



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

Appeal No: EA/2016/0004

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50586835
Dated: 4 January 2016**

Appellant: Gerry Rowland

Respondent: The Information Commissioner

On the papers

**Before
HH Judge Shanks
and
Henry Fitzhugh and Suzanne Cosgrave**

Date of decision: 6 June 2016

Subject matter:

Freedom of Information Act 2000 (FOIA)
Section 14 (Vexatious or repeated requests)
Section 16 ((Duty to provide advice and assistance)
Code of Practice under section 45.

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows this appeal and substitutes the following Decision Notice for that issued by the Commissioner on 4 January 2016.

SUBSTITUTED DECISION NOTICE

Public authority: **Ministry of Defence**

Complainant: **Gerry Rowland**

The Substituted Decision

For the reasons set out below the Complainant's request for information made on 16 April 2015 was not vexatious and the Public Authority was not entitled to rely on section 14 of FOIA in answer to it.

Action Required

The Public Authority must by 12 August 2016 supply him with the information requested and/or serve a suitable notice under section 17.

HH Judge Shanks

6 June 2016

REASONS FOR DECISION

Factual background

1. This appeal concerns an issue relating to military justice which arose in the Army during 2012. It emerged that some soldiers may have been wrongly advised of the consequence of a finding of guilt to certain offences at a Court Martial or Summary Hearing. Such findings were required to be recorded as convictions on the Police National Computer but soldiers were not informed of this. The criminal record so produced could have serious implications when they left the Army and sought work or leave to remain in the country. An internal Army memo dated 27 July 2012 headed "PS2(A) DISCIPLINE POLICY – 8/2012 EFFECT OF A GUILTY FINDING AT COURT MARTIAL OR SUMMARY HEARING" which has been disclosed in the course of this appeal draws attention to this issue stating:

A recent case has highlighted the fact that unit staff are not aware of the implications of a finding of guilty for certain military offences. Soldiers may have been wrongly advised of the implications of a finding of guilty by unit staff who were unaware of the facts and had failed to check ...

2. It appears that the Appellant, Mr Rowland, is concerned about the military justice system and its fairness and transparency. Between 29 April 2014 and 16 December 2015 he made eight requests for information under FOIA on the subject.
3. On 15 January 2015 Mr Rowland requested the Ministry of Defence to supply him with copies of all emails sent and received by Army PersSvcs-PS2-Pol-SO1 over the past three years. That post-holder is responsible for reviewing and revising Army policy in the fields of discipline, values, standards and complaints. The MOD responded on 12 February 2015 by saying that they would not comply with the request because it was vexatious in that it was unfocussed and would place an unreasonable burden on them. They also stated that if he were to refine his request to seek information on a specific subject they would consider it in the normal way.
4. On 19 February 2015 Mr Rowland refined his request by asking only for emails containing various words in the title or body of the email. Those words included Service Justice Board, Summary Hearing, Unfair and Disgruntled. Again the MOD refused to comply with the request relying on section 14 and mentioning the burden

involved in identifying documents across a number of different file systems within the MOD.

5. On 16 April 2015 Mr Rowland wrote to the MOD again saying that he wished to refine his request so that it did not place an unreasonable burden on the department. He said this:

My understanding is that specific cases have resulted in media and political pressure on the Service Jurisdiction System. Initially I would like to focus on a document sent on 27 July 2012 in which SO1 Disc Pol PS2(A) advises of the affect of guilty finding at a Court Martial or Summary Hearing. The document highlights Soldiers may have been wrongly advised of the implications of a guilty finding by unit staff and may be unaware that a conviction may be recorded on the Police National Database.

Please provide this document, and all other documents held by SO1 Disc Pol PS2(A) that deal with the specific issue of Soldiers failing to have been advised of a conviction being recorded on the Police National Database.

The MOD responded on 15 May 2015 again relying on section 14 and the unfocussed nature of the request and the unreasonable burden it would place on the department.

6. Mr Rowland sought a review and the MOD responded on 16 June 2015. The MOD upheld their position. Under a section headed "Burden on the Authority" they said that he had made 11 requests for information on the topic of service justice in 8 months (it is apparent that the three mentioned above are included in this figure); they said that the email account would have sent and received more than 30,000 emails over three years on a range of topics; they said that responding to the request would involve a significant burden even in the refined form; they said in effect that the requests were a "fishing exercise" with no real value to Mr Rowland and no wider public interest and meeting the burden would be disproportionate and that the request was an improper use of the FOIA procedure.
7. Mr Rowland complained to the Commissioner who upheld the MOD's position that the request was vexatious on the basis that, even in relation to the refined request of 16 April 2015, the volume of information which fell to be considered would result in a disproportionate burden of work creating disruption and distress which was not

justified, particularly when balanced against the purpose and value of the request, and matters of distress and harassment referred to by the MOD in the course of his enquiry. Mr Rowland appeals against the Commissioner's Decision Notice dated 4 January 2016.

The issue on the appeal

8. We must consider, based on all the material now before us (including in particular the MOD's memo for the Commissioner dated 6 October 2015) and concentrating on the final refined version of Mr Rowland's request, whether the Commissioner was right to conclude that it was vexatious. In so doing we have regard to the jurisprudence on the question of what a vexatious request is, in particular the decisions of the Upper Tribunal and the Court of Appeal in *Dransfield* ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454); we take into account all the circumstances, in particular the motive of the requester, the value or serious purpose of the request, the burden imposed by the request and the harassment or distress to staff, and decide whether the request represents a "manifestly unjustified, inappropriate or improper use of a formal procedure" and is therefore vexatious.

The motive of the requester

9. We have no reason to doubt Mr Rowland's assertion that his motive in making the request is "... to highlight shortcomings within the Service Justice System". We do not draw the inference from the list of previous requests that his motive has become one of harassing the MOD or causing any individual harm or distress. Although the request of 16 April 2015 is not perfect we accept that it was a genuine attempt to "refine" the earlier requests. We do not think that the MOD's characterisation of it as a "fishing expedition" is relevant or fair. We do not feel able to reach any views on the points raised about Mr Rowland's possible connections with others who have made requests about Army justice.

The value or serious purpose of the request

10. It is clear from the memo of 27 July 2012 that there was a serious issue which arose in relation to the justice system in the Army. Whatever its shortcomings as a request it is clear that Mr Rowland wishes to know more about the background to this memo and the cases that gave rise to it. It seems to us that that indicates that the request has a serious purpose and that it may also have value to the public.

11. The MOD says in response that the issue was all dealt with in 2012. That may be so but does not in our view detract from the serious purpose or value of the request: the release of information about past problems makes public authorities more accountable, throws light on their workings, can help avoid future problems and may help those who have been victims of some injustice to find out about it.

The burden imposed by the request

12. This is the nub of the MOD's case. They say that the relevant post holder (SO1 Disc Pol PS2(A)) will personally have to search through his emails, opening and reading documents that answer to search terms, in order to find all documents held by him dealing with the specific issue of soldiers failing to be advised about convictions being recorded on the police computer and that this process will take 180 days.

13. That seems to us on any basis a wildly exaggerated position. But in any event we consider that if steps were taken to talk to Mr Rowland and to clarify or narrow down further what he is seeking (as required in any event by section 16 of FOIA and paras 8 to 11 of the Code issued under section 45(5)) and if some further thought and imagination were applied to the matter the request could be dealt with in a way that was not unduly onerous to the post holder or the MOD as a whole. We note that the memo of 6 October 2015 states that the post holder has said that he believes that a search would identify 50 emails dealing with the issue "... which were largely generated from casework ...". We take it from that that he is pretty familiar with the area concerned and has a good idea what information is going to be available. It appears from the MOD's memo that the post holder's work is normally shared with two assistants but that the support is currently unavailable because of sickness and difficulty filling a post: those, it seems to us, are problems which the MOD needs to deal with and which should not affect Mr Rowland's position.

14. Before leaving this topic we note that the MOD expressly stated when dealing with the request that they had decided to rely on section 14 and not section 12 of FOIA, which exempts public authorities from providing information where the cost of compliance with a request will exceed certain limits. In the circumstances it does not seem to us that it would be open to them to rely on that section in relation to this request at some later date.

Harassment or distress to staff

15. Apart from the general burden on the relevant post holder which we have considered above, the MOD has also referred confidentially to related matters which have caused personal distress and harassment to the post holder. We have considered those matters and, although we sympathise with his personal position, we cannot conclude that they are in any way the responsibility of Mr Rowland. We do not therefore consider them relevant in considering whether his request was vexatious.

Conclusion

16. Looking at the overall picture we do not think that Mr Rowland's request for information of 16 April 2015 was properly classified as vexatious and we must therefore allow his appeal and issue a substituted Decision Notice. We will give the MOD two months either to supply the requested information or serve a suitable section 17 notice. Such a notice cannot rely on either section 14 or section 12.

17. Although he has succeeded on the appeal we would urge Mr Rowland to take a reasonable approach hereafter and to further clarify and narrow down what he wants if possible and to have fair regard to the limited resources of the public authority.

18. We also note the number of earlier requests he has made, the rather unfocussed nature of the three requests we have considered and the fact that the last request says "*Initially*, I would like to focus on [the] document sent on 27 July 2012". All that indicates that he may be approaching the line where further requests may become vexatious.

19. This decision is unanimous.

HH Judge Shanks

6 June 2016