionate use of FOIA, as held by the Upper Tribunal, that aim would only be realised if the high standard set by vexatiousness was also satisfied. Parliament had chosen a strong word in 'vexatious', meaning that the hurdle of satisfying it is a high one: consistent with the constitutional nature of the right. It is an objective standard, primarily involving making a request where there 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. This, and a relevant motive that could be identified with a sufficient degree of assurance, such as vengeance for the public authority's actions, might both be evidence from which vexatiousness could be inferred. Arden LJ nonetheless added that 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." At [85], Arden LJ also agreed that a request might be vexatious in part because of, or solely because of, the costs of complying with it. The preservation of the Upper Tribunal's guidance in Dransfield has subsequently been confirmed in authorities such as Cabinet Office v ICO and Ashton [2018] UKUT 208.

19. While a public authority is usually obliged by s.17 to notify a requester that it considers an exemption to apply, this is not the case where (a) it claims that the request is vexatious, (b) it has notified the requester in relation to a previous claim that it relies on such a claim, and (c) it would be unreasonable to expect it to give notification on this occasion.

20. A requester is entitled, under section 50(1), to apply to the Commissioner for a decision on whether the request has been dealt with by the public authority in accordance with FOIA. There is then a right of appeal against the Commissioner's decision to the Tribunal, by virtue of s.57.

21. In Information Commissioner v Malnick [2018] UKUT 72 (AAC), at [45] and [90], it was confirmed that the Tribunal exercises a full merits appellate jurisdiction. We make any necessary findings of fact and decide for ourselves whether the provisions of the Act have been correctly applied. But we do not start with a blank sheet: the starting point is the Commissioner's decision, to which we should give such weight as we think fit in the particular circumstances. The proceedings are inquisitorial save that we are entitled to respect the way in which the issues have been framed by the parties. We address matters as they stood at the date of SYP's response on 2 July 2021: Montague (Information rights - Freedom of information - public interest test, qualified exemptions) [2022] UKUT 104 (AAC) at [62]-[63].

The parties' cases

The Commissioner

22. In his formal response to the Grounds of Appeal set out above, on vexatiousness the Commissioner maintains the position set out in the Decision Notice. In response to the specific issue of reliance upon Subject Access Requests, the Commissioner points to the requirement in Dransfield that all relevant circumstances be considered. As to the assertion that the Decision Notice was discriminatory, the Commissioner argues that this Tribunal has no jurisdiction to make findings or award remedies in relation to the Equality Act 2010. The Commissioner has made no other submissions in relation to the appeal and was not represented at the final hearing.

South Yorkshire Police

23. Mr Ketteringham adopted the points already made by SYP and the Commissioner already summarised in the introduction to these reasons. He developed these at the hearing by reference to the four relevant topics identified in Dransfield.

24. On burden, Ms Winder had provided a witness statement for the appeal, exhibiting a table of communications received from Mr O'Mara up to 19 August 2021. Mr Ketteringham took us through each of them in detail to demonstrate the burden on SYP caused by both the frequency and manner of Mr O'Mara's communications. This included that they were unfocused, were often made over several emails, contained some questions that fell within FOIA but accompanied by those that could not, and that whenever there was any delay in responding to Mr O'Mara he would chase SYP "within seconds". The harassment and distress caused by his communications was apparent from the Commissioner's conclusions and investigations.

25. Addressing the issue of Mr O'Mara's motive, and whether the request had a serious purpose or value, Mr Ketteringham referred to the ongoing criminal prosecution as providing a potential context for Mr O'Mara's various request for information. Mr Ketteringham disclaimed any argument that a person facing criminal prosecution should be disentitled from making information requests, instead arguing that using FOIA to prepare a criminal defence, or to fight a collateral battle against the police, was an improper motive when considering vexatiousness. This, Mr Ketteringham argued, sat alongside the absence of any countervailing motive that could be identified from the evidence. Mr O'Mara is not a journalist and has no other apparent connection to the subject of his requests. An inference of the type anticipated by Arden LJ could be drawn.

26. On the issue of discrimination, Mr Ketteringham likewise adopted the jurisdictional argument advanced by the Commissioner. He also argued that insufficient evidence had been adduced by Mr O'Mara to show that the frequency and manner of his requests arose from his disability, or that any disadvantage he had suffered by the request being classed as vexatious arose from his disability. In any event, while SYP was under a duty to make reasonable adjustments to the way in which requests under FOIA were made and how they were responded to – such as accessible forms and the like – this did not extend to disapplying statutory provisions such as that at s.14 of FOIA or enabling someone to make as many requests as he wishes, in as burdensome a way as he wishes.

Mr O'Mara

27. Mr O'Mara began his submissions by pointing to a previous decision by the Commissioner concerning the same parties. Mr O'Mara had requested numerous pieces of information in a request made on 14 June 2020. SYP had complied in part, disclosing a copy of its Data Protection Policy with redactions said to be justified by s.31 of FOIA (exemption required for the purposes of law enforcement). The remainder of the request had been rejected as vexatious under s.14. In a decision notice dated 20 October 2021 under reference IC-72714-G8G7 (https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018842/ic-127807-q8v1.pdf), the Commissioner upheld Mr O'Mara's complaint. We need not set out the conclusion on s.31, which is irrelevant to this appeal, but on vexatiousness the Commissioner held as follows:

> *48. In that respect, the Commissioner noted that the request in this case, although not obviously vexatious in itself, does form part of a wider pattern of requests and interaction the complainant has had with SYP on various matters. SYP considers it unreasonable to have to expend further resources dealing with requests for what it considers to be similar information. It presumably considers that the public interest in disclosure is sufficiently low to outweigh the oppressive burden that compliance would cause to its resources.*
>
> *49. However, SYP has provided only limited quantitative information about the effect of that burden, and it has not addressed questions on the impact on its ability to deliver an FOI service to other requesters, or the delivery of its core services. That the complainant has submitted a large number of requests over a relatively short period is accepted. However, by SYP's own admission, in the period that it received over 600 requests, the complainant's requests only accounted for around 17 of them. He therefore cannot be considered to be dominating the FOIA service provision on the evidence that SYP has provided. Furthermore, SYP has not provided evidence that this request is similar to the other requests, it has merely stated that it is.*

28. Having then concluded that an unreasonable burden had not been established by SYP, the Commissioner continued:

> *51. As to the motive of the requester, SYP has expressed the view that the complainant is using the right of access to deliberately disrupt its work and that he is "on a campaign". It has made judgements about the complainant's motives for making the request, from which it has determined the purpose and value of the request to be low. However, although asked, it has not provided further information which evidences these claims.*

52. The Commissioner has not seen any evidence that the complainant has attempted to harass or cause distress to staff. For his part, the complainant has assured the Commissioner that he has a genuine interest in the information he has requested. He says that he did not fully appreciate that multiple requests might place a strain on a public authority, and that when this was explained to him by the ICO, he voluntarily withdrew most of his complaints about SYP.

53. The Commissioner welcomes the complainant's pragmatic approach, although she notes that SYP had previously provided him with a similar explanation. However, given the high evidential threshold for applying section 14, on balance the Commissioner must conclude that the complainant is pursuing a genuine line of enquiry in this request.

54. As previously stated, it is for public authorities to demonstrate to the Commissioner why the exemption at section 14 applies. In this case, while she accepts that compliance with the request would require SYP to absorb some costs, the Commissioner is not satisfied that SYP has demonstrated that the burden of compliance would be disproportionate to the value and purpose of the request, or that, in the circumstances, compliance would be unreasonable, or that the request is a "manifestly unjustified, inappropriate or improper use of a formal procedure".

55. The Commissioner therefore finds that the request in this case was not vexatious and that SYP was not entitled to apply section 14(1) of the FOIA to refuse to comply with it.

29. Mr O'Mara complains that the present Decision Notice reached the opposite conclusion on similar facts. He reiterated his willingness to take the "pragmatic approach" cited by the Commissioner at para 53, and that he was always willing to change the way in which he made his requests once he was told to do so. He observed that SYP had previously rejected some of his requests on the basis that compliance would exceed the prescribed costs limit, and that he had never taken issue with this. All he wanted to do was access the information he requested where he was entitled to do so under FOIA. His autism, he said, meant that he often failed to understand the way in which he should make requests and communicate with people, but that once put right he always tried to be apologetic and to do things in a different way.

30. On burden, Mr O'Mara counted 17 requests with 29 emails. This, he argued, could hardly be described as distressing or harassing. He accepted that SYP might find complying with his requests annoying, but that was the job they were paid to do. In any event, he argued, all the evidence focused on his 2020 requests: their subject matter and frequency of communication were entirely unrelated to the 31 March 2021 request being considered in this appeal.

31. Dealing with Mr Ketteringham's arguments on motive and the value of the information, Mr O'Mara stated that he did in fact have a first-class degree in journalism and had worked as a journalist for a time. The operation of the Policing and Crime Act 2017, and the novel ability to 'release under investigation' as an alternative to bail, had not yet been sufficiently scrutinised. The subject was of longstanding interest to him.

32. As to discrimination, Mr O'Mara argued that having a social communication disorder was inextricably linked with the way in which he had been treated by SYP.

Consideration

33. We remind ourselves of the applicable legal principles, set out above. It is convenient in this appeal to address the four Dransfield topics in turn: burden; motive; value and serious purpose of the request; and any harassment or distress. Our findings of fact have been made according to the standard of the balance of probabilities.

Burden

34. We first reject Mr O'Mara's legal argument that his Subject Access Requests should be disregarded: on the contrary, *all* relevant factual circumstances existing at the time of SYP's response must be considered. However, this makes little difference: SYP has provided scant evidence of any relevant interactions with Mr O'Mara outside the context of FOIA. While correspondence with "other departments" was mentioned in SYP's response to the Commissioner, no evidence or detailed particulars were given. Nor have they been raised in this appeal. Some of the previous requests do include matters that do not properly fall within FOIA, for example being blended with Subject Access Requests or general questions about SYP's policy and operations, and we do give that some weight as increasing their burden. This is only to a modest extent however, as Mr O'Mara's mixed requests are not particularly egregious examples. It is commonplace for requesters to misunderstand what comes within the ambit of FOIA, and a routine task of an FOI compliance team to filter requests for what does.

35. We also reject any argument by Mr O'Mara that the previous decision by the Commissioner in his favour renders this decision unlawful. The facts were not precisely the same, the Commissioner is under no duty to reconcile his decisions with one another, and there is no rule of law requiring the Commissioner or the Tribunal to be bound by previous decisions on similar facts. Nonetheless, the previous decision still forms part of the relevant factual matrix. In particular, we note the following from the decision notice:

> *49. However, SYP has only provided limited quantitative information about the effects of that burden, and it has not addressed questions on the impact of its ability to deliver an FOI service to other requesters, or the delivery of its core services. That the complainant has submitted a large number of requests over a relatively short period is accepted. However, by SYP's own admission, in the period that it received over 600 requests, the complainant's requests only accounted for around 17 of them. He therefore cannot be considered to be dominating the FOIA service provision on the evidence that SYP has provided. ...*

36. Despite that decision being communicated on 20 October 2021, we find ourselves independently reaching the same conclusion on the evidence in this appeal. There remains no quantitative evidence that Mr O'Mara's requests, by themselves, have an appreciable effect on SYP's overall ability to meet its FOI and other responsibilities, or that his requests required discrete additional resources. In the absence of specific evidence, and with the benefit of our members' specialist experience, the number of emails and communications cited by SYP is insufficient to simply infer such an effect. While the lack of an overall detriment to SYP's ability to perform its public functions does not preclude a finding of vexatiousness, as a potentially contributory factor it is absent here.

37. SYP's figures have changed considerably. This may well arise from how multi-part requests have been counted. We take the number of requests in their evidence before the Tribunal, as

counted in Ms Winder's table, which equals 29 requests from January 2020 to March 2021. Whatever their precise number, their pattern is relevant: one in January 2020, one in February, none in March, seven in April, seven in May, nine in June, none in July, two in August, one in September, none from October 2020 to February 2021, then the present request in March. So by the end of June there had been over 20 requests, and their frequency was increasing. Some of the requests had been, as argued by Mr Ketteringham, wide-ranging and unfocused. Others were repetitive, in particular those concerning the training received by police officers and the absence rates of FOI personnel.

38. We agree that at the time of the 14 June 2020 request it would have appeared that Mr O'Mara's requests might (at the very least) be on their way to becoming disproportionately burdensome. The sudden escalation of the requests was real, and was reasonable for SYP to address its mind at that stage on how to address it. But as can be seen from the figures in the above paragraph, the number of requests had actually peaked.

39. In providing its response to a request made on 11 June 2020, SYP gave a warning that further requests "relating to this subject area" may be treated as vexatious. It read as follows:

> *The Freedom of Information Act is a piece of legislation designed to give the public access to information held by public authorities. It exists to make the decisions of those authorities transparent and to keep the populace better informed regarding matters which affect them. I would like to point out the following:*
>
> *Under the provision of the Act, an authority must process a request in writing from a named applicant under the terms and conditions of the legislation. Whilst giving maximum support to individuals genuinely seeking to exercise the right to know, the Commissioner's general approach will be sympathetic towards authorities where requests can be characterised as being part of a campaign. Therefore with regard to this enquiry, we are including a warning under Section 14(1) (Vexatious Request) of the Freedom of Information Act that any future requests relating to this subject area may attract this exemption.*

40. We do not consider this to be a particularly helpful warning. Requests that are "part of a campaign" and requests that relate to the same subject area are not necessarily the same thing. The treatment of future requests as vexatious is stated as being restricted to those "relating to this subject area". But which subject area? That particular request was extremely broad. That broadness is now put forward as part of the problem from SYP's perspective, but this warning does not say so. Further, as we shall see, future requests were treated as being vexatious despite asking for unrelated information. We find that SYP fell short of actually warning Mr O'Mara, as it did not tell him *why* his requests were problematic for SYP and how he could act differently in future. The table of requests indicates that a later response may have included a fuller explanation, but SYP has not provided this in evidence. When considering the 14 June 2020 request the Commissioner was unsure of the basis on which SYP went on to differentiate between vexatious and non-vexatious requests. We find that at June 2020 it would certainly not have been clear to Mr O'Mara.

41. Mr O'Mara made four further requests in June 2020. While not entirely repetitive, they were on similar topics to previous requests. By then SYP had decided not to acknowledge his requests, sending no reply and marking them vexatious on their own records. Mr O'Mara spent the next two months chasing replies to his requests, and made no new ones. He resumed on 23 August 2020, making a multi-part request for information concerning the

number of arrests of those with medical conditions, disabilities, and children. He ended the request by saying:

> *Please note, this FOI request is in no way the same or similar as any of my previous FOI request categories and is in no way vexatious in nature. I am merely interested from the point of view of a disabled person myself and someone who cares about disabled people and children.*

42. We entirely agree with Mr O'Mara that the information had never been previously requested, nor any like it, so could not rationally be described as being on the same subject as any previous request. While it contained several numbered requests for information, each of them was focused and clear. The email is polite and respectful and can be seen to engage with the previous warning on vexatiousness. Nonetheless, the request was marked as vexatious and SYP simply did not reply. We make the same findings of fact on his next request, made on 31 August 2020, for "the statistics, in days, for the top 200 longest investigation periods for all suspects who were/have been arrested by South Yorkshire Police" after the coming into force of the Policing and Crime Act 2017.

43. On 14 September 2020 Mr O'Mara raised what SYP describe as an internal appeal against the treatment of one of his requests. In SYP's (undated) response, a much more comprehensive explanation of the situation was provided, and referred Mr O'Mara to the Commissioner's guidance on handling vexatious requests. A breakdown of the previous requests was given, but only to 22 June 2020. Those that had received responses were then grouped into a table and allocated the following themes:

    a. "ICU department, staff numbers, sickness, absence and salaries" (3 requests)

    b. "Training and Training level of Officers by rank and Training subjects covered in training. Information provided to officers for investigations." (5 request)

    c. "Officer personal and sensitive details, ranks, job roles, payscales & qualifications. Recruitment." (7 requests)

    d. "Force Policy." (1 request)

44. By reference to that table, SYP said that it had "received frequent requests relating to the same issue. It also said that some were received "on the same subjects before we are able to address further enquiries". We note that once late compliance by SYP is stripped out, that latter point had not been the case since April. The letter continued that from January to 15 June 2020 SYP had received 18 requests, and described the current resources of the department. No link was drawn with their current workload. The 15 June 2020 request was again rejected as vexatious, so far as we can tell for the reasons of burden, campaigning, and falling into one of subject areas given in the table.

45. Mr O'Mara made a further request on 14 September 2020 concerning SYP promotion policy. This undoubtedly fell within one of the subject areas warned as likely to lead to exemption as being vexatious, and this is the decision SYP took.

46. Mr O'Mara then made no further requests for over six months, when he made the request of 31 March 2021 being considered in this appeal. Nor did he enter into any objectionable correspondence. The request falls entirely outside the topics cited in the warnings given to

him. A sensible reading of each warning gives such repetitiveness as a principle ingredient of a vexatious request. While the request of 31 August 2020 had also concerned the Policing and Crime Act 2017, SYP had never replied to it.

47. Having considered the factual situation in detail, we remind ourselves of the further guidance on burden given in Dransfield at [29]-[33]. The present or future burden on the public authority may be inextricably linked with the previous course of dealings. In particular, the number, breadth, pattern and duration of previous requests may be telling. A high volume of previous requests may increase the chance of another one being properly found to be vexatious, but is not decisive. Their nature must also be considered, as must the way in which the public authority has responded to them. The breadth of individual requests may also be indicative of the burden they impose. So too is the pattern of requests relevant – as stated in Dransfield, a requester who "relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request". Finally, the length of time over which repeated requests have been made may be relevant.

48. Applying those considerations, we are unable to share the view taken by SYP and the Commissioner on burden. While the number, escalation, repetitiveness and breadth of his requests was a reasonable cause for concern in June 2020, the present request came after six months of making no requests at all. In the three months before that, there had only been three. During March 2021, Mr O'Mara's requests were imposing no day-to-day burden at all; if there was ever any perceived "bombardment", it had ceased long before. This was, of course, with the exception of complaints to the Commissioner, which we decline to count: they related to requests made at an earlier time, in one complaint Mr O'Mara was vindicated, and we have not been referred to any evidence that they were pursued inappropriately. His latest request was also for new information that was readily accessible by SYP. Nor, we find, did the previous pattern of requests give any reasonable basis for considering that compliance with the latest request would re-open the floodgates. Mr O'Mara's approach had patently changed, and his requests state that he had endeavoured to make them in a correct and non-vexatious way. The number, pattern and breadth of the requests had all changed in such a way as to count heavily against a finding of vexatiousness. It disclosed the precise opposite of the "spread" described in Dransfield at [37].

Motive

49. While SYP's correspondence and submissions refer to a 'campaign', it has never been clear how this is categorised. In the undated complaint response of 2020 it is concluded that Mr O'Mara was on a campaign to "obtain as much information as possible", and the warnings raised the issue of repetitiveness on the same subjects.

50. Contrary to Mr Ketteringham's closing submissions, there is nothing inherently objectionable about using FOIA to aid in a long-running dispute: see Dransfield at [36]. In some circumstances it will be improper, and undermining (or vengeance for) a criminal prosecution might be an example. But we cannot see that SYP ever raised the issue of Mr O'Mara's criminal proceedings before the end of the hearing. While these proceedings are inquisitorial, they must also be fair. If SYP believed Mr O'Mara's motive in making the requests was connected with his criminal proceedings, then this ought to have been raised in its rule 23 Response to the appeal or in subsequent correspondence. Perhaps remarkably, the subject appears to be entirely absent from the papers before us. We decline to allow the issue to be raised at such a late stage: evidence ought to have been provided of how the requests

might meet such a motive, for example that it directly attacked the way in which the Crown's case was being argued; and relevant questions ought to have been put to Mr O'Mara in cross-examination.

51. We would certainly be willing to infer a general animus against SYP from the nature of many past requests (particularly those in May and April), concerning the education and intelligence of police officers and the effectiveness of SYP's FOI team. Whatever Mr O'Mara's motivation, by June 2020 it may have been reasonable for SYP to treat him as engaged in a campaign to reveal a lack of competence and qualification on the part of its officers, and to engage it in debate on that subject under the auspices of FOIA. Yet SYP did not express that concern at the time and still does not argue its case in that way. In the end, our findings on this subject mirror those on burden. The preoccupation with SYP's officers' qualities was not contained in the present request for information. While we do take account of it having been raised in a relatively recent request, that provides an insufficient basis upon which to infer the same motive in making the present request.

52. Mr O'Mara's evidence was that his request reflects an interest in a social issue that he has always had, both as a journalist and then as a parliamentarian. Notwithstanding the circumspection demanded by the nature of his previous requests, we accept this.

Value or serious purpose

53. This issue was considered by Arden LJ in the Court of Appeal, and was phrased as whether there is any "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". In the Decision Notice, the Commissioner accepted that Mr O'Mara was subjectively interested in the information requested, and that its disclosure might engage a wider public interest. SYP's written submissions and evidence does not state a contrary position. We agree that the requested information will shed light on the use of the new powers under the 2017 Act and that it has value to Mr O'Mara and to the public.

Causing harassment of, or distress to, staff

54. While the examples asserted by SYP might seem strong on their face, for example accusing it and Ms Winder of fraud, these appear to have occurred *after* it had issued its response on 2 July 2021. The only examples we have found in the bundle before us of fraud being alleged are dated 19 July 2021, 29 July 2021, and 11 August 2021. They are therefore irrelevant to whether the present request was considered in accordance with FOIA: see Montague. In any event, the evidence comes nowhere near establishing that Mr O'Mara has caused harassment or distress. There is also no evidence putting them into context, which is dangerous. The allegation of fraud against Ms Winder personally appears to have arisen from SYP's refusal to release information relating to a complaint that an officer had wrongly applied Mr O'Mara's signature to a drugs test, and Ms Winder's refusal to accede to Mr O'Mara's demand that she report a crime as having been committed. Mr O'Mara questioned the genuineness of that explanation, given that his complaint had already been upheld by SYP's Professional Standards Department. The Commissioner, in the decision notice, appears not to have appreciated the timing or context of the incident. We make no findings as to the underlying matters, and should not be taken as accepting Mr O'Mara's accusation as being reasonable or justified, but it must still be seen as having been made in a very specific context rather than as common ingredient of his FOIA requests.

55. We were referred to no other evidence at all of a wider pattern of distressing or harassing behaviour. Ms Winder's witness statement makes no mention of the subject. We also disagree with Mr Ketteringham that, all else being equal, chasing a late FOI response "within seconds" of it being late should be treated as harassing behaviour; the burden of being chased for missing a deadline can be avoided by not missing it in the first place. We have not been shown any chasing correspondence that was unreasonable in quantity or content.

Conclusion on vexatiousness

56. We take a broad and holistic view, taking into account all the circumstances set out above without repeating them, to find that SYP were not entitled to treat the request as vexatious, and therefore as exempt from the duty at s.1 of FOIA. Without doubt, Mr O'Mara's requests in early to mid-2020 looked likely to become disproportionately burdensome to SYP. There would have been justifiable concerns about his motive and the value of the information he sought.

57. Yet in subsequent requests, Mr O'Mara changed his ways. While public authorities, the Commissioner and the Tribunal more commonly encounter a relentlessly deteriorating pattern of requests, here the opposite had occurred. It is unfortunate that this was not recognised by SYP; the present request followed a positive trend, having all the characteristics one might wish: easily complied with; politely and respectfully worded; on a new topic with an identifiable public interest; and coming some six months after any previous request. Parliament did not intend s.14 to operate as a permanent bar against making requests. If there was ever a point at which SYP was entitled to treat Mr O'Mara's requests as vexatious, then it had long passed by 31 March 2021. There was no basis to consider that the burden of complying with the request was disproportionate to the motive and its value, given the high threshold of vexatiousness. We disagree with SYP's characterisation of the situation, summarised at paragraphs 3 to 8 above.

58. We therefore allow the appeal on the basis that, on the facts as we have found them to have been, the Commissioner was wrong in law to find that the request was dealt with in accordance with the provisions of FOIA. The appropriate decision is for the request to be re-considered without applying s.14(1).

Postscript – Mr O'Mara's disability

59. Our decision to allow the appeal has been reached without regard to Mr O'Mara's submissions concerning the treatment of his disability according to the Equality Act 2010. Section 113 of the Equality Act 2010 excludes this Tribunal from considering proceedings relating to any breach of its provisions, which disposes of various claims made by Mr O'Mara for remedies that can only be awarded by the County Court. Beyond that, we decline to reach a concluded view on an issue that is better left for an appeal where it is determinative.

Signed Date:

Judge Neville 18 April 2023

ANNEXE A

Extract of case management directions and written reasons following a case management hearing on 10 November 2022

[header omitted]

Case Management Directions

[…]

7. At the final hearing the Tribunal will decide the procedure. It is likely to be as follows:

   a. The Tribunal will make its usual introductions and ensure that the remote platform is working, that everyone is connected properly and that everyone has all the relevant documents.

   b. Mr O'Mara and Mr Ketteringham will raise any preliminary points about how the hearing should conducted, or about any potential new issues in the appeal that had not already been raised by the time of the case management hearing on 10 November 2022.

   c. Mr O'Mara will then give evidence according to the following procedure:

      i. The judge will ask Mr O'Mara to confirm the truth of the documents at pages A47 and A52 of the hearing bundle, as well as any additional document provided according to paragraph 3 above.

      ii. Mr Ketteringham may, if he chooses, ask Mr O'Mara questions in cross-examination.

      iii. Mr O'Mara may then tell the Tribunal anything else that arises out of the questions, and which has not been said already.

      iv. The judge and members hearing the case may then ask Mr O'Mara questions to clarify his evidence. While questions are usually asked at this point, the judge and members have the right to interject and ask questions at any point should they feel that it is appropriate. The judge may also intervene at any point to ensure that questions and answers are appropriately given, and to ensure the hearing proceeds effectively and fairly.

   d. Mr Ketteringham will then address the Tribunal on what decision should be made on the appeal, and why.

   e. Mr O'Mara will then address the Tribunal on what decision should be made on the appeal, and why.

   f. That will be the end of the hearing. The Tribunal will not give its decision there and then. It will be sent out in writing at a later date.

8. The hearing will be in public, meaning that any person may apply to connect and observe. The Tribunal's final decision and reasons will be publicly available on its website, the National Archives Find Caselaw service and perhaps other websites. Any objection to remote observation and / or publication should be raised at the beginning of the final hearing.

REASONS & CASE MANAGEMENT DISCUSSION

i. This case management hearing was listed due to a failure by the Information Commissioner to comply with previous case management directions, to decide a number of outstanding procedural applications by the appellant, and to ensure that the appeal would be ready for final hearing on 6 December 2022.

ii. Prior to the hearing, the Information Commissioner complied with the outstanding directions and submitted written representations in response to Mr O'Mara's applications. The Information Commissioner's attendance was therefore excused at this case management hearing.

Arrangements for the final hearing

iii. Reasonable adjustments for the final hearing were discussed. Mr O'Mara has autism, generalised anxiety disorder and cerebral palsy. Early on in these proceedings he expressed concern to the Tribunal as to how he could effectively participate. The final hearing is listed to be held using CVP, as was today's case management hearing. Mr O'Mara had been unable to obtain either suitable technology or good enough internet to connect using video, nor does he feel able to attend a face-to-face hearing. He attended this case management hearing by telephone, which he agreed would not be ideal for the final hearing.

iv. I informed Mr O'Mara that the Tribunal may be able to arrange the use of a video booth at a court centre local to him. Mr O'Mara considers that the travel involved to his local magistrates' court would still be unaffordable, and he would investigate whether he could make other arrangements to connect using a laptop. I indicated that the possibility of a local video booth would remain open, but would need to be raised quickly so that arrangements could be made. Mr O'Mara also stated that if he did successfully connect by video, he would rather turn his camera off due to recognised difficulties with eye contact experienced by people with autism. He would have no objection to having his camera switched on at the start of the hearing simply so that his identity and his physical surroundings could be confirmed. Mr Ketteringham confirmed that he had no objection to evidence being given in this way, the outcome of the appeal being unlikely to turn on Mr O'Mara's oral evidence; any cross-examination would be brief. I reminded Mr O'Mara that he would need to be able to access and navigate the papers during the hearing.

v. It was therefore left that the hearing would take place by CVP, Mr O'Mara connecting by telephone unless he is able to work out a way in which he can connect by video. No further steps are requested from the Tribunal at this time.

vi. Also discussed during the hearing was the relevant section of the Equal Treatment Bench Book, which at pages 396-400 discusses autism and likely reasonable adjustments. I summarised it to Mr O'Mara who agreed with its suggestions, save that he thought breaks might be needed during the hearing on an ad hoc basis. These will be offered. There is other information in the bundle about the needs of people with autism that the Tribunal will consider.

vii. Mr Ketteringham had been unable to connect to the CVP hearing. The Tribunal will expect him to be able to do so on the next occasion, and the Tribunal offers connection tests prior to the hearing.

viii. As to the trial timetable, the parties thought that Mr O'Mara's evidence would take an hour, his submissions two hours, and Mr Ketteringham's submissions 1 hour. On reflection I decline to impose strict time limits at this stage. The Tribunal will manage the hearing on the day to ensure that it can be completed.

Mr O'Mara's applications

ix. There were three applications still outstanding. I can summarise the orders they seek as follows, but I have paid careful attention to everything said by Mr O'Mara:

a. An order that each respondent provide specific disclosure and witness statements from specified decision makers.

b. An order requiring each respondent to explain how the request could be vexatious given the outcome of a related civil dispute and a decision by the Information Commissioner (made prior to the decision subject to this appeal) that vexatiousness was not established by Mr O'Mara's requests.

c. An order requiring each respondent to provide evidence and arguments as to how their conduct does not breach sections 19, 20(3), 27, 29, 31 and Schedule 2 of the Equality Act 2010. Separate liability by individual decision makers is also argued.

x. Each application also requested that the order sanction any non-compliance by barring the respective respondents from further participation in the appeal. Each respondent had made a written response to the applications, and I heard further oral submissions from Mr O'Mara and Mr Ketteringham.

xi. As argued by the respondents, I consider that much of what is sought by the applications would only be relevant if the Tribunal were concerned with overall supervision of the respondents' decision-making processes. Mr O'Mara is plainly very concerned at his treatment by the respondents as shown in the papers more widely, for example a request that the Tribunal order the Information Commissioner to undergo disability awareness training. The Tribunal's jurisdiction and statutory function in this appeal is much more narrow than this. The Tribunal will decide for itself, on the evidence and according to the law, whether Mr O'Mara's information request was vexatious within the meaning of s.14 of the Freedom of Information Act 2000. It will not decide why the respondents reached their decisions, much less order them to make amends or to take steps to stop it happening again. These are matters for oversight bodies and the civil courts.

xii. There is no need to require evidence or argument from the respondents concerning the Equality Act 2020. The respondents were put on notice long ago that the arguments would be made, and have had the opportunity to address them. The arguments put forward in the grounds of appeal, the application and other documents can be made at the hearing. I do observe that while the Equality Act 2010 may be relevant to whether the request is vexatious, the Tribunal has no power to order any remedy under the Equality Act 2010.

xiii. Further relevant to disclosure, as well as the application for orders that witnesses attend, is that the Tribunal will decide the appeal according to evidence that the parties have provided. I disagree with Mr O'Mara that he has identified any documentary evidence withheld from him by the respondents that might arguably undermine their case or support his. If Mr O'Mara thinks that the evidence is inadequate to show that his request is vexatious, he can make that argument at the hearing.

xiv. So far as oral evidence is concerned, it is instructive to consider the submissions made concerning the witness statement made by Ms Winder at page B159. Mr Ketteringham does not propose to call Ms Winder to give evidence, because her witness statement is intended to do nothing more then exhibit a table she produced showing Mr O'Mara's requests for information. I asked Mr O'Mara to indicate where he disagreed with the entries in the table, given that it appends a cross-referenced paginated bundle of the individual requests. His complaints with the table are first that it includes requests already held by the Information Commissioner not to be vexatious, and second that it misleads by omission, neglecting to specify that some of the requests were subsequently withdrawn. I agree with Mr Kettering that no benefit would derive from cross-examining Ms Winder on those issues. She simply made a table of the requests that had been made. Whether applications were subsequently withdrawn can be evidenced by Mr O'Mara, and the decision by the Information Commissioner is contained in the hearing bundle. The relevance of either to vexatiousness can be addressed in submissions. The direction at paragraph 3 gives Mr O'Mara a fair opportunity to address the point.

xv. The requirement for skeleton arguments enables the parties to provide any further argument on the issues raised in the grounds of appeal and subsequent documents.

Other matters

xvi. Mr O'Mara intends to make an application for costs. It is better that all ancillary matters are dealt with together where possible. I have extended the time limits for that, and any for challenge to the refusal of the applications, so that they coincide with the time limit for any application for permission to appeal the Tribunal's final decision. There is no need to set out any other observations on the parties' conduct for the time being.

xvii. The Information Commissioner does not propose to be represented at the final hearing. On considering its rule 23 response I see no reason to require otherwise, or to require a skeleton argument.

Signed Date:

Judge Neville 10 November 2022

ANNEXE B
Case management directions made on 5 December 2022

[Header omitted]

1. The application to stay the proceedings as an abuse of process will be heard at the start of the hearing on 6 December 2022. The Tribunal's preliminary view is that the matter has been

resolved by Mr O'Mara's email of 30 November 2022 timed at 20:26, but if the application is maintained then it will be considered on its merits.

2. Given the report of Dr Stott dated 21 April 2022, the Tribunal will be assisted by South Yorkshire Police being able to confirm at the hearing whether it accepts that Mr O'Mara has a disability within the meaning of s.6 of the Equality Act 2010.

3. The following is addressed by the Judge to Mr O'Mara:

    a. I consider that the remarks at paragraphs 15-16 and 35-37 of your skeleton argument were indeed offensive and inappropriate. They represent a breach of rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, which requires you to cooperate with the overriding objective and with the Tribunal in general.

    b. I do also note your email of 30 November 2022, in which you withdrew those remarks, stated that you did not appreciate that they might be considered abusive, and apologised. That was a helpful and constructive thing to do, but was then undermined by the email you sent on 1 December 2022 at 17:37 which repeated that Mr Ketteringham was taking pleasure in bullying you.

    c. So that you understand the rules for the hearing, I make it clear that you will not be allowed to make those allegations again. Nor will you be allowed to attack Mr Ketteringham's motivations or character in any other way. In turn, I will be alert to ensure that your disability is reasonably accommodated, you are treated fairly, and that you can participate to the fullest and fairest extent possible. Mr Ketteringham's job is to tell the Tribunal why South Yorkshire Police say that the appeal should be dismissed. You may find some of what he says distressing, but afterwards you will be given the opportunity to tell us why you disagree with him. He will also be given the opportunity to respond to your argument that your appeal being allowed. Both of you are entitled to civil and respectful behaviour from the other. That includes not being interrupted by the other while speaking.

    d. You said in your email of 1 December that when you are upset you become verbally aggressive. I remember that you became upset at the end of the case management hearing and disconnected. If you feel that you are becoming upset during tomorrow's hearing, and might have a "meltdown", then you should ask for a break so that you can calm down again. If your behaviour is still so disruptive that the appeal cannot proceed fairly, I might take one of the following actions:

        i. Give you a warning that your behaviour is unacceptable;

        ii. Take a break even if you do not want one;

        iii. If it is not your turn to talk, mute your audio and carry on with the hearing until it is your turn to talk;

        iv. Again after fair warning, either:

            1. make an order preventing you from saying anything else for the rest of the hearing; or even

2. strike out your appeal under rule 8(3)(b) due to your failure to cooperate.

e. Each of those is more serious than the last. The action taken will be proportionate to what has happened, but will escalate if it does not solve the problem.

f. Remember that the purpose of what I say above is to ensure that a fair and effective hearing of your appeal takes place. The Tribunal will decide your appeal fairly, independently and objectively.

Signed Date:

Judge Neville 5 December 2022