NCN: [2024] UKFTT 18 (GRC)

Appeal Number: EA/2023/0026

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

PAUL BENTLEY

Appellant:

and

THE INFORMATION COMMISSIONER

Respondent:

Date and type of Hearing: Heard at an oral appeal through the GRC – CVP – on 20 December 2023.

Panel: Brian Kennedy KC, Anne Chafer and Marion Saunders.

Representation:

The Appellant: as a Litigant in person by way of his Grounds of Appeal dated 2 December 2022 and his further oral submissions at this hearing.

Respondent: Clare Nicholson of the ICO in a written Response dated 25 April 2023.

Decision: The Tribunal dismiss the Appeal.

REASONS

Introduction:

1. This decision relates to an appeal dated 12 January 2023 and 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 7 November 2022 (reference IC- 77747 – G1H1), which is a matter of public record.

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 Open Bundle pA7 -A12, a matter of public record and not repeated here, other than to state that, in brief, the Appellant requested information regarding the public authority's (Bank of England's) legal costs in defending an employment tribunal matter. The Commissioner's decision is that Bank of England correctly relied on section 14 (vexatious or repeated requests) to not provide the requested information.

The Relevant Law:

3. S.1 FOIA General right of access to information held by public authorities:
   (1) Any person making a request for information to a public authority is entitled;
   (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
   (b) if that is the case, to have that information communicated to him.

4. S14 FOIA Vexatious or repeated requests:

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

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

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

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

The Burden:

6. First, the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus, the context and history of the particular request, in terms of the previous course of

dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.

7. As to the *number*, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. Volume, alone, however, may not be decisive. Furthermore, if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against a finding that the new request is vexatious.

8. As to their *breadth*, a single well-focussed request for information is, all other things being equal, less likely to run the risk of being found to be vexatious. However, this does not mean that a single but very wide-ranging request is necessarily more likely to be found to be vexatious – it may well be more appropriate for the public authority, faced with such a request, to provide advice or guidance on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.

9. As regards the *pattern*, a requester who consistently submits multiple FOIA requests or associated correspondence within days of each other, or relentlessly bombards the public authority with e-mail traffic, is more likely to be found to have made a vexatious request.

10. Likewise, as to *duration*, the period of time over which requests are made may be significant in at least two ways. First, a long history of requests e.g. over several years may make what would otherwise be, taken in isolation, an entirely reasonable request, wholly unreasonable in the light of the anticipated present and future burden on the public authority. Second, given the problems of storage, public authorities necessarily have

document retention and destruction policies in place, and it may be unreasonable to expect them to e.g. identify whether particular documents are still held which may or may not have been in force at some perhaps now relatively distant date in the past.

11. In this case the Tribunal note that, during investigations, the Commissioner considered the history and chronology of the Appellant's requests to the public authority as can be seen in paragraphs 18 to 25 of the DN. In the Open Bundle from p110 the chronology of the correspondence, both written and by telephone for the period 19 November 2014 to 29 May 2020 extends to 33 pages. The Tribunal also has access to the Closed Bundle provided, in which the public authority provides detailed confidential information relating to the history and chronology. Even in the executive summary, we see included a long and burdensome history and chronology of challenge and objection from the Appellant arising from his dismissal from employment with the public authority. We agree that the public authority has dealt with an undoubtedly burdensome request with some patience, diligence and courtesy culminating in the decision to rely upon s.14(1) FOIA which was in our view justifiably made. See our Conclusions below.

The Motive:

12. Second, the motive of the *requester* may well be a relevant and indeed significant factor in assessing whether the *request* itself is vexatious. The FOIA mantra is that the Act is both *"motive blind"* and *"applicant blind"*. There is, for example, no need to provide any reason for making a request for information under section 1; nor are there any qualifying requirements as regards either the identity or personal characteristics of the requester. However, the proper application of section 14 cannot side-step the question of the underlying rationale or justification for the request. What may seem an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the

relevant public authority. Thus, vexatiousness may be found where an original and entirely reasonable request leads on to a series of further requests on allied topics, where such subsequent requests become increasingly distant from the requester's starting point.

13. In this context it is important to bear in mind that the right to information under FOIA is a significant but not an overriding right in a modern democratic society. As has already been noted, it is a right that is qualified or circumscribed in various ways. Those restrictions reflect other countervailing public interests, including the importance of an efficient system of public administration. Thus section 14 serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources. In that context it must be relevant to consider the underlying motive for the request. As the FTT observed in *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222) (at paragraph 19):

"Abuse of the right to information under s.1 of FOIA is the most dangerous enemy of the continuing exercise of that right for legitimate purposes. It damages FOIA and the vital rights that it enacted in the public perception. In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill-intentioned requests and should not feel bound to do so only where a sufficient number of tests on a checklist are satisfied."

14. This approach should not be seen as giving licence to public authorities to use section 14 as a means of forestalling genuine attempts to hold them to account. For example, an investigative journalist may make a single request which produces certain information, the contents of which in turn prompts a further request for more information, and so on. Such a series of requests may be reasonable when viewed both individually and in context as a

group. The same may also be true of a request made by a private citizen involved in a long-running dispute or exchanges with the public authority. As the IC's Guidance for public authorities helpfully advises (p.3).

"Many previous cases of vexatious requests have been in the context of a longstanding grievance or dispute. However, a request will not automatically be vexatious simply because it is made in the context of a dispute or forms part of a series of requests. There may be genuine reasons for this. For example, a series of successive linked requests may be necessary where disclosures are unclear or raise further questions that the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the individual. You should not use section 14 as an excuse to avoid awkward questions that have not yet been resolved satisfactorily. You must always look at the effect of the particular request and consider the questions [the five factors] as set out below."

15. However, in other circumstances a series of requests may suggest that later requests have become disproportionate to whatever the original inquiry was. This phenomenon has been described as "spread". The term now often used is "vexatiousness by drift" where the Appellant's conduct becomes wholly disproportionate to their original aim. However, "drift" is not a prerequisite to a finding that section 14 applies, as by definition it may only arise where there is a previous course of dealings. A single well-defined and narrow request put in extremely offensive terms, or which is expressly made purely to cause annoyance or disruption to the public authority rather than out of a genuine desire for the information requested, may be vexatious in the complete absence of any 'drift'.

16. In this case while the motive may be seen as reasonable the email exchanges in context clearly indicate that the underlying complaint of the Appellant was dealt with by public authority. Our consideration of the material

provided in the Closed bundle leads us to conclude the public authority in this case acted reasonably and well within the reasonable expectation this Tribunal would expect in all the prevailing circumstances. See our Conclusions below.

The value or serious purpose:

17. Third, and usually bound up to some degree with the question of the requester's motive, is the inherent value of the request. Does the request have a value or serious purpose in terms of the objective public interest in the information sought? In some cases, the value or serious purpose will be obvious – say a relative has died in an institutional setting in unexplained circumstances, and a family member makes a request for a particular internal policy document or good practice guide. On the other hand, the weight to be attached to that value or serious purpose may diminish over time. For example, if it is truly the case that the underlying grievance has been exhaustively considered and addressed, then subsequent requests can in context become disproportionate to whatever the original inquiry was. See the references to "spread" or "vexatiousness by drift" above. In other cases, the value or serious purpose may be less obvious from the outset. Of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14, unless there are other factors present which raise the question of vexatiousness. In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident.

18. The public authority in this case recognised value and purpose of the request and took appropriate action. However, this was not enough for the Appellant who did persist in an obsessive manner to the extent that in our view it became wholly disproportionate. Furthermore, we find that this obsessive approach or behaviour continues through to this appeal and is

likely in our view to continue to do so. While we accept his grievance is honestly heartfelt, de facto the effect of his actions or behaviour and his obsession in this context is apparently limitless and, in our view, likely to persist further.

19. Fourth, 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 in any other respect extremely offensive (e.g. the use of unacceptable language). As noted previously, however, causing harassment or distress is not a prerequisite for reaching a conclusion that a request is vexatious within section 14.

20. On examination of the exchanges and evidence before us (including significant examples in the Closed Bundle) we are satisfied that the staff at the public authority who were required to deal with this request were caused harassment and distress to an unacceptable degree. See our Conclusions below.

21. The Appellant conducted his oral appeal on the telephone on 20 December 2023. He presented as a reasonable individual who has a genuine grievance at his dismissal from employment with a public authority. The Appellant also brought to our attention that in the letter from the public authority to the ICO, dated 17 March 2022, there was a reference number for a complaint made by the Appellant to the ICO which he believes should not have been shared with the public authority or indeed anyone else (p99 para 17(a) bundle).

22. That said, the Appellant misconceives the purpose and scope of the purpose of the FOIA. At the outset of the hearing, we asked him what the purpose or motive for his request was. He said he wishes to know what the public authority paid for legal services in connection with his Employment Tribunal so he could compare it with the cost he would have to pay to

instruct legal representation to obtain copies of his health and medical information which he believes is held by the public authority. Ultimately, he indicated that the public authority had engaged an expensive team including a top Counsel and that it was in the public interest that this sort of expenditure was disclosed. The Appellant also takes issue that the DN determined in effect that his conduct was reprehensible, and he now has to live with that. He still does not accept his dismissal was justified. See our Conclusions below.

The Hearing:

23. The Appellant also took issue with the description attributed to him in the DN for the first time as: *" - - -dismissed due to conduct related issues:* indicating that the Employment Tribunal had stated it was for a "*fundamental breakdown of working relationships".* He challenged the truthfulness of assertions made against him. He further engaged in criticising the ICO's modus operandi and in the respective representation in previous s14 decisions. The Appellant also indicated that he found the public authority were treating him as vexatious and not this particular request.

24. The Appellant explained in more detail the reason he wanted the costs of the public authority's litigation. He believes the public authority holds some information regarding his health and medical issues from a period while he was still in their employment around 2011 when the public authority paid for his medical treatment and around 2015/2016 when he was referred to the public authority's Medical Officer. He explained that he had asked the public authority for copies and was told he had received everything he was entitled to, but he had not received these records which he believes the public authority holds. In his view, the only way he can obtain these is to take the public authority to court.

25. The Appellant explained that he wants the costs which the public authority incurred in relation to his Employment Tribunal so that this will give him an estimate of what it might cost him to take the public authority to court. The Tribunal took the Appellant to his Grounds of Appeal where there is no mention of this fact.

26. The Appellant then explained that he had searched for the costs of an Employment Tribunal on the internet because he wondered if the public authority's costs were excessive. Why, he asks had the public authority used a Barrister from a law firm which he believes to be one of the most expensive in this area of law. He had attended several Employment Tribunals prior to his hearing and very few parties had engaged a barrister at all.

27. The Tribunal were not persuaded that this was evidence leading to a matter of significant public interest but rather more a private interest and are of the view that the costs from 2016 would not be in any way comparable to the costs which would be charged now. This may have been different if there was some cause for concern about the public authority's conduct or misconduct but there is no evidence or justification for any such concern in this case.

28. The Appellant mentioned examples within the copious correspondence where he pointed out errors which had been made by the public authority and specifically two points in paragraph 17(a) of the public authority's response dated 17 March 2022 to the Commission's questions (OB 99). One regarded the reason for his dismissal from the public authority in June 2016 which was replicated within the DN and is now in the public domain. The Tribunal understand the Appellant's distress at this misrepresentation. However, we could see no evidence that this had been deliberate.

29. Another point raised by the Appellant was that the public authority had quoted a reference number from a Service Complaint the Appellant had raised with the Information Commissioner in 2016 which the Appellant believed the public authority should not have received. This was not the subject of the request or the DN.

30. The chronology included in the open bundle (D110 – D143) lists the contacts from the Appellant (by email, letter, telephone calls) from 19 November 2014 until 29 May 2020. The Tribunal notes that in 2016, 75 contacts are recorded and in 2020, 44 were recorded in six months.

31. The Tribunal also noted at A45 - OB – the Employment Tribunal findings on their hearing of the Appellant's appeal as a complainant, appearing in person, the Judgment found: 1. The claim of breach of Section 10 of the Employment Relations Act 1999 is dismissed after withdrawal by the Complainant and 2. The Complaint of unfair dismissal fails and is dismissed.

Conclusions:

32. We acknowledge that whilst not an error in law, the Commissioner had identified the reason for the Appellant's dismissal from work which was at odds with the Appellant's understanding of the stated reason and led to the Appellant believing that there was collusion between the ICO and public authority. The Appellant clearly indicated several times that it was his belief that his former employer treated him as vexatious rather than this particular request.

33. Apart from the overall volume of requests, both SARs and FOI, each was chased up and new requests were made before the initial ones were resolved placing a significant burden on those tasked with replying.

34. We record some specific examples by way of illustration in support of our findings herein:

    p129 2/7/18 response to a SAR of 30/5/18 included the fact that the applicant was warned that future requests could be considered manifestly unfounded.

    p131 28/2/19 the section 14 vexatious flag was raised given the large volume of correspondence on related matters and that the Bank will consider its applicability to any future requests. This was in relation to a request of 4/2/19.

    p134 29/3/19 four telephone calls culminating in a further SAR requesting access to the recordings of his telephone conversation from his first call of the day and for the recording of his current call.

    p136 29/8/19 - behaving unpleasantly on the phone and the start of a series of communications in which the Appellant wanted to know who he should notify of his change of address, despite being informed that the Bank did not need to know or hold the address of ex-employees.

    p139 20/4/20 the Appellant does not want response by email but wants the information to be printed and sent to a Cash Centre for him to collect specifically from his ex-line manager.

    We find that whilst the request, the subject of this appeal might not appear onerous or vexatious per se, the context of the preceding behaviour pattern suggests that it is more likely than not that providing a response would generate yet further correspondence, requests for clarification and further FOI requests.

35. We find the tone and nature of some of the correspondence and contact, e.g. the refusal to accept email replies whist sending requests by email suggests that there is an underlying intent to annoy and disrupt the business.

36. As the interpretation of a vexatious request has developed over the years the Tribunal and higher courts take a holistic view of all the circumstances

in a case to arrive at what admittedly can be a difficult decision. Proportionality is key in this sense and on the evidence before us and hearing this matter afresh, the Tribunal take the view that the Appellant's expectations of the public authority in relation to the request in question was disproportionate, manifestly unjustified, inappropriate and an improper use of a formal procedure or the use of FOIA.

37. Accordingly, we must also accept the reasoning in the DN and find no error in law or in the exercise of his discretion by the Commissioner therein.

38. For all the above reasons and in all the circumstances of this case we must dismiss the appeal.

Brian Kennedy KC 29 December 2023.

Promulgated on: 09 January 2024