



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0055-7

ON APPEAL FROM:

The Information Commissioner's Decision Notices FS 50550588, FS 50551392 and FS50551403

Dated: 3 February 2015

Appellant: Oxford Phoenix Innovation Ltd

Respondent: The Information Commissioner

Date of hearing: 17 July 2015

Venue: Seacourt Tower, Oxford

Representation:

Appellant: Orde Levinson

Respondent did not appear

Tribunal discussion: 23 September 2015

Before

HH Judge Shanks

Judge

and

Rosalind Tatam and Anne Chafer

Tribunal Members

Date of Decision: 3 November 2015

Subject matter:

Freedom of Information Act 2000

s.14	Vexatious or repeated requests
s.40	Absolute exemption: <i>Personal data</i>
s.41	Absolute exemption: <i>Confidential information</i>
s.44	Absolute exemption: <i>Prohibitions on disclosure</i>

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below:

- (1) Appeals 2015/0055 and 2015/0056 are dismissed;
- (2) Appeal 2015/0057 is allowed in part and the following substituted decision notice is issued in relation to the request for information made on 20 March 2014.

SUBSTITUTED DECISION NOTICE

Public authority: **The Medicines and Healthcare Products Regulatory Agency**

Name of Complainant: **Oxford Phoenix Innovation Ltd**

The Substituted Decision

The Public Authority did not deal with the Complainant's request for information made on 20 March 2014 in accordance with FOIA in that it failed properly to consider the effect, in relation to the prohibition in section 237 of the Enterprise Act 2002, of the fact (a) that Jbol Ltd may have ceased to be in existence and (b) that Mr Levinson had consented to the disclosure of information relating to his affairs.

Action Required

The Public Authority is to review its records and inform the Complainant whether it now holds the information requested on 20 March 2014 and to supply the Complainant with any such information which it holds and has not already supplied to him which it is not prohibited from disclosing under section 237 of the Enterprise Act 2002 and is not exempt under sections 40(2) or 41 FOIA by 16.00 on 27 November 2015. It is to confirm to Complainant in writing at the same time that, in so far as it seeks to withhold information under section 44 FOIA and section 237 of the Enterprise Act 2002, it has considered the effect of (a) and (b) above.

Dated 3 November 2015

REASONS FOR DECISION

Factual background

1. Orde Levinson is an inventor and entrepreneur. He invented a sterile midstream urine sample collecting device called the “Whiz Midstream” (or “Cleancatch”) which was manufactured and supplied by his company JBoI Ltd. A report produced for the NHS Centre for Evidence-based Purchasing (CEP) in January 2008 concluded that, compared with the conventional collection methods, the device was more hygienic, significantly reducing spillage of urine, and that it would potentially save costs for the NHS (in particular because fewer re-tests would be required). He tells us that there was nevertheless hostility towards his device from parts of the NHS as well as from the manufacturers of ordinary urine sample containers, namely Sterilin and RBI.

2. In late October 2008 Mr Levinson informed the Health Protection Agency (HPA) that those containers were being marketed wrongly labelled as sterile. He says that the HPA’s response to the concerns he expressed was simply to change the requirements of the relevant specification without consultation on 11 November 2008. This led to extensive judicial review proceedings brought by JBoI Ltd against the HPA for which permission was obtained in March 2010 but which ultimately led to costs orders being made against JBoI Ltd which, following hearings before the costs judge, amounted to £60-70,000.

3. Mr Levinson says that his complaints about the urine containers and hostility to his own product led to a conspiracy to drive him out of business. He says that there was a meeting in March 2009 attended by representatives of the HPA, the Department of Health and the Medicines and Healthcare Products Regulatory Agency (MHRA) (which is an executive agency of the Department responsible for enforcing the Medical Devices Regulations 2002 (SI 2002/618)) at which these bodies decided how to proceed against him. He compares this meeting to the Wannsee conference at which senior Nazis discussed the plan to eliminate the Jews.

4. There is no doubt that in 2009 the MHRA started an investigation into both the Whiz Cleancatch and another device marketed by JBoI Ltd called the “Whiz Freedom” and the compliance of those devices with the requirements of the 2002 Regulations. This led to JBoI Ltd and Mr Levinson personally being prosecuted by the MHRA and to a trial at City of Westminster Magistrates’ Court between 9 and 16 May 2011. Both defendants were acquitted and applied for costs. JBoI Ltd ended up having to bring a judicial review to challenge an aspect of the District Judge’s decision on costs.

5. Mr Levinson says that as a consequence of the MHRA’s investigations and prosecution, which for obvious reasons put off investors, and the costs order arising from the judicial review against the HPA, JBoI Ltd went into liquidation sometime around 2012, although for some reason he was unsure exactly when. The position now is that Mr Levinson personally owns the intellectual property rights in his devices, a new company he set up called Oxford Devices Ltd bought the stock and the trading rights of JBoI Ltd and his new company Oxford Phoenix Innovations Ltd (Phoenix), the Appellant in this case, acquired all the litigation rights. It seems, however, that he has not yet been able to exploit his invention in the way he had hoped to do.

FOIA requests

6. In December 2010 Mr Levinson, acting through JBoI Ltd, made a request to MHRA under FOIA seeking information about the outcome of a complaint he had made about the Sterilin urine container. MHRA refused to supply the information in reliance on section 44 FOIA (prohibitions on disclosure) read with European Directive 93/42. Mr Levinson complained to the Information Commissioner maintaining that the relevant prohibition arose under a different Directive (98/79). The Commissioner upheld the position of the MHRA and there was an appeal to this Tribunal (2011/0199). That appeal was initially dismissed by David Farrer QC on the basis that it did not matter which European Directive applied but JBoI Ltd appealed successfully to the Upper Tribunal which on 26 October 2012 remitted the matter to this Tribunal where it was carried on by Phoenix as successor in title.

7. The matter came before Judge Warren in 2013. He ordered MHRA to be joined to the appeal. There was, it seems, considerable confusion on the part of MHRA as to whether the prohibition on disclosure they relied on arose under European Directive 93/42 or 98/79 or (as they later maintained) section 237 of the Enterprise Act 2002. As we indicate below, we are clear that the relevant prohibition does indeed arise under section 237 of the Enterprise Act 2002 read with the Medical Devices Regulations 2002 and that the whole extensive debate in appeal 2011/0199 is and always was a “red herring”.
8. The appeal was finally listed for hearing before Judge Warren in March 2014. At the hearing an order for disclosure of some information was made by consent, the MHRA having apparently obtained consent from Sterilin for that disclosure (which had the effect of negating the prohibition in the Enterprise Act). Mr Levinson told us that he was surprised that following the issuing of the decision by consent the Tribunal did not proceed to give a ruling, which he said would have vindicated the position that he had adopted on the relevant prohibition on disclosure; given his obvious intelligence and experience of legal matters, we were ourselves surprised that he should have been surprised by this turn of events.
9. Following the hearing in March 2014, Phoenix made more than twenty applications to the Tribunal, including applications for costs. There was a hearing which led to a full written decision by Judge Warren dated 23 October 2014 which is in our papers. Judge Warren dismissed an application to set aside the consent decision, rejecting a suggestion that Phoenix had been pressurised into agreeing the consent order and making the point that it was important that the litigation be brought to an end, Phoenix having obtained all the disclosure it sought. He dismissed a series of applications which the Tribunal had no jurisdiction to grant. He dismissed a series of applications seeking the referral of the MHRA to the Upper Tribunal for contempt: he found that although there were imperfections in their conduct of the litigation they did not come anywhere near the threshold of behaviour which constitutes contempt. He refused an application for costs against the MHRA, rejecting entirely an allegation of malicious, corrupt and improper behaviour and observing that they had struggled to identify the

legal basis on which they were operating but that they had a serious burden of confidentiality which arose under the Enterprise Act 2002 and that they had succeeded in settling the case on the basis of the distributor's consent to disclosure. An application for costs against the Treasury Solicitor on the basis that they were aware of a previous "fraudulent private criminal prosecution" was also dismissed.

10. Meanwhile, following the hearing in March 2014 Mr Levinson, acting through Phoenix, also made a number of further requests under FOIA addressed to the MHRA which are the subject of these appeals.
11. On 20 March 2014 he made a request also containing 12 questions relating to the actions taken by the MHRA against himself and JBoI Ltd concerning the Whiz Midstream and Freedom products. The response to that request led to a complaint to the Commissioner under section 50 FOIA and to his decision notice FS50550588 dated 3 February 2015 in which he upheld the MHRA's decision to withhold certain information in reliance on sections 40(2) (personal data), 41 (information provided in confidence) and 44(1)(a) (prohibitions on disclosure), read with Part 9 of the Enterprise Act 2002. Appeal **2015/0057** challenges that decision notice.
12. On 21 March 2014 he made a request for information relating to his complaint made to the MHRA on 16 January 2009 against RBI that its container was incorrectly labelled as "sterile". The request contained 12 questions. Oddly, the first question asked whether the complaint was made by JboI Ltd and the second asked what the substance of the complaint was: those were both matters of which Mr Levinson was well aware. In decision notice FS50551392 dated 3 February 2015 the Commissioner upheld the MHRA's decision to withhold certain information requested in reliance on sections 40(2) (personal data) and 44(1)(a) (prohibitions on disclosure), read with Part 9 of the Enterprise Act 2002. Appeal **2015/0056** challenges that decision notice.
13. In the course of its initial reply to the request of 21 March 2014 made on 15 April 2014 the MHRA said that the file in the RBI matter had been closed on 13 March

2009 and that the policy at the time was that if no prosecution case was raised after an initial investigation any paper file would be destroyed after three years. Following that response on 16 April 2014 Mr Levinson wrote to the MHRA asking nine questions relating to that policy. On 19 April 2014 he asked a further five questions and on 30 April 2014 a further three on the same topic. On 14 May 2014 the MHRA responded by saying they would not reply to these requests on the grounds that they were vexatious. The Commissioner upheld that position in his decision notice FS51551403 dated 3 February 2015. Appeal **2015/0055** challenges that decision notice.

14. On 16 May 2014 the MHRA completed a review in relation to the request made on 21 March 2014. In the review document it was stated that, contrary to what had been said in the reply of 15 April 2014, the paper file on the complaint about RBI was in fact still in existence and had been in storage at an off-site facility. It was said that this was an honest mistake based on the fact that the policy was unwritten and systems were not in place to ensure that intended disposal dates were adhered to.

The course of the appeals

15. The appeals have had a far from ideal procedural history. Mr Levinson's notices of appeal are, it seems characteristically, very long and diffuse and raise many points which are irrelevant and/or not within the jurisdiction of the Tribunal (they raise respectively 55, 26 and 34 grounds of appeal spread over many closely typed pages). The MHRA did not apply to be (and was not) joined as a respondent to the appeals. For some reason Mr Levinson was left to prepare the bundles for the Tribunal and they run to nearly 1,200 pages. It was anticipated that the Commissioner would prepare a "closed bundle" containing the information which had been withheld by the MHRA under section 44 of FOIA but on 3 July 2015 he informed the Tribunal that the MHRA had told him that despite extensive searches they had been unable to locate that information. It was said that the relevant person at the MHRA who had dealt with the requests had retired overseas and could not be contacted. Unsurprisingly, this only served to feed Mr Levinson's suspicions about the MHRA.

16. The Information Commissioner chose not to attend the hearing which was arranged for 17 July 2015 in Oxford for Mr Levinson's convenience. Mr Levinson addressed the Tribunal at length but we were of the view at the end of the hearing that we needed more help on the statutory framework under which MHRA worked and on the statutory bar to disclosure of information on which they relied and, given the nature of the section 44 exemption, we directed that further written submissions be supplied on these points by the Commissioner although he had not attended the hearing. After yet further directions addressed to the Commissioner seeking further clarification and further submissions all round (which finally rested with Mr Levinson's dated 18 September 2015), we deliberated by phone on 23 September 2015.
17. We should also record that in the course of the post-hearing exchanges, on 13 August 2015, the Commissioner received an email from the MHRA stating that they had continued to search "other record archives and [had] located a number of files (attached) to support our response to the questions posed below ...". The questions listed below were questions 2, 3, 4 and 11 in relation to the request of 20 March 2014 which is the subject of appeal 2015/0057; question 2 had sought the identity of the person who had made the complaint about the Whiz Midstream product. The email concluded by saying "I hope this is helpful in answering the outstanding questions from Mr Levinson/the Tribunal..." That unfortunately indicated that the person now dealing with the matter had little idea what was going on. The Commissioner forwarded a copy of the MHRA email to the Tribunal along with the enclosures stating that the MHRA had made further investigations as to what information it held electronically and inviting the Tribunal to make an order under rule 14(6) that it should not be shared with Mr Levinson. Save for the name of the writer of the MHRA email and for the answer to question 2 the Tribunal was of the view that there was no good reason to withhold the email or the enclosures from Mr Levinson and they were duly disclosed. He was also given an opportunity to make further submissions on this material in writing. This series of events has served again, perhaps understandably, to feed Mr Levinson's suspicion and mistrust of the MHRA yet further.

18. Notwithstanding this sorry story we are satisfied that Mr Levinson and Phoenix have had a fair hearing. Mr Levinson was able to address us at some considerable length on 17 July 2015 and we have done our best to consider any points which might assist him or Phoenix in spite of the inevitable difficulties which arise from him being unrepresented and in particular the long, diffuse and often irrelevant nature of the written material he has put before us. It is right to say that in the interests of proportionality (as required by the “overriding objective”) we have not dealt expressly with many of the points he has raised: that does not mean we have simply ignored anything he has said or written.
19. We now set out the legal framework as we understand it to be and then consider each of the three requests which are the subject of these appeals in turn.

Legal framework

20. The MHRA is, as we have said, an executive agency of the Ministry of Health which acts on behalf of the Secretary of State in relation to the enforcement of the Medical Devices Regulations 2002. Those Regulations were made by the Secretary of State in the exercise of his powers under the European Communities Act 1972 in order to implement European Directives 90/385, 93/42 and 98/79, which relate to various types of medical device. The Regulations were also made under other powers, including section 11 of the Consumer Protection Act 1987. Regulation 61 which is headed “Enforcement etc” provides as follows:

- (1) Notwithstanding that they were made partly in the exercise of powers other than those conferred by section 11 of the 1987 Act, these Regulations shall be regarded for all purposes relating to enforcement (whether by criminal proceedings, notices, or otherwise) ... as safety regulations as defined in that Act ...**
- (2) ... [the] duty imposed by section 27(1) of the 1987 Act [ie the duty to enforce safety regulations] in so far as it is exercisable in relation to relevant devices ... is transferred to the Secretary of State.**

Thus, the position in English law is that the rules in the European directives relating to medical devices have been implemented by the 2002 Regulations, the Secretary of

State is responsible for their enforcement and they are to be regarded for the purposes of enforcement as regulations made under the Consumer Protection Act 1987.

21. Section 238 of the Enterprise Act 2002 provides that information is “specified” if it:

... comes to a public authority in connection with the exercise of any function it has under or by virtue of ...

(b) an enactment specified in Schedule 14 ...

The list of enactments in schedule 14 to the Enterprise Act 2002 includes the Consumer Protection Act 1987. Thus it is clear that information which comes to the MHRA as agent for the Secretary of State in connection with the enforcement of the 2002 Regulations is “specified” for the purposes of the Enterprise Act 2002. Section 237 of the Enterprise Act 2002 provides:

(1) This section applies to specified information which relates to -

(a) the affairs of an individual

(b) any business of an undertaking.

(2) Such information must not be disclosed-

(a) during the lifetime of the individual, or

(b) while the undertaking continues in existence

unless the disclosure is permitted by this Part [of the Act].

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene [that subsection or any other enactment]

Section 239 of the Act provides:

(1) This Part [of the Act] does not prohibit the disclosure by a public authority of information held by it to any other person if it obtains each required consent.

(2) If the information was obtained by the authority from a person who had the information lawfully and the authority knows the identity of that person the consent of that person is required.

- (3) If the information relates to the affairs of an individual the consent of the individual is required.**
- (4) If the information relates to the business of an undertaking the consent of the person for the time being carrying on the business is required.**

22. The main exemption relied on by the MHRA in dealing with the requests made on 20 and 21 March 2014 is the absolute exemption provided by section 44 of FOIA which says:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it

(a) is prohibited by or under any enactment,

(b) is incompatible with any EU obligation

Given the statutory framework set out above there can be no doubt that the MHRA is entitled (indeed obliged) by virtue of section 44(1)(a) FOIA to withhold information coming to it in connection with its function of enforcing the Medical Devices Regulations 2002, unless one of the exceptions in the Enterprise Act 2002 applies. In those circumstances any question as to whether a particular device comes properly under European Directive 93/42 or 98/79 (or is even a medical device at all) is beside the point, as is the particular wording of any provision in the directives relating to non-disclosure of information by enforcing authorities. Mr Levinson has spent a great deal of time and effort in this and the earlier appeal arguing over these points but in our view they are, as we have said, simply a “red herring”.

23. The MHRA also relied on section 40(2) of FOIA (which provides an absolute exemption) in relation to specific requests made on 20 and 21 March 2014 for the identity of the MHRA officers who dealt with and investigated the JBoI Ltd products and the RBI container respectively. Section 40(2) provides an absolute exemption for information which is the personal data of any person if its disclosure would contravene a data protection principle. As a very general rule in this area, disclosure of personal data will not contravene a data protection principle if the disclosure:

is necessary for the purposes of legitimate interests pursued by the ... third ... parties to whom the data are disclosed, except where the [disclosure] is unwarranted in any particular case by reason of prejudice to the rights and freedoms and legitimate interests of the data subject

[see: the first data protection principle in Schedule 1 to, and para 6(1) of Schedule 2 to, the Data Protection Act 1998].

In a case like this, that will involve a consideration of the nature of the role and the seniority of the officers concerned and the utility and importance of the disclosure of the officer's identity.

24. The MHRA also relied on the absolute exemption provided by section 41 FOIA in relation to a specific request on 20 March 2014 for the identity of the person who had complained about the JBol Ltd Whiz Midstream product to the MHRA. Section 41 provides:

(1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person ... and**
- (b) the disclosure of the information to the public ... by the public authority holding it would constitute a breach of confidence actionable by that or any other person.**

The MHRA's case is that complainants to regulatory bodies like them make their complaints on the basis that their identity will remain confidential; this was expressly stated on their website and the relevant entry (annexed to a witness statement by Stephen Wilson of the MHRA made in the course of appeal 2011/0199) is among our papers. We accept that case and we also accept that, in general, no specific detriment need be shown to found an actionable breach of confidence provided the information is to be disclosed to someone the complainant would prefer not to know it (see: *Attorney General v Guardian Newspapers (No2)* [1990] 2 AC 109 at 255-6). In these circumstances, in the absence of any countervailing weightier public interest in disclosure of the information, the complainant would have an actionable breach of confidence against the MHRA (see *ibid* at 282E)

25. Finally, in relation to the requests made on and after 16 April 2015 which are the subject of appeal 2015/0055 the MHRA relied on section 14 of FOIA which provides that FOIA “ ... does not oblige a public authority to comply with a request for information if the request is vexatious.” In construing this provision the Tribunal has in mind the guidance of the Upper Tribunal and the Court of Appeal in the case of *Dransfield v Information Commissioner and Devon CC* [2012] UKUT 440 (AAC) and [2015] EWCA Civ 454, and in particular that it is appropriate to look at a request under FOIA in the context of previous dealings between the requester and the public authority in considering whether the current request is vexatious.
26. We turn to consider the individual appeals in the order in which the underlying requests for information were made.

Appeal 2015/0057 (request made on 20 March 2014)

Section 44

27. This request raised 12 questions about the MHRA’s investigation into Jbol Ltd’s Whiz Midstream and Freedom products and the prosecution of Jbol Ltd and Mr Levinson, including, by question 2, the identity of the complainant in relation to the Whiz Midstream and, by question 8, the identity of the officers who dealt with the complaint (note questions 1 and 13 appear both to ask for the full investigation file). It is clear that the whole of this request was for information which came to the MHRA in connection with its functions under the Medical Devices Regulations 2002 and that it all relates to the business of Jbol Ltd and the affairs of Mr Levinson so that it is “specified information” for the purposes of section 237(1) of the Enterprise Act 2002.
28. However, in so far as the information requested related only to the business of Jbol Ltd, it seems very likely, based on what Mr Levinson told us about its financial position, that the company had by the time of the request ceased to be in existence so that section 237(2)(b) of the Enterprise Act 2002 would mean its disclosure would not have been prohibited. And, in so far as the information related only to the affairs of Mr Levinson personally, it is clear that he gave a valid consent to disclosure under

section 239(3) in the document at page 7 of the bundle relating to appeal 2015/0057 so that, unless another person's consent was also required under section 239(2), the information could be disclosed by reason of section 239(1). (We note that the consent Mr Levinson purported to give on behalf of Jbo1 Ltd at page 8 could not have been a valid consent given that it had gone into liquidation and, as we surmise, ceased to exist).

29. We do not think that the Commissioner fully appreciated the possible effect of sections 237(2)(b) and 239 on the case. He appears to have taken the view that all the information requested would necessarily relate to the business or affairs of the complainant. We do not think that can be right: once the complaint was made any investigations or further action based on it were, we think, unlikely to have related to the business or affairs of the complainant, though they may also have related to the business or affairs of others. He does not refer at all to Mr Levinson's form of consent. We are therefore of the view that this appeal should be allowed in part. We consider further below the appropriate remedy.

Section 41

30. The MHRA also relied on section 41 in relation to the identity of the complainant (question 2). As we have said, we consider that the identity of a complainant in circumstances like these is confidential and we accept that the mere fact of disclosure to others would be sufficient detriment to give rise to an actionable breach of confidence. We have not seen anything which might suggest there was any public interest in disclosure. We therefore uphold the Commissioner's decision that the MHRA were entitled to withhold this information on the basis of section 41.

Section 40(2)

31. The MHRA relied on section 40(2) in relation to the identity of the officers who dealt with the complaint (question 8). There can be no doubt that this information is the personal data of the officers concerned. We cannot see that it was necessary for the purposes of any legitimate interest which Mr Levinson or Pheonix were pursuing to

know the identity of the officers and, in any event, the disclosure would have been unwarranted since there was a risk, based on his conduct generally, that Mr Levinson would use the information in a way that would cause them unnecessary distress. We therefore uphold the Commissioner's decision on this aspect of the case too.

Remedy

32. The Commissioner only considered questions 2, 3, 4, 8, 11 and 12 in his decision notice. It is not clear to us to what extent Mr Levinson has accepted that the other questions were dealt with by the MHRA satisfactorily nor what information answering the request the MHRA still holds: this applies particularly to the overlapping questions 1 and 13 which seek the full investigation file (which the MHRA say in their answers to the request has already been supplied). We therefore propose to allow the appeal in part and to direct the MHRA to review their answers to the request of 20 March 2014 in the light of the matters we refer to at para 28 and to take the action set out above.

Appeal 2015/0056 (request made on 21 March 2014)

33. The request made on 21 March 2014 was for information about the investigation by the MHRA into the RBI container following JBoI Ltd's complaint, including (in question 12) a request for a full copy of the investigation file. There can be no doubt that all this information was covered by section 237(1) of the Enterprise Act 2002 and there is no reason to think that RBI had ceased to exist or that it had given consent to disclosure of information relating to its business when the request was made. Mr Levinson is wrong to suggest that there was a positive obligation on the MHRA to prove that RBI had withheld consent to disclosure or that other sections in Part 9 of the Enterprise Act 2002 (he mentions sections 240, 241, 241A, 242 and 244 in his notice of appeal) did not allow the information to be disclosed (see: *OFCOM v Morrissey and IC* [2011] UKUT 116 (AAC)). In those circumstances we have no doubt that the MHRA was entitled to withhold all the information requested by Mr Levinson by virtue of section 44(1)(a) of FOIA (although it appears that a certain amount has in fact been supplied to him) and we uphold the Commissioner's decision to that effect.

34. Reliance was also placed by the MHRA on section 40(2) of FOIA in relation to question 6 which asked which MHRA officers dealt with the complaint into the RBI container. For the same reasons as we give in relation to appeal 2015/0057 we consider that the MHRA were also entitled to rely on section 40(2) in withholding that information and we uphold the Commissioner's decision notice to that effect.
35. We therefore dismiss this appeal in its entirety.

Appeal 2015/0055 (requests made on 16, 19 and 30 April 2014)

36. The MHRA refused to deal with these requests on the basis that they were, in context, "vexatious" for the reasons set out in a detailed letter dated 14 May 2014 and the Commissioner upheld their position in his decision notice dated 3 February 2015. We went through the contents of the MHRA's letter in detail with Mr Levinson at the hearing and have reviewed the whole matter ourselves.
37. There is no doubt that these requests arise out of the on-going dispute between Mr Levinson and the MHRA which we have described above, and he did not really argue to the contrary. He was quite open in saying that he believed there was a conspiracy against him and that the MHRA "... had been at war..." with him since 2009. Although he has been acting through different companies we also have no doubt at all that Mr Levinson is personally responsible for all the litigation and all the FOIA requests and his complaints about the fact that the Information Commissioner had designated him and not Phoenix as the complainant have no substance. Although he took exception to some of the figures produced we are quite satisfied that he has made something like 50 FOIA requests over this period, including the six multi-part requests which are referred to above. He did not argue with the suggestion that he sent 36 emails to the MHRA between 18 and 27 March 2014 after the hearing before Judge Warren and, as we have said, Phoenix made no fewer than twenty applications after that hearing which were heard on 23 October 2014. Although he took exception to the suggestion that he had used "abusive or aggressive language" in the course of

his dealings with the MHRA and pointed out that some of the statements relied on by the Commissioner were taken out of context and arose some years before 2014, he was quite content to repeat to us during the hearing that the meeting in March 2009 which we refer to in para 3 above was like the Wannsee conference (which must be regarded as somewhat provocative) and it is clear that he has been very free in making serious accusations against the MHRA and its staff (and against the Commissioner) in the context of his FOIA requests without really being able to substantiate them.

38. We recognise that Mr Levinson may be sincere in his belief that there is a conspiracy against him. We recognise that he may be sincere in saying that he has genuine concerns about public health issues which are motivating him to seek information from the MHRA. We recognise that the MHRA has not always “covered itself in glory” in its dealings with him and that this may well have fed his existing suspicions. And we recognise that what was said about the paper file in response to his FOIA request of 21 March 2014 was odd and gave rise to legitimate questions (see paras 13 and 14 above). But, looking at the whole picture objectively as disclosed in the papers and through the course of these proceedings, we are of the firm view that, by 16 April 2014, his continued use of the right to seek information under FOIA in the context of his on-going dispute with the MHRA, in the remorselessly persistent and aggressive way we have described, had become a manifestly unjustified, inappropriate and improper use of the procedure. He was in effect “carrying on the war by other means” and the MHRA were entitled to say: “Enough is enough.”

39. We therefore agree with the Commissioner that these requests were vexatious and we dismiss the appeal in relation to that finding.

Disposal

40. For the reasons set out above we dismiss appeals 2015/0055 and 2015/0056. We allow appeal 2015/0057 to the limited extent indicated and issue a substituted decision notice to reflect our conclusions.

41. We note again that Mr Levinson raises numerous points in his notices of appeal which we have not expressly referred to. We do not consider that any of them would affect the outcome of these appeals: they are either wholly irrelevant (e.g. complaints about the reference to him personally as the complainant rather than his company, Phoenix; complaints about the Commissioner misleading tribunals in previous cases; complaints about irrelevant factual findings) or they relate to the European directives and the misconceived arguments to which we refer to in para 22 above.

42. This decision is unanimous.

HH Judge Shanks

3 November 2015