NCN: [2023] UKFTT 685 (GRC)

Case Reference: EA/2022/0324

First-tier Tribunal
General Regulatory Chamber
Information Rights

Determined on the papers

On: 11 July 2023
Decision given on: 18 August 2023

Before

TRIBUNAL JUDGE C GOODMAN
TRIBUNAL MEMBER A GASSTON
TRIBUNAL MEMBER N MATTHEWS

Between

MARK BOYCE

Appellant

and

(1) INFORMATION COMMISSIONER
(2) PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN

Respondents

Decision:

1. The appeal is allowed.

2. Decision Notice IC-143337-G9Z0 is not in accordance with the law.

Substituted Decision Notice:

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The Parliamentary and Health Service Ombudsman was not entitled to refuse Mr Boyce's request for information dated 12 August 2021 on the grounds that it was vexatious under section 14(1) of the Freedom of Information Act 2000 ("FOIA").

To ensure compliance with FOIA, the PHSO must issue a fresh response to Mr Boyce's request for information which does not rely on section 14(1) FOIA within 35 days of the date of promulgation of this Decision Notice.

REASONS

Background

1. The Parliamentary and Health Service Ombudsman ("PHSO") investigates complaints about maladministration by the NHS, UK Government departments and other public bodies. After completing an investigation, the PHSO sends a report to the relevant MP under section 10(1) of the Parliamentary Commissioner Act 1967 Act.

2. While there is no legislative requirement for further review, the PHSO has allowed complainants to raise concerns after a report has been issued through internal complaints systems. The PHSO regards this internal review process as a non-statutory, administrative function to rectify mistakes. Judge Shanks observed, in an earlier appeal brought by the Appellant in the First-tier Tribunal, that: "the legal status and possible outcome of such a review are not entirely clear but... may lead in principle to a completely fresh investigation and report if circumstances required" [paragraph 7, EA/2019/0334/P]. The team who carry out internal reviews have had a number of different names. In July 2018, they were known as the "Customer Care Team" (or CCT), later as the "Review and Feedback Team" (or RAFT).

3. The Appellant made a complaint to the PHSO about the way in which the Adjudicator's Office had dealt with a complaint which he made about HMRC. The final report rejecting his complaint was issued by the PHSO on 31 October 2017. The Appellant requested an internal review and applied for permission to seek judicial review which was refused by a Court on 21 February 2018.

Requests for information under FOIA

4. On 31 July 2018, the Appellant made a request for information to the PHSO ("Request A"). The first part of Request A was for:

   "..all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of reviews of decisions."

5. The PHSO refused to release information in response to Request A in reliance on section 42(1) of the Freedom of Information Act 2000 ("FOIA") (legal professional

privilege). The Appellant complained to the Commissioner which upheld the PHSO's reliance on section 42. The Appellant appealed to the Tribunal.

6. On 12 October 2018, the Appellant made another request in relation to the PHSO review process, for information about the number of complainants who had requested and received a new investigation after receiving a final report, and the number who had requested and received a new investigation after a review of their final report ("Request B").

7. The PHSO refused Request B on the basis that it was vexatious under section 14(1) FOIA. The Commissioner agreed that PHSO was entitled to rely on section 14(1) and the Appellant's appeal against that decision was refused by Judge Shanks on 28 May 2020 (appeal EA/2019/0334/P).

8. The Appellant's appeal in relation to Request A was allowed in part on 13 May 2021, with the Tribunal finding that some of the withheld information was not exempt, but that information which was legal advice could be withheld under section 42 (ref. EA/2019/0032/P).

9. The Appellant made another request for information on 12 August 2021 ("Request C") as set out below. Request C is the subject of this appeal.

> "Please provide all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of non-CCT reviews and the re-opening of final decisions."

10. On 6 October 2021, the PHSO refused to respond to Request C on the basis that it was vexatious under section 14(1) FOIA. The Appellant requested an internal review but none took place. He complained to the Commissioner.

The Decision Notice

11. On 27 September 2022, the Commissioner decided in Decision Notice IC-143337-G9Z0 that Request C was vexatious and that the PHSO was entitled to refuse to respond under section 14(1) FOIA.

12. The Commissioner observed in the Decision Notice that:

    a. Request C had value or serious purpose;

    b. frustration expressed by the Appellant about the PHSO on the w*hatdotheyknow.com* website, and the tone of his comments, reduced the value of the request; and

    c. balancing the purpose and value of Request C against the detrimental effect on the PHSO, the request was not an appropriate use of FOIA.

The Appeal

13. The Appellant appealed to the Tribunal. His position, as set out in his grounds of appeal and Reply, can be summarised as follows:

    a. the test for vexatiousness is a "high bar";

    b. the Commissioner had failed to address in the Decision Notice the *Dransfield* factors of burden, or of harassment or distress;

    c. the Commissioner had accepted the PHSO's assertion that the Appellant's motive was to cause disruption without any evidence. In fact, his motive was to obtain useful information and to hold the PHSO to account;

    d. Request C had a value and serious purpose because it would enable the public to understand changes to the PHSO processes for reviewing and re-opening decisions which would facilitate greater transparency and scrutiny around its investigative processes, and inform debate about reforms to the Ombudsman system; and

    e. Request C was framed in the same terms as Request A, but related to "non-CCT" reviews. Request A had not been found to be vexatious.

14. The Appellant's application for the appeal to be transferred to the Upper Tribunal was refused.

15. In their Response, the Commissioner acknowledged that it had not made a finding about the Appellant's motive. In relation to burden, the Commissioner submitted that there was:

    > "clearly a history of correspondence and a significant number of requests on and around this topic which have been going on since 2018 and… responding to Request C would not resolve matters for the Appellant but likely lead to further communications with the PHSO" [paragraph 44].

16. The PHSO was joined as a party to the appeal on 28 November 2022, but did not provide a Response or any further evidence to support its reliance on section 14(1) FOIA. Its position had been previously set out in a letter to the Commissioner dated 23 September 2022 as follows:

    a. Request C was a manifestly inappropriate use of FOIA to revisit matters already addressed by the Tribunal;

    b. the Appellant was pursuing the issue with "unreasonable levels of persistence" as demonstrated by his comments and requests on *whatdotheyknow.com*, his disregard of PHSO's position, and his refusal to accept Tribunal findings; and

    c. the Appellant is carrying on a campaign against the PHSO whom he holds in contempt. His motive is to find evidence of "PHSO bad practice to confirm his already established view that it is part of an "establishment stitch-up".

Matters not in scope of the appeal

17. The Appellant addressed at length in his grounds of appeal and submissions the relevance to a FOIA appeal of events taking place after the date of the relevant request for information. He analysed the approach taken to this "post request events" issue by the Commissioner, the First-tier Tribunal and the Upper Tribunal in a number of cases, and invited the Tribunal to consider in this context the case of *Dr Yeong-Ah-Soh v Information Commissioner and Imperial College London* [2014] UKUT 0249 (AAC).

18. In reaching our decision on this appeal, this Tribunal has taken into account only events occurring in the 20 working days after Request C was received. We therefore do not find it necessary or useful to address the legal arguments made by the Appellant about the "post request events" issue.

19. The Appellant drew the Tribunal's attention to another request which he had made to the PHSO on 21 October 2021 for a copy of its review and feedback guidance, which had been refused by the PHSO under section 22 FOIA. That request is not the subject of this appeal and was therefore not considered by this Tribunal.

20. The Appellant also expressed concerns about how the Upper Tribunal had dealt with his application for set aside in relation to an earlier appeal. This Tribunal has no jurisdiction to review decisions of the Upper Tribunal, which is a superior Tribunal, nor complaints against it. Again, we do not address that issue in this Decision.

Determination on the papers

21. All parties consented to this matter being dealt with on the papers and the Tribunal found that it was fair and in the interests of justice to do so.

22. The Tribunal had before it an open bundle of 290 pages, including the Commissioner's Decision Notices, the First-tier Tribunal decisions in respect of Request A and Request B, and copies of the Upper Tribunal and Court of Appeal decisions in *Information Commissioner* v *Devon CC and Dransfield* [2012] UKUT 440 (AAC). There was no closed bundle.

23. One member of the Tribunal declared that they had worked in the PHSO's Freedom of Information and Data Protection team at its London office until September 2017. The Tribunal accepted that the member had no recollection of dealing with the Appellant while at the PHSO, noting that the Appellant did not receive the PHSO report rejecting his complaint against the Adjudicator's Office until 31 October 2017. The member had not had a close working relationship with the individual at the PHSO who handled the Appellant's requests for information. The Tribunal was satisfied that there was no bias nor appearance of bias, given the circumstances and in particular the length of time since the panel member had worked for the PHSO.

The Law

Freedom of Information Act 2000

24. Section 1(1) FOIA gives individuals a right to information from a public authority unless it is "exempt information".

25. Section 14 FOIA provides that:

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

26. In *Information Commissioner* v *Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal concluded that:

> "vexatious connotes manifestly unjustified, or involving inappropriate or improper use of a formal procedure" [paragraph 27].

27. The Upper Tribunal suggested four broad issues or themes to be considered when assessing vexatiousness under section 14, namely (i) the burden on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request in terms of objective public interest in the requested information; and (iv) any harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic and broad approach.

28. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision on that case (reported at [2015] EWCA Civ 454), which emphasised 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].

29. The Upper Tribunal observed in *Dransfield* in relation to "burden" that the "present burden may be inextricably linked with the previous course of dealings" [paragraph 29]. The context and history of the request must be considered, in particular the number, breadth, pattern and duration of previous requests.

30. The Upper Tribunal noted the "FOIA mantra that the Act is both "motive blind" and "applicant blind"" [paragraph 34]. However, the application of section 14 "cannot side-step the question of the underlying rationale or justification for the request" and "the wider context of the course of dealings" between the individual and the public authority. 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)).

Powers of Tribunal

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

> "(1) 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.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

32. 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.

Discussion

33. The reasons for the Tribunal's decision are set out in full below. There is no Closed Annex.

34. In reaching its decision, the Tribunal took into account all the evidence before it and the submissions made by both parties, whether or not specifically referred to in this Decision. The Tribunal took into account previous First-tier Tribunal decisions in relation to other requests for information made by the Appellant to the PHSO under FOIA, while noting that these are not binding upon us.

35. As noted above, the PHSO failed to comply with its duty under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to provide a response setting out its grounds for opposing the appeal. It provided no evidence to support its reliance on section 14. While the Tribunal took into account the PHSO's letter to the Commissioner dated 23 September 2022, we did not consider information found at the links to w*hatdotheyknow.com* given in that letter because that information was not provided to the Tribunal as evidence in these proceedings.

36. The Tribunal applied the law as set out in paragraphs 24 to 30 above. It took a broad and holistic approach while considering the four issues or themes set out in *Dransfield*.

Manifestly Unjustified

37. The position of the Commissioner and the PHSO is that Request C is an attempt to re-open issues which have already been decided by the First-tier Tribunal in relation to Request A (ref. EA/2019/0032/P) and is therefore manifestly unjustified and an inappropriate and improper use of the FOIA process.

38. The wording of Request A and Request C are similar. However, Request A was for:

> "all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of reviews of decisions"

and Request C is for:

> "all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of non-CCT reviews and the re-opening of final decisions."
>
> [Our underlining]

39. The Appellant believes that that Tribunal which considered Request A wrongly limited its scope to information about the new "Customer Care Team (CCT) review process" and excluded from scope information relating to an earlier "non-CCT review process" i.e. the review process before it was managed by the "Customer Care Team". The purpose of Request C was therefore in part to fill in the gaps: to obtain the information requested in Request A, but in relation to the period before the "Customer Care Team" was created – what the Appellant calls in Request C the "non-CCT process".

40. In response, the PHSO submits that there is no practical difference between the CCT review process and the later RAFT team process other than the change to the name of the team. The PHSO does not address the issue of any earlier process, carried out before the "Customer Care Team" was established.

41. This Tribunal concluded, after careful consideration of the Decision of the Tribunal in relation to Request A (ref. EA/2019/0032/P) and in particular paragraphs 74 to 80 of that Decision, that the primary distinction made by that Tribunal was between (i) the internal review process on one hand, and (ii) "other PHSO post-decision processes, such as a decision to reopen an investigation or to consider remedies in the event of a known material error" on the other. The previous Tribunal found that Request A related only to (i), the internal review process, and not to other PHSO post-decision processes. It found the scope of Request A to be the internal review process generally and it did not intend to distinguish between "old" and "new" internal review processes or changes in the team name.

42. However, we accept, with respect, that there was some ambiguity in what the Tribunal said about the scope of Request A, in particular in the concluding sentence of paragraph 80 which states that: "the scope of the Appellant's information request was restricted to information about the review process carried out by the Customer Care Team". In light of that ambiguity, we find that it was not manifestly unjustified or inappropriate for the Appellant to request (shortly after receiving the Tribunal decision) that information which he believed the Tribunal had excluded from scope i.e. information about "non-CCT reviews". If the PHSO disagreed with the Appellant's interpretation of the Tribunal decision and regarded Request C as being the same as Request A, they could have refused it under section 14(2) FOIA (repeat requests).

43. Furthermore, it is clear that the second part of Request C – for information relating to the legal status of "the re-opening of final decision" - was not regarded as in scope of Request A by the Tribunal (see paragraph 41 above). The second part of Request C cannot therefore be said to be an attempt to re-open the first Tribunal's decision.

44. This Tribunal went on to consider the four *Dransfield* themes.

Burden

45. Request C is broadly worded, referring to "all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc)". However, without any evidence or submissions from the PHSO about the burden of responding to Request C, the Tribunal cannot speculate and must assume that the burden of responding to the request itself was not onerous.

46. The Commissioner alluded in the Decision Notice to previous dealings between the Appellant and the PHSO, but made no specific findings about the number, breadth, pattern or duration of previous requests for information. The PHSO provided no details of previous requests despite this being suggested by the Commissioner in its Response. The PHSO did assert in its letter to the Commissioner of 23 September 2022 that the Appellant was pursuing the issue with "unreasonable levels of persistence" but no dates are provided for the examples given.

47. The Tribunal did have before it the findings of Judge Shanks in relation to Request B (ref. EA/2019/0334/P) that the Appellant made 28 individual requests for information under FOIA in the period up to 12 October 2018 "on the same general theme" as Request B [paragraph 17]. It also appears that a further five requests were made between 12 October 2018 and the end of 2019 (paragraph 18 of the Decision Notice refers to 33 questions being raised in total in "2018-2019"). We have no evidence of the Appellant making any requests for information in 2020 nor in 2021 prior to Request C.

48. The Tribunal therefore finds that the burden of Request C cannot be "inextricably linked" to the burden of requests for information made in 2018 and 2019, given in particular that we have no evidence of any requests or correspondence for an 18-month period from 1 January 2020 to 12 August 2021.

Motive

49. As noted above, the Commissioner made no findings in relation to motive. However, the PHSO's view that the Appellant holds them in contempt and that his motive is to find evidence of "PHSO bad practice" to prove an "establishment stitch-up"" is consistent with Judge Shanks' conclusions in relation to Request B. Judge Shanks found that the Appellant was waging a campaign against the PHSO which "has become something of an obsession for him", which he will fight to the bitter end, and which will continue even if requests for information and answered in full [paragraph 22]. This Tribunal found on the balance of probabilities and based on the evidence before us that the Appellant's motive had not changed since Judge Shanks' made these findings.

Value or serious purpose

50. The Commissioner did not dispute that Request C had a value and serious purpose. The Tribunal noted the observations of Judge Shanks in respect of Request B that:

> "On considering the papers it is plain to me that the position in relation to the PHSO's internal review process is in a muddle and needs sorting out"

and agreed with Judge Shanks that:

> "given the PHSO's very purpose is to investigate maladministration by public authorities, there is a weighty public interest in disclosure of any substantial information bearing on the review process'…" [paragraph 23].

51. We noted in this regard that the internal review system has been reviewed by the Public Administration and Constitutional Affairs Committee and been the subject of legal advice to the PHSO [paragraph 7, EA/2019/0334/P]. We found that Request C did have a value and serious purpose.

Harassment or Distress

52. The Commissioner made no finding in relation to harassment or distress caused by Request C. The Tribunal noted the findings of Judge Shanks about the Appellant's attacks on the PHSO's integrity and competence, and on the Ombudsman and PHSO staff personally, and examples given by the PHSO in their letter to the Commissioner of comments posted by the Appellant on *whatdotheyknow.com*. However, those examples are undated, and again, the Tribunal had no specific evidence before it of harassment or distress after 2019.

Conclusion

53. Having considered each of the themes in *Dransfield* and taking a broad and holistic approach, the Tribunal concluded that Request C did not reach the "high hurdle" of vexatiousness set by the Court of Appeal. While we find that the Appellant's motive is to continue his campaign against the PHSO, his request has a serious purpose, as the Commissioner recognised, and there was insufficient evidence before us about the burden of the request, the wider course of dealings between the PHSO and the Appellant since 2019, or of harassment or distress. For the reasons given in paragraphs 41-43 above, the Tribunal does not accept that Request C is merely an attempt to re-open the Tribunal's decision on Request A and finds that it is therefore not manifestly unjustified and does not involve an inappropriate or improper use of FOIA.

54. The appeal is allowed.

Signed Judge CL Goodman Date: 8 August 2023