Neutral Citation number: [2023] UKFTT 881 (GRC)

Case Reference: EA.2023.0208

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by Remote CVP Hearing

Heard on: 6 October 2023
Decision given on: 23 October 2023

Before

TRIBUNAL JUDGE J FINDLAY
TRIBUNAL MEMBER J MURPHY
TRIBUNAL MEMBER N MATTHEWS

Between

PETER ROBINSON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

Peter Robinson, the Appellant

For the Respondent: no representation

Decision

1. The appeal is allowed

2. Decision Notice IC-191916-Z3Y3 is not in accordance with the law.

Substituted Decision Notice

3. The Department of Finance ("the DoF") of the Northern Ireland Civil Service Human Resources ("NICSHR") was not entitled to refuse Mr Robinson's Request for information dated 31 May 2022 on the grounds that it was vexatious and a repeat request under sections 14(1) and 14(2) of the Freedom of Information Act 2000 ("FOIA").

4. To ensure compliance with FOIA, the DoF must issue a fresh response to the Request which does not rely on sections 14(1)and 14(2) of the FOIA within 35 days of the date of the Decision Notice.

Procedure and Hearing

5. The Commissioner in the Response applied for the appeal to be struck out on the grounds that no part of the Appellant's case had any reasonable prospect of success. The application was refused on 11 August 2023.

6. The Commissioner indicated in the Response that he did not propose to be represented at the hearing. The Tribunal found no injustice in proceeding in the absence of a representative of the Commissioner having considered Rules 2 and 36 of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended.

7. In relation to his employment the Appellant lodged internal complaints with NICSHR.

8. The Tribunal made reasonable adjustments to ensure the Appellant could fully engage in the proceedings including ensuring he was content to proceed without a representative, asking straightforward and focussed questions, giving him the opportunity to answer questions without interruption, offering recesses and checking regularly that he was content to proceed.

9. Two observers from the DoF joined as observers at the beginning of the hearing. The Appellant was unhappy about the presence of observers on the grounds that he was angry with the DoF due to previous dealings, had not realised that they may attend but he accepted that it was a public hearing. The observers left the hearing after a few minutes indicating in the chat box that they had decided to do so as they did not wish to cause the Appellant any distress by their presence.

10. The Appellant applied in an email on 21 September 2023 for all the documentation not relating to his Request to be removed from the bundle because it was not relevant to his appeal and being included without any context made him appear unstable and a nuisance. He asserted that the information in the bundle regarding his complaints and grievances was incorrect and the personal information should not have been given and he considered it a data breach. No decision was made on this application to remove documents from the bundle and the application was renewed before the Tribunal.

11. The Appellant applied to the Tribunal for pages A15 to A94 to be removed from the bundle. The application was refused on the grounds that the Decision was that the Request was vexatious and not him personally, that the hearing would give him the

opportunity to put forward those points in issue and the information in the bundle was relevant to the issues before the Tribunal.

12. In reaching its decision the Tribunal took into account all the evidence before it, an open bundle of 187 pages and the submission and oral evidence from the Appellant. The Tribunal made findings on the balance of probabilities.

Background and Request

13. On 31 May 2022 the Appellant made the following information Request of the DoF (C99):

> "the content of the email communication [17 December 2021] between the Decision Officer and NICSHR that was withheld in the response to. SAR [reference redacted] as it was judged on review not to be personal. information"

14. The DoF responded on 28 June 2022 refusing the Request under sections 14(1) and 14(2) of the FOIA. The DoF upheld its position in its internal review on 16 August 2022.

The Decision Notice

15. The Appellant complained to the Commissioner on 15 September 2022.

16. On 23 March 2023 the Commissioner issued a Decision Notice IC-191916-Z3Y3, ("the DN") finding that the Request was vexatious and a repeat request and the DoF was correct to rely on section 14(1) of the FOIA to refuse the Request. The Commissioner did not require any steps.

17. The Commissioner found that the DoF had demonstrated that there had been a disproportionate burden place on it, over a sustained period of time, and having to respond further to the Request would further increase that burden.

18. The Commissioner accepted the DoF's position that even if it were to respond to the Request the Appellant was likely to continue to make further requests.

19. The Commissioner found that there had been a disproportionate, unjustified level of disruption, irritation or distress placed on it.

The Appeal

20. The Appellant appealed to the Tribunal and the appeal was received on 13 April 2023. The grounds of his appeal are as follows:

a) The Request was neither vexatious nor repeated. He was only trying to obtain relevant information and documentation relating to his complaint that had been withheld from him without adequate or justifiable reason.

b) The Request was made because the information sought related to an ongoing grievance and he Appellant had serious concerns about how his grievance had been handled.

c) The Request was not burdensome.

The Commissioner's Response

21. The Commissioner opposes the appeal. The Commissioner's decision relies on section 14(1) FOIA and did not need to consider section 14(2) of the FOIA.

22. The Commissioner argues that the Appellant did not provide any further explanation of supporting evidence about his concerns with the handling of his grievance.

23. The Commissioner argues that although the Request was not burdensome in isolation, the DoF demonstrated that there had been a disproportionate burden placed on it, over a sustained period of time and having to make a further response would increase that burden.

24. The Commissioner submits that taking a holistic view of the background and circumstances of this Request and balancing its limited wider serious purpose and value against the impact of complying and the likelihood of further request being made, the Request was correctly found to be vexatious.

The Legislative Framework

25. Section 1(1) FOIA provides that 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 so, to have that information communicated to him.

26. Section 14(1) FOIA provides that:

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

27. Section 14(2) FOIA provides that:

"Where a public authority has previously complied with a request for information which was made by any person, it is no 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."

28. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal ("UT") has considered the purpose of section 14(1) and the meaning of the term 'vexatious' in this context.

29. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the UT stated "the purpose of Section 14 … must be to protect the resources (in the

broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…" The UT concluded that "vexatious connotes manifestly unjustified, or involving inappropriate or improper use of a formal procedure" [paragraph 27]. The UT suggested four broad issues or themes to be considered when assessing vexatiousness, 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 UT stressed the importance of taking a holistic and broad approach.

30. The UT's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider "all the relevant circumstances". Arden LJ observed that:

"*vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one and that is consistent with the constitutional nature of the right*" [paragraph 68].

31. In *Dransfield*, the UT observed 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.

32. The UT noted the "FOIA mantra that the Act is both "motive blind" and "applicant blind"" [paragraph 34]. However, the application of section 14(1) "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)).

33. The powers of the Tribunal in determining this appeal are set out in s.58 of 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."

34. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

Reasons

35. In reaching its decision, the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.

36. The Tribunal found that the Request was not burdensome.

37. The Tribunal found that a disproportionate burden had not been placed on the DoF over a sustained period of time and having to respond to the Request would not increase the burden taking into account the history and the nature of the Request.

38. The Tribunal found that the Request had adequate and proper justification.

39. The Tribunal found that the Request was not likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

40. In reaching this decision the Tribunal took into account that the Appellant made a Subject Access Request ("SAR") relating to an email between the Decision Officer dealing with the Appellant's complaints and NICSHR. In an email dated 15 April 2022 (pages 100 and 101) a member of the NICSHR Information Management Team wrote:

"I do not therefore consider that the information withheld between the Decision Officer and NICSHR can be defined as being your personal information and in line with that determination, nothing further in relation to your original request can be disclosed. I understand the importance of this information to you and acknowledge the significance which you place upon its disclosure however my assessment is based solely on ensuring that the provision of information was within the legislation which governs the Right to Access."

41. The email dated 15 April 2022 indicated that if the Appellant was not satisfied with the outcome he should apply for an independent review and after a Final Written Response he had the right of complaint to the Information Commissioner.

42. On 28 June 2022 an email was sent to the Appellant from the DoF of NICSHR stating that between March 2020 and May 2022 the DoF had received 10 requests for information which had been registered as FOI request in addition to a number of complaints, SARs and additional correspondence. The email stated that the Appellant's request for information taken in the context of previous requests "may be demonstrating unreasonable persistence by seeking to re-open exhausted matters. The Department has also considered the volume and frequency of the

requests and therefore concluded that it regards this request (taken with previous requests) to be vexatious."

43. The Tribunal found that the Request was not manifestly unjustified or an improper use of the formal procedure taking into account that it was one follow up Request in response to the email from NICSHR dated 15 April 2022 in which the DoF recognised the importance and significance of the information to the Appellant.

44. Taking into account the wider course of dealings between the Appellant and the DoF and the previous information requested and provided (pages D124 to D127) the Tribunal found that the Appellant was not demonstrating disproportionate and unreasonable persistence and his Request was not an unjustified bid to re-open an exhausted matter. In reaching this decision the Tribunal has taken into account the number of requests, the period of time over which the request were made and the subject matters of previous requests. On the basis of the evidence before it the Tribunal found that this Request was not a continuation of previous requests but a first follow-up Request about information in an email not previously investigated.

45. The Tribunal found that the information requested was not information the Appellant already possessed and, therefore, he was not misusing the rights of access to information by making the Request. He had been given partial information about the contents of the email of 17 December 2021 (page C100) that was related to the grievance procedure and taking into account the terms of the email of 15 April 2022 it was reasonable for the Appellant to make the Request.

46. In reaching its decision the Tribunal has taken into account that five of the SAR requests referred to by the DoF (Annex B pages D127 and 128) arose after the decision of the DoF dated 28 June 2022. In reaching this decision the Tribunal has taken into account the decision of the UT *Montague v Information Commissioner & Department for International Trade* [2022] UKUT 104 (AAC) where it was decided that the balance of public interest should be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request. The Tribunal considered that although the facts of this case were not identical of *Montague* the principles set out in that case were relevant.

47. In reaching its decision the Tribunal took into account that there were nine FOI requests between 5 March 2020 to 25 November 2021 (Annex A pages D124 to 126) which were not directly connected to the Request with which the Tribunal is concerned.

48. In reaching its decision the Tribunal took into account that there were four SARs between 19 January 2022 and 4 August 2022 (Annex B page D127) and these were not directly connected to the Request with which the Tribunal is concerned.

49. In reaching its decision the Tribunal took into account that the substantial majority of the complaints made before 28 June 2022 (page D132) bore no relation to the subject matter of the Request.

50. Looking at the history of this matter, the number and dates of SARs and Requests, the nature and terms of those SARs and Requests and the nature of this Request, the Tribunal did not accept that there was a disproportionate burden on DoF over a sustained period of time and that having to respond to the Request would further increase that burden.

51. The Tribunal concluded on balance, taking a broad and holistic approach and considering the background and circumstances of the Request balancing its wider serious purpose and value against the impact of complying and likelihood of further requests being made, that the Request was not vexatious and allowed the appeal.

Signed: Judge J Findlay Date: 6 October 2023