



Neutral Citation number: [2023] UKFTT 00940 (GRC)

Appeal Number: EA/2023/0127

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Decision given on: 09 November 2023

Between:

JOHN MCTIGHE

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

THE WELSH GOVERNMENT (LLYWODRAETH CYMRU)

Second Respondent:

Date and type of Hearing: Heard on the papers on 30 October 2023.

Panel: Brian Kennedy KC, Paul Taylor and Susan Wolf.

Representation:

The Appellant: as a Litigant in person by way of comprehensive and detailed Grounds of Appeal and his further extensive written submissions.

The First Respondent: Jenny Roe of the ICO in a comprehensive and detailed written Response dated 26 May 2023.

The Second Respondent: Nick Howard of the Litigation team in the Legal Services Department of the Welsh Government in a comprehensive and detailed written Response dated 22 June 2023.

Decision: The Tribunal dismiss the Appeal and will hear submissions on the Second Named Respondents further applications including for the application of financial deterrence against the Appellant (see Paragraphs 28 -30 below and Case Management Directions).

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 21 February 2023 (reference IC-182604-J0Q3), which is a matter of public record. All relevant papers before us are in an Open Bundle before us and referred to throughout as (“OB”).

Factual Background to this Appeal up to the Hearing:

2. Full details of the background to this appeal and the Commissioner’s decision are set out in the DN at OB pA1 -A6, a matter of public record and not repeated here, other than to state that, in brief, the appeal concerns a request to the Welsh Government (“WG”) on 8 May 2022

requesting the following information regarding Trawscymru Annual Reports and Strategy Board minutes:

“Could you please provide copies of the following documents:

(1) The “incorrect” version of the 2018-2019 Trawscymru Annual Report (referred to by South Wales Police on 11/08/21, 12/08/21 and 07/03/22). The document was removed from the Welsh Government website in November 2021.

(2) The “correct” version of the 2018-2019 Trawscymru Annual report. (referred to by South Wales Police on 07/03/2022)

(3) The “documented evidence” , provided to South Wales Police by the Welsh Government Data Security Head), that [named individual] had attempted to correct the incorrect data over the months before the Strategic Management Board Meeting (referred to by South Wales Police on 07/03/2022)

(4) The minutes from the Strategic Management Board Meeting (referred to by South Wales Police on 07/03/2022)

3. The WG responded on 7 June 2022, refusing the request by virtue of section 14(1) FOIA, upholding this position in its internal review issued on 6 July 2022.
4. The Commissioner considered the complaint from the Appellant and carried out an investigation which considered the detailed history, chronology and full factual matrix provided by the WG and referred to in the DN.
5. Founded on the arguments put forward by the WG, and the background of previous requests, from the Appellant (including two previous Decision Notices referenced in §12 of the DN), the Commissioner had no hesitation in concluding that this request is indeed vexatious, and that the WG was therefore entitled to refuse the appeal based on section 14(1) FOIA. The Commissioner provided

comprehensive, meticulous and compelling reasoning for his findings at §§ 4 to 20 of the DN.

6. The Appellant lodged his comprehensive and detailed Grounds of Appeal in a file “labelled IC-182604-J0Q3 grounds” attached to his Notice of Appeal dated 03 March 2023 at OB pA15 – A27.
7. The appeal came before me as a Judge alone to have the matter Struck Out on the grounds that there were no reasonable prospects of the Appellant’s case, or part of it succeeding and that application failed as in all the circumstances of this case, the appeal is more suitably addressed by a full FTT Panel.
8. A strike Out order is a draconian measure, not taken lightly and particularly in such a subjective field such as a s14 ruling. Accordingly, the appeal now proceeds against the Commissioner’s DN on the merits before me, a Judge in the Information Rights Tribunal (since its inception over two decades ago), and two Specialist Panel members, expert in these appeals and the issues arising herein. There is collective Judicial Notice behind this decision.
9. The parties have agreed to have the appeal dealt with on the papers and the Tribunal have carefully considered all the evidence and submissions before us. In addition to the comprehensive evidence and submissions presented by the parties, the Law has been well set out in the Respondents’ Responses at OB pA84 – A102 & pA103 – A110, and without prejudice to the generality of the relevant legal issues, we will set out very briefly the most pertinent criteria that have assisted us best when coming to our Decision in this case. In

Dransfield, Judge Wikeley identified a critical test applied on the test for a vexatious request thus: *“The question ultimately is this; – is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?”* [§43] and further *“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”* [§10]. Arden LJ approved that formulation in the Court of Appeal, subject to the rider that it was an aim which could only be realised if *“the high standard set by vexatiousness is satisfied”*. [§72]

Conclusions:

10. On considering all the evidence and submissions before us we unanimously conclude as follows:

On Motive, value and serious purpose:

11. It is our firm view that the Appellant is continuing a campaign against the WG and one member of staff in particular. Two previous appeals brought by the Appellant have dealt with the application of s.14(1), as in this case. The Commissioner rightly illustrated this in his Response at OB, pA92, §46., identifying; EA/2019/0156; and EA/2019/0008 at OB, pA95, §60.

In EA/2019/0008, the Tribunal noted at §22: *“...we are satisfied that the requests represent the continuation of an obsessive campaign which will involve further FOIA requests and further accusations against individuals, whatever responses are given this time. So far as there is public interest in the matter, it does not come close to “trumping” the conclusion that the*

requests are vexatious." (emphasis added). We echo that articulate reasoning herein and are firmly of the view that clearly then the Tribunal in that case were right to state as they did. In all the circumstances it could not be said to be in the Public Interest.

12. In relation to value and serious purpose, what is perhaps more evident now is that whatever public interest in the matter was identified by the previous Tribunal panels has since been served to a greater degree by the findings of an investigation carried out by South Wales Police. We have seen from the outcome of their investigation (OB, p.A34) that no criminal offences, as had been alleged by the Appellant, had been committed.

13. Whilst there may remain minimal public interest in transparency and openness, that is clearly insufficient to warrant disclosure of the requested information which is inextricably linked with a matter settled at the end of the investigation conducted by South Wales Police, which found that no offences had been committed.

14. This Tribunal are inclined to agree with the Commissioner's observations at OB, p.A97, §71 where he states: *"It appears that the Appellant has waited for the outcome of the SWP's investigation (7 March 2022) to then make a request to SWP (11 March 2022) and this request to the WG (5 May 2022) and continue their pursuit of the WG's alleged wrongdoing."*

15. We also note the Appellant requested that South Wales Police conduct a review of its decision not to charge; and that he has stated his intention to have the matter referred to the Independent Office for Police Conduct for further consideration.

16.Regarding the requested versions of the annual report; based on all the evidence given by the WG, we find that there is no obligation to make these public, contrary to the Appellant's claim. There is consequently no serious purpose in that respect.

Harassment and Distress of, or caused to, Staff:

17.The Upper Tribunal in Dransfield ruled, at §39, that: *“Vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is any other respects extremely offensive”.*

18.Part 3 of the request for information, identified a particular member of staff previously targeted by the Appellant in other requests. It was worded as follows: *“The “documented evidence”, (provided to South Wales Police by the Welsh Government Data Security Head), that [named person] had attempted to correct the incorrect data over the months before the Strategic Management Board Meeting (referred to by South Wales Police on 07/03/2022)”*

19. We entirely agree and adopt with the Commissioner's appropriate response at OB, p.A93, §51, where he states: *“The Commissioner agrees that the request is a direct reference from SWP, however he submits that it was not necessary to name [a named person] in the request. The direct mentioning of [a named person] in the same request for documents ‘referred to by SWP’ would allow people dealing with the request, such as employees of the Welsh Government's FOIA department (who may be unaware of SWP's investigation), to speculate on some kind of wrongdoing by [a named person]. This would certainly cause a level of distress for [the named person].”*

20.We also entirely agree that by copying his request and complaint to the Commissioner, to 80 email addresses, including members of the Welsh Government, leadership of the Conservative and Labour parties

and a number of news agencies (our emphasis), the Appellant has caused considerable distress to the targeted member of staff (see OB, p.A94, §52). To continue to pursue a matter which has been closed following a Police investigation appears to us to be a calculated measure aimed at causing harassment and distress. Such behaviour is a clear and unambiguous abuse of FOIA and could not in any sense be said to be in the Public Interest.

21. The individual member of staff in question has also been the focus of other requests made by the Appellant, not only to the WG but also to South Wales Police. We have already noted (above) two other requests involving the application of s.14(1) which on appeal were ultimately dismissed.

22. Evidence from the WG provided to the Commissioner (during his investigation in this case) leaves no uncertainty as to the effect this approach has had on the individual in question (see OB, pD186):

“Ultimately, the police investigation found no case to answer, but the actions of the requester have had a material impact on the life of [Redacted]. They have caused immense and unnecessary stress and upset to a Welsh Government official who is simply doing his job, and which has penetrated every part of [Redacted] life - both professional and personal. This is having a serious and profound impact on the welfare of a Welsh Government employee and has been ongoing since before 2018.”

23. Taking all the above into account, we find that the request has caused significant and considerable harassment and distress.

24. Whilst there appears to be little evidence of burden in connection with satisfying this request, the determination of whether a request is vexatious falls to be decided on various factors and not all need to be

present. Taking a holistic view (as is a well-recognised concept in the authorities on s14 appeals) and taking account of previous requests, subsequent refused appeals, together with the cost, harassment, distress, inconvenience and the factual matrix pertaining and generally incurred, we unanimously find that the Commissioner was right to find the current request to be vexatious.

Vexatious as a life sentence:

25. We note the Appellant's argument that an Appellant cannot be declared "vexatious" as some sort of "life sentence". We have found no evidence that he has been treated as such. The WG and the Commissioner both found the request to be vexatious, rather than the Appellant, as is the correct interpretation of s.14(1). This argument is a subjective assessment which the Appellant has adopted to suit his plea cause which we reject.

26. As a rule, the Tribunal are reluctant to dismiss a s14 appeal lightly, however in this case we find that the Commissioner's DN is in accordance with the law and involved no misuse of discretion.

27. In all the circumstances we find the Commissioner has properly focussed on the Upper Tribunal's ruling in Dransfield, identifying relevant themes in that case which apply equally here.

Costs and/or further orders to effect deterrence as sought by the WG in part D of the Conclusion in their Final Submissions dated 22 August 2023.

28. In all the above circumstances we agree to consider the further orders sought in the WG's final submissions dated 22 August 2023 including that an order that a monetary penalty (fine/s) might be awarded against the Appellant on the grounds that he has acted unreasonably in bringing, defending or conducting this Appeal. As we have noted earlier, the Appellant is clearly continuing his campaign against the WG and one member of staff in particular. His continuing requests on the same subject, persistent pursuit of criminal charges against the member of staff in question and intransigence in the face of investigated allegations is nothing short of obsessive. Whilst generally the Tribunal are reluctant to award financial penalties (such as fines) or costs, in this appeal the WG argue such may be warranted as a deterrent to continuance of his campaign and in recognition of the costs incurred by the WG in dealing with this appeal

29. Accordingly, and for all the above reasons, the Tribunal dismiss the appeal and will consider and deliberate on the further applications referred to at §28 - above.

CASE MANAGEMENT DIRECTIONS

30. The WG will provide further specific submissions on the general applications (whether on costs, fines etc.) sought by the WG and referred to at § 28 & § 29 above within 28 days following the date of delivery of this Judgment and the Appellant will respond to those submissions within 14 days thereafter. The parties are reminded of their obligations under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Brian Kennedy KC

2 November 2023.