



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0163

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50294583

Dated: 29 June 2011

Appellant: E Rex Makin & Co

Respondent: Information Commissioner

Additional Party: Legal Services Commission

Heard at: Field House, London

Date of hearing: 18 and 19 June 2012

Date of decision: 3 August 2012

Before

Angus Hamilton

Judge

and

Malcolm Clarke

and

Andrew Whetnall

Subject matter: s 14 Freedom of Information Act 2000

Cases considered:

Ahilathirunayagam v Information Commissioner EA/2006/0070

Independent Police Complaints Commission v Information Commissioner
EA/2011/0222

Voges v Information Commissioner and TfL EA/2011/0076.

Coggins v Information Commissioner EA/2007/0130

Wise v Information Commissioner EA/2009/0080

Welsh v Information Commissioner EA/2007/0088.

Betts v Information Commissioner EA/2007/0109.

Gowers v IC and London Borough of Camden EA/2007/0114

Burns v IC and Lancashire County Council Lancashire Fire and Rescue Service
EA/2011/0085 and 0158

Rigby v IC and Blackpool NHS Trust EA/2009/0103; [2011] 1 Info LR 643

Young v IC EA/2009/0057; [2011] 1 Info LR 658

Graham v Information Commissioner [2012] 1 Info LR 121

Ainslie v Information Commissioner & Dorset CC EA/2011/0097

Conway v Information Commissioner EA/2011/0224

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Decision Notice dated 29 June 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

- 1 Section 1 (1) of FOIA provides that:

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.

- 2 Section 14 (1) of FOIA provides that:

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

Request by the Appellant

- 3 The Information Commissioner in his Decision Notice (DN) of 29 June 2011 has correctly set out the background to this appeal and we have adopted that description:
- 4 On 8 January 2010 the complainant wrote to the public authority naming three of its employees. As to these three employees he requested information regarding their training in the following areas:

- (a) Equality and Diversity Matters
 - (b) Freedom of Information and subject access requests
 - (c) The scope of LSC funding.
- 5 In a letter dated 2 February 2010 the public authority confirmed it held the information requested. The public authority listed various training modules and courses related to equality and diversity matters. The public authority then stated that the three named employees had completed the said modules and attended the courses. The public authority provided a copy of the training records for the three named employees and also provided a copy of training material.
 - 6 The complainant, by way of a letter dated 4 February 2010, refuted the public authority's suggestion that it had provided the requested information to him and asked it to review his decision.
 - 7 In a letter dated the 8 March 2010 the public authority informed the complainant that the review constituted a fresh consideration of his request. In relation to the training activities undertaken by the three named employees it considered that the criteria under section 14(1) were satisfied and therefore it would not communicate the requested information to him.
 - 8 On 13 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

The Commissioner's Decision

- 9 The chronology of the Commissioner's investigation is set out in detail in the Commissioner's DN.
- 10 The Commissioner served a Decision Notice dated 29 June 2011 in

relation to this matter in accordance with s. 50 of the Act. The Commissioner found that section 14(1) of the Act was engaged and that that the public authority dealt with the request for information in accordance with the Act, save that it had failed to provide a timely response it breached section 17(5).

The Appeal to the Tribunal

- 11 On 26 July 2011 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal challenged the Commissioner's Decision Notice on grounds that the Commissioner erred in finding that section 14(1) of the Act was engaged.

The Questions for the Tribunal

- 12 The Tribunal judged that the sole question for them was to consider whether the Appellant was, on the balance of probabilities, 'vexatious' within the meaning of s14(1) FOIA.

Evidence & Submissions

- 13 The Tribunal heard oral evidence from Mr Makin, who is the managing partner of the Appellant firm, and from Mr Steve Winfield from the Legal Services Commission. The Tribunal also considered a considerable number of witness statements submitted by the Appellant. The attendance of these witnesses was not required by the Respondents although it was made clear that this was on the basis that the Respondents did not accept the truth of the contents of these statements but rather they questioned their relevance. The Tribunal also considered a large number of documentary exhibits. The totality of the evidence, which was lengthy although not always relevant, has been summarised in this judgement.

14 The Tribunal also received and heard extensive submissions from all the parties on the appropriate approach to the term 'vexatious'. These submissions were very lengthy and they have again been summarised rather than reproduced in full in this judgement. All the written and oral submissions were however considered by the Tribunal in detail.

15 On the issue of 'vexatious' the Commissioner submitted:

a) *The term "vexatious" should be given its ordinary and natural meaning in the context in which it is used: see e.g. Ahilathirunayagam v Information Commissioner EA/2006/0070 Independent Police Complaints Commission v Information Commissioner EA/2011/0222,*

b) *The Oxford English Dictionary (2nd edition, volume XIX, page 586) defines "vexatious" as "causing, tending or disposed to cause vexation". "Vexation" is defined as "the state or fact of being mentally troubled or distressed, in later use especially by something causing annoyance, irritation, dissatisfaction or disappointment".*

c) *The Commissioner's Guidance properly reflects the meaning of section 14(1), when it describes the key question as being "whether the request is likely to cause unjustified distress, disruption or irritation".*

d) *In order to assist public authorities in answering that key question, the Commissioner's Guidance identifies five relevant considerations:*

- *Could the request fairly be seen as obsessive?*
- *Is the request harassing the authority or distressing to staff?*
- *Would complying with the request impose a significant burden in terms of expense and distraction?*
- *Is the request designed to cause disruption or annoyance?*

- *Does the request lack any serious purpose or value?*
- e) *They are not, and are not intended to be, a substitute for the statutory language. They are intended to promote consistency in decision-making, and to help public authorities ensure that they take into account all legally relevant considerations when reaching their decision. The Commissioner does not suggest that all of these factors must be present in order for a request to be regarded as vexatious. If any of these factors is present then that is a consideration in favour of finding that the request is vexatious. The Guidance suggests that it is likely that more than one of the questions would have to be answered in the affirmative, in order for the request to be vexatious: but this is a rule of thumb rather than an attempt at formulating a strict legal test.*
- f) *The Tribunal has recognised the relevance of these factors on a number of occasions: see e.g. Voges v Information Commissioner and TfL EA/2011/0076.*
- g) *The question is whether a request is vexatious, rather than whether the requester is vexatious. There is no mechanism for an individual to be treated as being the FOI equivalent of a “vexatious litigant”, so as to lose his right to make requests to a specific public authority or to public authorities generally. Each request needs to be considered on its own merits. But that does not mean that requests can be viewed in isolation. A request needs to be looked at in its context and history, and by reference to the previous course of dealing between the requester and the public authority: see e.g. Coggins v Information Commissioner EA/2007/0130; Wise v Information Commissioner EA/2009/0080. It follows that it may be proper to treat a request as vexatious, even if the same request made by a different individual would not be vexatious.*

h) Thus a request which, viewed in isolation, is unobjectionable, can still be vexatious because of the previous course of dealing between the requester and the public authority: see e.g. Welsh v Information Commissioner EA/2007/0088. Likewise, a request that on its face is not burdensome to reply to may nevertheless be vexatious because of the further correspondence to which any response is likely to give rise: see Betts v Information Commissioner EA/2007/0109.

16 The LSC submitted:

- a) FOIA does not define the term “vexatious”. The term has, however, been analysed and applied by Tribunals on a number of occasions. At the outset, the LSC highlights these principles:*
- b) It is legitimate to take into account the background and context of the request: see for example Gowers v IC and London Borough of Camden (EA/2007/0114). Indeed, a request will rarely be vexatious when considered in isolation.*
- c) Identity and purpose can be very relevant in determining whether a request is vexatious: Welsh v IC (EA/2007/0088).*
- d) The request and its context should be assessed objectively rather than subjectively: Burns v IC and Lancashire County Council Lancashire Fire and Rescue Service (EA/2011/0085 and 0158)*
- e) Different Tribunals have taken different (though by no means contradictory or mutually exclusive) approaches to vexatiousness. Some have applied the Commissioner’s multi-factoral guidance. Others have preferred simply to apply the dictionary definition of the term in a “common sense” way. The LSC says that, whatever approach one takes, s. 14(1) plainly applies in this case.*

- 17 Like the Commissioner the LSC also referred to the Commissioner's 5-point guidance on 'vexatious'.

The LSC further submitted:

A number of Tribunal decisions have endorsed the above questions as offering useful guidance: see for example Rigby v IC and Blackpool NHS Trust (EA/2009/0103); [2011] 1 Info LR 643. No single factor is decisive, and not all of the above conditions need to be met in order for a request to be vexatious. The Tribunal in Young v IC (EA/2009/0057); [2011] 1 Info LR 658 approved the approach of the Tribunal in Rigby.

- 18 The LSC made fairly extensive reference to the case of Rigby:

In Rigby, the Tribunal offered the following additional guiding principles.

(i) S. 14(1) is concerned with whether the request is vexatious in terms of the effect of the request on the public authority, and not whether the applicant is vexatious.

(ii) "Vexatious" is to be given its ordinary meaning, i.e. it refers to activity that is likely to cause distress or irritation.

(iii) The focus of the question is on the likely effect of the activity or behaviour and whether it is likely to vex.

(iv) For the request to be vexatious, there must be no proper or justified cause for it. The LSC submits that this must mean "no proper or justified cause for that request in its particular form".

(v) The request must be examined in context, taking into account the history of the applicant's relationship with the public authority, and the number and subject matter of previous requests.

(vi) The standard for establishing that a request is vexatious should

not be set too high, nor too low. The judgment that s. 14(1) calls for is one of balancing the need to protect public authorities from genuinely vexatious requests on the one hand, without unfairly constraining the legitimate rights of individuals to access information.

The Tribunal in Rigby considered that the factors to be considered may include the following.

(i) whether the request forms part of an extended campaign to expose alleged improper or illegal behaviour, and that campaign is not well founded or stands no reasonable prospect of success;

(ii) where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;

(iii) where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and/or where the applicant's purpose is to argue rather than obtain information;

(iv) where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority;

(v) where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before and is, in effect, the pursuit of a complaint by alternative means;

(vi) where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority;

(vii) where providing the information requested previously has tended to trigger further requests and correspondence making it unlikely that this request will result in a resolution of the correspondence.

- 19 The Appellant also made extensive reference to the Commissioner's 5-point guidance on 'vexatious' but contended that the question - *Does the request lack any serious purpose or value?* - was the most important

factor and could 'trump' the other factors if 'serious purpose or value' was found.

- 20 In the Appellant's evidential submissions the Appellant contended that the classification of his FOIA request by the Legal Services Commission (LSC) was a decision taken in bad faith stemming from a history of antagonism shown towards the firm by the LSC over a substantial period. Mr Makin on behalf of the Appellant referred the Tribunal to a number of incidents which he considered demonstrated this history of antagonism.
- 21 The Appellant further contended that the FOIA request could not be properly categorised as vexatious when it had a serious purpose and value. The Appellant, in his written submissions, stated:

Clearly the Appellant had very serious and important purpose; compelling reasons for this particular request. RM [Robin Makin] explained this extensively in evidence, but to summarise, he wished to verify the level of knowledge of:

- (a) Discrimination law – had raised issues about orthodox Jewish interests and gender discrimination [There was a contractual obligation on the Appellant to assist LSC complying with their obligations in this regard]*
- (b) Sections 19 & 20 of the Access to Justice Act 1999 – The ignorance of the LSC in respect of such matters caused considerable distress and prejudice to RM's clients [by way of illustration see witness statement of Mr and Mrs Dunne].*
- (c) FOIA & DP training – It was clear that the LSC had not complied with previous requests – breach of their statutory duty and matters had been taken up with the ICO. The LSC had been put on the first list of public authorities that had failed to respond to FOIA requests and had claimed to the*

ICO in respect of one request by the Appellant that it has been overlooked.

22 To further illustrate the serious purpose of the FOIA request the Appellant referred the Tribunal to a number of cases he had handled which he indicated had, at least in part, prompted the particular FOIA request. Mr Makin for the Appellant was understandably anxious about some of his clients being identified in the proceedings and we do not intend, consequently, to refer to these cases in any detail.

23 In his evidential submissions the Commissioner, referring to his own guidance, submitted that:

- the request could fairly be seen as obsessive;
- the request was harassing the authority or distressing to staff; and
- complying with the request would impose a significant burden in terms of expense and distraction.

24 On 'obsessive' the Commissioner referred, inter alia, to the following:

- *The Liverpool regional office correspondence logs (1/C80-C85) showed 142 separate items from 6th November 2007 up to and including the FOI request on 8th January 2010. This included numerous complaints: as the summary at 1/C85 shows, there were many more complaints from ERM in 2007 and 2008 than for all other Merseyside providers put together.*
- *The table of FOI and DPA requests at 1/C75-79 showed 44 separate requests from 2nd October 2000 to 4th December 2009. Of these, 33 were made during 2007-2009.*

- *The table to complaints made to the LSC's Central Complaints Handling Unit showed 22 complaints from 5th January 2005 to 9th June 2009 (1/C93).*

- 25 On 'harassing' and 'distressing' the Commissioner referred to the '*history of focusing his correspondence, queries and complaints on named individual employees of the LSC*' as evidenced by Mr Winfield.
- 26 On 'significant burden' the Commissioner submitted that he '*was right to conclude that the request of 8th January 2010 would impose a significant burden, since on past history any answer was likely to lead to further correspondence and additional requests*'.
- 27 The LSC supported the Commissioner's analysis on the Commissioner's 5-point guidance but also contended that the Appellant's FOIA request had no serious purpose or value:

As to the lack of serious purpose or value ... Mr. Winfield says:

"In my view, this particular request – for what training in 3 specific areas those named individuals had received and when – would not be of any serious value in helping the Appellant to determine whether or not these individuals had actually carried out their duties properly. Therefore, even if he had a legitimate ground of complaint against those individuals (and I was not aware of any such grounds), I could not see how this information could reasonably assist."

- 28 The LSC also made extensive submissions as to how adopting a 'dictionary' definition of 'vexatious' would also lead to the conclusion that this particular FOIA request was vexatious.

Conclusion

29 The Tribunal first considered its approach towards the term 'vexatious'. The Tribunal were very grateful to all the parties for the work they had put into this point. The submissions we received were detailed and quite exhaustive. The Tribunal reached the following conclusions on this issue:

a) The Tribunal did not consider itself to be in any way bound by the Commissioner's 5-point approach to this issue which appears in the Commissioner's 2008 guidance. Indeed the Tribunal felt that there was a compelling counter-argument that the Commissioner's guidance should not even guide the Tribunal's deliberations since this might have the appearance of giving submissions from one party a higher status than those from the other parties. The Tribunal effectively decided to put the Commissioner's guidance 'to one side'.

b) The Tribunal noted the approach taken by other FTTs in relation to 'vexatious'. The Tribunal found some of these analyses to be helpful although not, of course, binding. The Tribunal found the following analysis from the Rigby case, of the factors to be considered, of particular assistance:

(i) whether the request forms part of an extended campaign to expose alleged improper or illegal behaviour, and that campaign is not well founded or stands no reasonable prospect of success;

(ii) where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;

(iii) where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and/or where the applicant's purpose is to argue rather than obtain information;

(iv) where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority;

(v) where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before and is, in effect, the pursuit of a complaint by alternative means;

(vi) where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority;

(vii) where providing the information requested previously has tended to trigger further requests and correspondence making it unlikely that this request will result in a resolution of the correspondence.

c) Ultimately the Tribunal considered that it should give 'vexatious' its ordinary and natural meaning. The Tribunal noted the OED definition - as "causing, tending or disposed to cause vexation". "Vexation" is defined as "the state or fact of being mentally troubled or distressed, in later use especially by something causing annoyance, irritation, dissatisfaction or disappointment".

30 The Tribunal then considered the evidence it had heard in this matter. The Tribunal noted or concluded the following:

a) The Appellant's case was presented in a fashion which did not always greatly assist his case. There was a responsibility on the Appellant to establish on the balance of probabilities that his FOIA request was not vexatious. There was therefore an obligation on the Appellant to put forward a positive case on this point. However the Tribunal felt that the vast majority of the Appellant's case was taken up with somewhat generalised attacks on the other parties.

- b) Mr Makin, on behalf of the Appellant, persistently made assertions unsupported by evidence - for example his claim that the LSC were planning to remove him as liaison manager.
- c) The Appellant did not challenge in any coherent way the contents of LSC's evidence in relation to the number and nature of calls made and the quantity of complaints and other correspondence submitted to the LSC. In the absence of any coherent challenge the Tribunal accepted the accuracy of this material. In particular, the Tribunal concluded that the respondents claims that many of the complaints tended to focus on individual members of staff, sometimes in a threatening way, and that answers to correspondence or requests for information, very often led to extensive supplementary requests, were well-founded.
- d) The Tribunal could find no evidence at all of the LSC engaging in a vendetta against the Appellant. Indeed the Tribunal felt that the evidence it heard positively indicated that there was no such campaign. The Tribunal noted in particular the manner in which the LSC had initially responded to the Appellant's FOIA request and also noted the manner in which Mr Winfield had arranged for a telephone bar imposed on the Appellant to be lifted.
- e) The Tribunal considered that the Appellant's assertion that the FOIA request was related to legitimate concerns raised on behalf of the firm, its clients or Mr Robin Makin personally to be extremely tenuous. The Tribunal accepts that the Appellant possibly did have some legitimate concerns as described at para 21 above but could not see how a request for the details of training received by the three named individuals at the LSC took any such concerns forward.

- f) Accordingly the Tribunal found that there was no serious purpose at all behind the Appellant's FOIA request.
- g) In this context the Tribunal concluded that, on the balance of probabilities, the FOIA request had certain characteristics which rendered it vexatious, namely:
 - (i) The nature and extent of the Appellant's preceding correspondence with the LSC suggested an obsessive approach.
 - (ii) Providing the information requested previously had tended to trigger further requests and correspondence making it unlikely that this request would result in a resolution of the correspondence.
 - (iii) The appellant's purpose in the FOIA request was to argue rather than obtain information.
 - (iv) The FOIA request targeted named individuals and was likely to cause them distress
 - (v) Persisting with this and other FOIA requests imposed a disproportionate financial and administrative burden on the LSC although this request in isolation was not particularly burdensome

31 Our decision to dismiss this appeal is unanimous.

[Signed on the original]

Angus Hamilton DJ(MC)

Tribunal Judge

3 August 2012

'Decision Notice' on the opening sentence of page 3 and paragraph 16(e) amended on 10 August 2012 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009