IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0179
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50361346
Dated: 7 July 2011

Appellant:	**James Burke**
Respondent:	**Information Commissioner**
Second Respondent:	**One North East**
Heard at:	**45 Bedford Square**, **London**
Date of hearing:	**8 November 2011**
Date of decision:	**13 December 2011**

Before

Robin Callender Smith
Judge

and

Paul Taylor and Andrew Whetnall
Tribunal Members

Attendances:

For the Appellant:	Mr James Burke in person
For the Respondent:	Mr Richard Bailey, Solicitor for the Information Commissioner (on the papers)
For the Second Respondent:	Mr Robin Hopkins, Counsel instructed by One North East

Subject matter:

Freedom of Information Act 2000

Vexatious or repeated requests s.14

Cases:

Duke v IC & University of Salford (EA/2011/0060), *Gardner v IC & Nottingham City Homes* (EA/2011/0054), *Young v IC* [2011] 1 Info LR 658, *Rigby v IC & Blackpool, Fylde and Wyre Hospitals NHS Trust* [2011] 1 Info LR 643 and *Betts v IC (EA/2007/0109)*.

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 July 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. One North East was, at the time of the requests, a Regional Development Agency with offices in Newcastle upon Tyne.

2. The Appellant is a director of a company which made a formal complaint to One North East in December 2009 about the way the company's funding application had been dealt with and managed.

3. The Appellant also submitted a number of freedom of information requests via www.whatdotheyknow.com relating to the management of Agency funds which was one of the concerns raised in the formal complaint. On 6 January 2010 it became apparent there was a link between the formal complaint and the freedom of information requests. The Appellant requested that the complaint and requests should be dealt with at a meeting arranged between One North East which took place on 27 January 2010.

4. The company's formal complaint and subsequent appeal was investigated by One North East and the findings communicated. A director on temporary secondment to One North East was asked to review the findings from an independent fund management perspective. That review upheld the original funding decision. Both the complaint and One North East's application of s.14 (1) together with an

internal review outcome were scrutinised and upheld by a One North East non-executive board member.

5. Throughout the formal complaints process One North East continued to receive freedom of information requests from the Appellant. By their calculations a total of 149 requests were received, contained in 8 letters. These often resulted from its responses to his previous requests or followed meetings with One North East employees.

6. The Agency stated that the:

> "...*volume, frequency and overlapping nature of the requests necessitated the creation of a separate spreadsheet within the Agency's existing FOIA system to track…. requests for compliance purposes*."

The request for information

7. On 13 July 2010 the Appellant requested the following information from the Second Respondent via the WhatDoTheyKnow.com website:

> *"This request under the FOIA Act is related to project related financial transactions with subsidiary companies and/or 'Special Purpose Vehicles' and funding recipients' breach of procurement requirements and 'clawback' of grant by ONE North East for the financial year is of 2008/09, 2009/10 and 2010/11."*

8. The Decision Notice – at Annex A – gave details of the nine separate points listed under that request. One North East issued a refusal notice on 15 July 2010 on the basis that s.14 (1) vexatiousness applied to this request.

9. The Appellant requested an internal review on 19 July 2010 and that was concluded on 23 August 2010. The review upheld the original decision to apply s.14 (1).

The complaint to the Information Commissioner

10. On 23 November 2010 the Appellant contacted the Information Commissioner (IC) to complain about the way his request for information had been handled. He specifically asked the IC to consider his view that – as opposed to 149 requests cited by the Second

Respondent – he had submitted 8 requests. The Appellant's view was that much of the correspondence relating to his requests became necessary for reasons of clarification, because the information provided by the Second Respondent had been "incorrect, incomplete or contradictory".

11. The IC's decision notice dated 7 July 2011 concluded that the Second Respondent had applied s.14 (1) of the Act correctly. In terms of obsessiveness the IC accepted there was often a fine line between obsession and persistence but – taking into account the context and background to the requests and the frequency with which the Second Respondent was contacted by the Appellant – considered that the requests could fairly be seen as obsessive.

12. He also concluded that the requests could be considered as having a harassing effect on the public authority and its staff. The IC was satisfied that the additional work undertaken in order to meet the demands of the Appellant constituted a significant distraction from the core business of the Agency and its employees.

13. He was not satisfied that the requests were designed to cause disruption or annoyance but he had concluded that the requests lacked any serious purpose or value.

14. The IC considered that – if viewed in isolation from the considerable volume of correspondence that existed between the Appellant and the Second Respondent – the request under consideration would not necessarily be "manifestly unreasonable, without serious purpose or value, or disproportionate).

15. The IC considered the wider context, however, and concluded that the obsessive nature of the request – when taken in context – together with its impact on the Agency and its staff was sufficient for the requests to be deemed vexatious.

The appeal to the Tribunal

16. The Appellant, in his appeal to the Tribunal, highlighted the following points in urging that the IC had erred in concluding his request was vexatious because:

(1) The IC had failed to consider evidence provided by the Agency and the Appellant in a balanced and fair manner;

(2) The IC had failed to provide appropriate notice to the Appellant of all the matters that were in issue in reaching his decision. He had taken the assertions of the Agency to be factually correct while failing to disclose to the Appellant documents provided to the IC by the Agency, thereby denying the Appellant an opportunity to respond and rebut, where appropriate, assertions made by the Agency.

(3) The IC had failed to keep the Appellant informed of the progress of the IC's investigation and to provide him with updates at least every 6 to 8 weeks. That had deprived the Appellant of the opportunity to respond to assertions put forward in comprehensive submissions made by the Agency which were taken into account by the IC in reaching his decision but had not been disclosed to the Appellant.

(4) The IC had failed to address the scope - as set out by him in Paragraph 11 of the Decision Notice - which was central to the decision about whether the FOIA request could be refused on grounds of being vexatious. The IC appeared to attach significance to the volume and frequency of the requests as alleged by the Agency. The IC had failed to take into account or provide a decision on why additional clarifications had to be sought by the Appellant in his requests.

The questions for the Tribunal

17. The effect of the application of the five questions in the IC's Guidance dated December 2008 to these requests.

18. Were the requests vexatious so that they fell within the provisions of s.14 (1) FOIA?

Evidence

19. The Tribunal had the benefit of considering written witness statements from the Appellant and his wife together with a written witness statement from the Second Respondent. Both the Appellant and the

Chief Legal Officer of the Second Respondent (Peter Judge) adopted their written witness statements as their primary evidence in the oral hearing and both were cross-examined on those statements. Both parties present at the appeal hearing made submissions in addition to the oral evidence.

20. The written and oral evidence provided by the Appellant and the Second Respondent produced marginally more detail than had been explored in the earlier written submissions. It is not proposed however to explore this material separately because – looked at in its totality – the Tribunal's reasoning in respect of it is incorporated in its decision below.

Conclusion and remedy

21. The Tribunal is grateful for the courtesy and attention to detail demonstrated by the Appellant and the Second Respondent in attending the Tribunal hearing itself, giving oral evidence and putting their respective arguments before the Tribunal.

22. Both the Appellant and the Agency argued their case in relation to five questions for use in determining whether a request is vexatious, as set out in the Commissioner's Guidance dated December 2008. It is convenient for us to follow that pattern of analysis. We accept that in other cases (***Rigby***, for instance) the Tribunal has found that these questions constitute useful guidance, although no single factor is decisive and not all of the conditions have to be met in order to establish that a request is vexatious. ***Rigby*** also sets out some further principles for determining whether a request is vexatious, which we take into account in our analysis below.

23. a) Can the requests fairly be seen as obsessive?

There is a dispute about the number of the requests, and the way they were logged and recorded by the Agency as 149 requests, approximately 140 requests in seven batches before the further nine

that the Agency refused to respond to in its letter of 13 July 2010. The Appellant's position has been throughout the appeal that the requests for further information were for clarification: attempts to get accurate or complete responses where the Agency's initial responses were either "incorrect, incomplete or contradictory." Accordingly he argues that it is incorrect to see them as a large number of requests, implying that he would not have needed to persist if the Agency had given him the information requested in his eight initial requests in the first place. In response the Agency argues that the requests were clearly additional, for the most part sought new information, and takes issue with some of the alleged inconsistency between earlier replies, on the grounds that like not compared with like. Each new request required further work. While there are some supplementary requests that could be seen as calling for correction or reconciliation of one answer with another, on balance we accept the Agency's case that the accumulation of requests indicated an obsessive attempt to challenge its grant decisions. They have the character of a campaign attempting to force the authority to change its mind following a grievance over refusal of a grant. Where not directly related to the grant application and reviews of the decision to refuse it, the FoI questions seek to "cast the net wider", in the words of the Agency's Counsel, for material to support the Appellant's view that there were general irregularities or misuse of public funds in the Agency's programmes of support for digital investment in the region. (For our findings on this see below under the heading on serious purpose or value.)

24. We accept that the Agency initially tried to give the Appellant the benefit of the doubt, and continued to answer requests well past the Appropriate Cost limits, declining to apply s12 or s14 well after there was an appropriate basis for doing so , inviting Mr Burke to discuss the matter (Open Bundle p.301) and refraining from invoking s.14(1) until the final batch of requests, and even answering these when they were repeated by another person and the Agency could not be confident that

they were properly attributable to Mr Burke.

25. The Tribunal finds that, taken together, the string of requests can reasonably be construed as onerous, and appropriately logged as separate items where they seek additional facts or further information. A series of 149 requests, or thereabouts, can fairly be characterised as obsessive when considered in the context, even though, as the Information Commissioner concluded, particular elements of the requests in isolation could not necessarily be shown to be ‘’manifestly unreasonable, without serious purpose or value”.

26. The key issue in this case is that the requests can fairly be seen as a campaign against a grant decision, widening to a more general exploration of alleged inadequacies in the handling of support programmes. A campaign will not be vexatious if it exposes improper or illegal behaviour, but if it is not well founded or stands no reasonable prospect of success it can correctly be assessed as vexatious. The Agency submits that this case is “a paradigm example” of an ill-founded campaign. We return to that in our analysis of the fifth question below.

27. b) <u>Is the request harassing the authority or causing distress to staff</u>?

The meaning of harassment on the facts of this case is that the total effect of the requests and associated correspondence (some 396 separate pieces of correspondence were logged) was to take up significant time and distract from other business. The Tribunal in ***Rigby*** found that the likely effect on the authority is the key test, and this relates to the impact of the request or requests, rather than the characteristics of the requester. The authority was certainly put to a lot of trouble, and staff were frustrated that their best efforts could not satisfy the appellant. It is not in our view a necessary part of the definition of harassment that the public authority should be distressed or its staff should be upset, they may be made of sterner stuff. Nor is it

critical that the person seeking information behaves in an offensive or derogatory manner. The Appellant denies that his tone or manner were offensive, and said that there was no evidence that staff were in fact distressed or that derogatory remarks had been made to them. His relations with staff had not been abusive or malicious, and he recalled only one conversation with a particular member of staff who was said to have been harassed. We accept that that the Appellant's approach was not abusive or offensive at the relevant time, and that combative statements on the web after the event cannot have been a justification for the decision not to answer requests in July 2010. There may have been, as Counsel for the Agency attempted to show, some implication that the Agency had acted in bad faith or some passages that were "accusatory" in tone. We are unable to judge the precise temperature and tone of the exchanges. There will often be confrontation when sustained grievances are dealt with, and we are aware of other cases involving prolonged disputes, whether vexatious or not, where stronger language or a tendency to personal attack has been evident.

28. The Appellant was not the only representative of his company in contact with the Agency, and many of the FoI requests were submitted by his wife. In a record of a phone call with her in April 2010, Mr Judge described her part in the conversation as "very measured and polite. By contrast I may have come across a little frustrated. I have tried to be direct and helpful but they simply do not accept the investigation, its findings, or that the original decision not to fund them could possibly have been justified." Mr Judge suggested that other telephone conversations with his staff were becoming, at the relevant time, increasingly confrontational, hostile or accusatory. Our finding is based not on lack of courtesy or abusiveness on the part of requesters or on whether or not there were implications of bad faith, but on cumulative impact. We accept that staff found it frustrating to deal with the Appellant and his wife, because they saw them as wishing to reopen or simply refusing to accept issues that had been dealt with properly and

several times over, and because every response to a request for information over a period of more than six months seemed to prompt further requests.

29. c) <u>Would complying with the request impose a significant burden in terms of expense or distraction</u>?

The requests did impose a significant burden on the Authority as evidenced by the 41% figure of all FOIA requests during the relevant period, and the complaint and FoI requests taken together had logged 396 pieces of correspondence. There are, as the Appellant points out, no time sheets to support an exact calculation of the hours that had been spent or would have been spent on the information requests asked, but having reviewed the number and nature of the requests we are content to accept the Agency's estimate of the burden as reasonable.

30. d) <u>Are the requests designed to disrupt or annoy</u>?

The Appellant denied this, and observed that no evidence had been put forward on the point by the Agency. The Information Commissioner did not find against the Appellant on this point.

31. e) <u>Do the requests lack serious purpose or value</u>?

The Agency's conclusion that there was no prospect of further responses to the Appellant leading to a satisfactory conclusion of their complaint was part of their reasoning that further requests had no serious purpose or value. . The Appellant argued that we need only be satisfied that it was "conceivable" that One North East had not satisfactorily conducted the investigation into his company's initial complaint in order to come to a conclusion that the information requests and associated correspondence had clear purpose and value. It is not our function to review the substance of the complaint concerning the grant, but we noted the Agency's evidence of several different attempts at informal and formal review which had not satisfied

the Appellant. We take account of Mr Judge's summary of the efforts he had made to explain the reasons for refusal of funding, and satisfy the Company that some poor customer service and communications by the case manager, which was accepted, had not adversely affected the funding decision. The Company sought compensation for late communication of the request, which was not granted. Appeals against the decision were rejected, and the Appellant had raised various points about these review processes. Mr Judge's view by July was that he and his staff had done all they could, and further FoI requests were unlikely to lead to either satisfaction on the part of the company, or reversal of the grant decision.

32. This would not necessarily have persuaded us that further requests were of no serious purpose or value if the Appellant had convinced us that the replies he had been receiving from the Agency were so full of inconsistency, inaccuracy or flaws that it was necessary to follow up with requests for more information in order to clarify what he had already been given

33. We found no evidence that responses from the public authority were extensively inaccurate or incomplete. There was an acknowledged error in one press notice, but this does not justify the further requests that were swiftly made, creating an impression on the part of the staff dealing with them that the flow of requests was likely to continue however helpful they tried to be.

34. Our view of the requests is that they tended to enlarge on earlier requests, and what the Appellant saw as necessary seeking of clarification is more often an extension of his probe into projects or funding programmes which, he came to believe, revealed misuse of public funds.

35. If the Appellant's questions had in fact revealed misuse of public funds, it would clearly not be fair to conclude that they were without purpose or value. The Appellant argues that he did not set out to find wrong-

doing, but found it in the information he had been given. The Appellant and his wife were using FoI to explore other grants and funds managed by or on behalf of the Agency. This may have stemmed from a feeling that other projects had been wrongly preferred to theirs, and that there were widespread irregularities in selection, appraisal and funding procedures. It developed into a request for investigation addressed to the Comptroller and Auditor General (C&AG) in March 2011, some eight months after the refusal to answer further FoI requests in July 2010. We take this request and the resulting findings by the NAO to be relevant to this appeal as both parties turned to them to support their position. The request to the C&AG and the NAO findings throw light on whether the FOI requests were exposing matters of public concern.

36. The request for investigation addressed to the C&AG on 20th March 2011 summarised the Appellant's concerns in respect of three programmes or funds managed by or on behalf of the Agency, suggesting a pattern of irregular procurement, bypassing of tender processes (contrary to OJEU (Official Journal of the European Union) requirements and undue preference for companies already known to ONE through other dealings and processes. Some minor issues apart, and subject to continuing audit, the NAO response does not seem to have upheld these complaints.

37. We find that in the light of this subsequent failure to establish wrong-doing, and in view of the volume of requests, it was reasonable for the Agency to conclude in July 2010 that response to further questions would have no useful purpose or value.

38. f) <u>Finally we address the concerns the Appellant raised about the process of the Information Commissioner's investigation</u>.

The Appellant's complaints about the process of the Information Commissioner's investigation are summarised in paragraph [16] above, in particular he submits that he should have been given more particulars of the Agency's evidence to and communications with the

Information Commissioner, and an opportunity to comment. The Information Commissioner's representations on this point in written submissions were that it is not for the Tribunal to review the procedure by which his decisions are reached, but only to satisfy itself that the Decision Notice is in accordance with the law. To this we would add that, where the Commissoner has exercised discretion, we may find that he should have exercised it differently. The Commissioner cites the cases of ***Carins v IC*** and ***Channel 4 v IC and Sky*** as authority for the limits on the Tribunal's powers to review his process. The Appellant cites ***Carins v IC*** and argues that it shows that the Tribunal can look at omissions in the way a case is investigated. We agree with the interpretation of ***Carins*** advanced by the Respondents. Paragraph 38 of the decision makes clear that "…*no jurisdiction exists entitling us to regulate or review the way in which an investigation is conducted. We may review the outcome of the investigation (in the form of the Decision Notice issued at the end of it) not the process by which it is conducted*." In reaching our decision, we have heard the arguments of the Appellant that some material submitted to the Commissioner by ONE North East related to events after their decision to apply s14(1), and we have not relied on that material, except for the NAO report which both parties drew to our attention. We have also assessed the argument that inadequacies in the information provided by the public authority justified the extent of the supplementary and additional requests that the Appellant found it "necessary" to make. We have not found in favour of the Appellant on that point, which we find is central to this case, or on any of the other assessments made by the Commissioner when addressing the five-point test of vexatiousness.

39. In all the circumstances, for the reasons outlined above, the Tribunal is satisfied to the required standard (the balance of probabilities) that both the Second Respondent and the IC were correct in deeming the requests for information vexatious under the provisions of s.14 (1) FOIA.

40. Our decision is unanimous.

41. There is no order as to costs.

Robin Callender Smith

Judge

13 December 2011