



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0206

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ALISON LOWTON AND MARION SAUNDERS

Between

RONALD ASHLEY WILCE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Decision

The decision of the Information Commissioner is upheld. No action is required by the Driver and Vehicle Standards Agency.

NB Numbers in [square brackets] refer to the open bundle

Introduction

1. This is the appeal by Mr Ronald Wilce against the rejection by the Information Commissioner (the Commissioner) on 20 September 2018 of his complaint that the Driver and Vehicle Standards Agency (DVSA) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
2. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).¹
3. In her decision, the Commissioner noted that DVSA is not a public authority under FOIA. It is an executive agency of the Department for Transport (DfT), which is a public authority. However, she treated DVSA as though it were the public authority. The decision should have been addressed to DfT but nothing turns on that for the purposes of the appeal. Neither DVSA nor DfT has been made a party to the appeal.

Factual background

4. Mr Wilce joined DVSA as an Enforcement Support Officer (ESO) in January 2015. He had previously worked for HMCTS as a court bailiff. As an ESO he was largely on the road, with a base in Exeter.
5. Since early on his employment, Mr Wilce has been in dispute with DVSA about what his normal working hours are. There was no dispute that he was expected to work 37 hours a week but it is not clear, he says, when DVSA could expect him to work. His terms and conditions, part of the Modernised Employment Contract (MEC) introduced in 2014 (before he joined), are silent on the question. DVSA's normal core business hours appear to be 8am to 5pm. Mr Wilce says that, during his interview, he was told that his hours were 8am to 4.30ish, but a manager later informed him he could be required to work any time between 7am and 7pm (it was after this that he sought formal clarification). He says that, on another occasion, he was informed by his area manager that there were no normal working hours for him.
6. Mr Wilce had extensive discussions with this employer's HR department but to no avail. In October 2015, he submitted a formal grievance [59]. This did not resolve matters and he later brought a claim in the Employment Tribunal (ET). His complaints included [42]: (i) DVSA failed to respond to his grievance; (ii) it failed to include in his statement of employment particulars his normal working hours, as required by section 1(4)(c) Employment Rights Act 1996 (ERA 1996);² and (iii) it

¹ SI 2009 No 1976

² Section 1 ERA provides:

(1) *Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.*

...

(4) *The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of –*

failed to ensure that the particulars required by (*inter alia*) section 1(4)(c) were available in a single document with other prescribed particulars, contrary to section 2(4).³

7. The claim was dealt with in two tranches. On 18 October 2017, the ET judge gave a short judgment to the effect that DVSA should indeed have included in a single document the prescribed information (including his normal working hours). On 20 April 2018, the judge noted that Mr Wilce had withdrawn his claim in relation to section 1(4)(c) because the parties had agreed to vary his terms and conditions by incorporating a collective agreement with DVSA's minority recognised trade union, Prospect, which clarified core hours and overtime requirements. These varied terms were favourable to Mr Wilce. The judge also ruled that Mr Wilce's claim that sickness provisions were not reasonably accessible to him – because he did not, he said, have time to look at DVSA's intranet during normal working hours – should be struck out because it had no reasonable prospect of success. Mr Wilce withdrew one of his other claims.
8. Mr Wilce does not appear to claim that he was asked to work more than 37 hours without overtime a week or outside DVSA's core business hours. His complaint is that DVSA were not clear as to what his normal working hours were.
9. It appears that there is a broader dispute between DVSA and its employees over hours, with strike action mooted, but that is not directly relevant to Mr Wilce's request for information.

The request and DVSA's response

10. On 1 November 2017, Mr Wilce made the following request of DVSA:

'Please provide me with information concerning Terms and Conditions that were implemented or changed by the introduction of the "DfT modernising employment contract" (MEC) within the DVSA and in particular, and changes to Enforcement Staff "normal working hours" within the meaning of the Employment Rights Act 1996. Please also provide me with details of collective agreements in place since December 2014 concerning "normal working hours" for DVSA Enforcement Staff, within the meaning of the Employment Rights Act 1996.'

11. On 15 November 2017 [152], DVSA provided the MEC Offer [154] but explained that it was not specific to groups of staff such as Enforcement. However, in relation to 'normal working hours', the table at Point 15 under *Out of hours payment*, it explained, stated 'work outside of normal contracted hours, between 7pm and 7am, will receive equal to 25% of their plain-time hourly rate'.

12. The same day Mr Wilce wrote again [153]:

...
(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours) ...'

³ Section 2(4) provides:

'(4) The particulars required by section 1(3) and (4)(a) to (c), (d)(i), (f) and (h) shall be included in a single document'

'... there is no mention of any collective agreement details, as requested. Accordingly, is the Agency saying that there are no collective agreements in place "which directly affect the terms and conditions to the employment"?'.

He requested the following information in a later email the same day:

'Please also provide me with all relevant documentation which states what "contractual hours" and "normal working hours" ACTUALLY are/have been for enforcement staff, since January 2015' (his capitalisation).

He noted that there appeared to be no specific mention of any contractual hours, or of any change to them.

13. DVSA provided some further information on 20 November 2017 [175]. It clarified that the MEC did not propose any changes to employees' working hours and that there were currently no collective agreements in place regarding contractual hours or normal working hours for DVSA enforcement staff.
14. On 21 November 2017 [176], Mr Wilce pointed out that he had not been sent the MEC but rather a copy of the formal offer. He said:

*'I am therefore seeking a copy of **the substantive MEC document** i.e. the collective agreement between the DVSA and the TUS [trade unions] that gave effect to MEC to prove the situation either way'.*

*If MEC did **not** change contractual hours, was there any agreement in place prior to the introduction of MEC stating what contractual hours were, or, has there never been contractual hours? If so, I would like copies of the relevant documents' (his emphasis).*

He refused to accept that there were no collective agreements in place regarding contractual hours or normal working hours for DVSA enforcement staff and suggested that DVSA HR were practising a degree of deception. He referred to the requirements about normal working hours in section 1 ERA.

15. With another email the following day [177], Mr Wilce attached various documents which, he said, rebutted the claim that there were not agreements in place or other relevant documents relating to 'normal working hours'. He said that requests for numerous documents from DVSA had been ignored. He had made a formal complaint to the Cabinet Office and would be doing the same to the Commissioner.
16. On 23 November 2017 [180], Mr Wilce made a yet further request of DVSA:

'1 How many employees has the DVSA supplied with an amended s1 ERA 1996 statement stating that a) there (sic) contractual hours have changed to 0700-1900hrs or b) that there were no contractual hours whatsoever and/or c) that there were no normal working hours within their new employment contract (MEC). And, if it was done, when was it done

2 How many employees has the DVSA supplied with a s1 ERA 1996 statement stating that a) there (sic) contractual hours are to 0700-1900 hrs or b) that there are no

contractual hours whatsoever and/or c) that there are no normal working hours within their employment contract (MEC)'.

17. DVSA replied on 20 December 2019⁹⁷ [181]. It did not hold the requested information because it was DfT which supplied contract statements and amendments to such statements. It added that outstanding matters in Mr Wilce's emails of 15 and 21 November were not considered to be requests under FOIA as they sought clarification on points already responded to under FOIA; Mr Wilce should address the points to HR.
18. On 6 February 2018 [183], DVSA wrote again to Mr Wilce. It referred to an email from Mr Wilce of 15 January 2018 as another FOIA request. However, there is no email of that date in the bundle and neither Mr Wilce nor the Information Commissioner's Office has been able to identify it. It may be that DVSA intended to refer to the request of 15 November 2017. The agency said that it regarded Mr Wilce's requests as similar in nature, with a number made within a short period and with several supplementary requests, and vexatious. They were obsessive. It outlined some of the tests the Commissioner applies in assessing whether a request is vexatious and again referred Mr Wilce to HR.
19. On 8 February 2018 [184], Mr Wilce sent another email to the FOI team: 'To clarify, I have been trying to ascertain my own normal working hours now for over 3 years. Have you been told yours, as per s1 Employment Rights Act 1996'.

Proceedings before the Commissioner

20. Mr Wilce made a complaint to the Commissioner on 9 February 2018 [185]. He said that he had been trying to find out from his employer what his normal hours of work were. This was the reason for his FOIA requests.

The Commissioner's decision

21. In her decision dated 20 September 2018, The Commissioner upheld DVSA's reliance on section 14(1) FOIA. It was clear, she said, that Mr Wilce had a personal grudge with regard to MEC and its implementation, and that he had made repeated and overlapping requests to more than one public authority relating to the same issue. He had chosen to ignore advice about where to direct his queries and had instead persisted with FOIA requests. The requests lacked serious purpose because of his failure to follow that advice.
22. Moreover, the tone of Mr Wilce's correspondence was clearly critical and was almost certain to cause, at the least, irritation. She did not know all the details but she was aware of other proceedings covering the same subject-matter and therefore considered that Mr Wilce was being unreasonably persistent. He had adopted an unreasonable entrenched position. She saw the case as a clear example of inappropriate use of FOIA.

The Grounds of Appeal and the Commissioner's Response

23. In his **Grounds of Appeal [11]**, Mr Wilce referred to the ET proceedings and annexed considerable documentation relating to them. The information he had requested from DVSA – presumably, his normal working hours – was finally provided in May 2018, following three years of ‘delay and obfuscation’. The Commissioner was wrong to say that he had not heeded advice to contact the HR department: he had done so for three years. He denied that he had a grudge against his employers. DVSA had decided the requests were vexatious ‘purely in order to avoid providing the information requested, having put continuous pressure on [him] to drop his ET claim’. It was DVSA, not him, which had adopted an unreasonable entrenched position
24. In her **Response [103]**, the Commissioner said she appreciated that knowing normal working hours was important for an employee. However, the value of information was not determinative in the context of section 14(1) FOIA (see below). The Commissioner noted that Mr Wilce had made five FOIA requests, and sent other correspondence, in the three-month period from 1 November 2017 onwards. His requests were ‘continual and overlapping’ and fell ‘within a wider pattern of behaviour [with] no reason to suspect [he] would be satisfied were these requests to be answered (as evidenced by [his] email to DVSA dated 9 February 2018 [probably a reference to his email of 8 February 2018]). Indeed it is highly probable that [Mr Wilce] would continue to pursue these matters through whatever channels he could identify’. DVSA was faced with the concurrent ET claim as well as the FOIA requests.

Discussion

25. This is an unusual case in that Mr Wilce made a number of requests for information in a relatively short period, supplemented by questions and comments, and DVSA has provided some of the information sought but yet is relying on section 14(1) FOIA. Section 14(1) permits a public authority not to process a request where it considers it to be vexatious. Clearly, DVSA has processed some of the requests, at least in part. It appears now to regard simply those parts of the requests which it has not answered as vexatious.
26. The Tribunal will consider whether section 14(1) FOIA applies to all the requests in question, even where information has been provided.

The law on vexatiousness

27. It is trite law that, for section 14(1) to apply, it is the request which must be vexatious, not the requester. Although the motives and behaviour of the requester may be relevant, vexatiousness looks at the effect on a public authority of having to deal with a request. The central question is: is the public authority vexed by the request?
28. The leading case is the Court of Appeal decision in *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another* (collectively *Dransfield*).⁴ The only substantive judgment was given by Lady Justice

⁴ [2015] EWCA Civ 454 (14 May 2015)

Arden. She cited,⁵ with apparent approval, this passage from the decision of Judge Wikeley in the Upper Tribunal:

'27. ... I agree with the overall conclusion that the [Tribunal] in Lee [Lee v Information Commissioner and King's College Cambridge] reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".

28. Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms'.

29. Arden LJ then said:

'68. In my judgment, the UT [Upper Tribunal] was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross [Counsel for the Commissioner] to accept that proposition, which of course promotes the aims of FOIA.

...

72. Before I leave this appeal I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by

⁵ Paras 18 and 19

30. There is, therefore, a high hurdle for a public authority to cross before it may rely on section 14(1). All the circumstances of the case have to be considered. On one side of the equation, these include the burden on the public authority, the motive of the requester and any harassment or distress caused to staff by the request. On the other side is the value of the information to the requester or the public at large. However, it is not a simple weighing of the two sides of the equation. Where information has value, that is likely to be a particularly important factor, because of the need to promote the aims of FOIA to facilitate transparency in public affairs, accountability of decision-making and so forth.
31. However, as the Commissioner says in her Response the fact that a request has value is not determinative. In *Parker v Information Commissioner*, Upper Tribunal Judge Knowles said: ⁶ ‘The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. It is clear from the Court of Appeal’s decision that the public interest in the information which is the subject of the request cannot act as a trump card so as to tip the balance against a finding of vexatiousness’.

Application of the law to the facts of the case

32. There is no doubt In the Tribunal’s judgment that, by submitting a number of FOIA requests, intermingled with supplementary questions and comment, over a short period Mr Wilce imposed a burden on DVSA over and above that which is to be reasonably expected from FOIA. According to the letter of 11 September 2018 from DVSA to the Commissioner, Mr Wilce also sent more than 10 emails to various persons within DfT and the Cabinet Office on the same topic over the same period. Mr Wilce has not helped his case by sometimes deploying sarcasm in some of his correspondence with DVSA.
33. Equally, he says that he had been trying to get to the bottom of what his normal working hours are for three years. That is his motive for the requests. He is clearly, and understandably, frustrated that it has proved so difficult. Some of the information he requested ranged wider than his normal working hours but it was all designed to elicit what those hours were: he was building his own case and wanted the information for no other purpose.
34. The key question is whether the information sought has sufficient value to set against the burden imposed on DVSA. Arden LJ made it clear that the fact that information is desired for personal reasons can be sufficient for the section 14(1) evaluation. Parliament has recognised that employees are entitled to know their normal working hours, and that is understandably important for Mr Wilce, albeit there does not seem to have been a problem in practice.
35. The Tribunal has nevertheless concluded that his requests do not have sufficient value, for this reason. At the time of his requests, he had already initiated the ET

⁶ [2016] UKUT 0427

proceedings. One of his principal complaints was that his statement of employment particulars did not set out what his normal working hours were.

36. In fact, the ET had already given its first ruling, on 18 October 2017, prior to the first of Mr Wilce's requests on 1 November. Disappointingly, it appears to have taken DVSA several months to clarify what his normal working hours were. It was only on 20 April 2018 that the parties incorporated into Mr Wilce's contract the collective agreement reached with Prospect which appears to clarify core hours and overtime requirements.
37. The fact remains, however, that the appropriate vehicle to pursue his employment rights was the ET claim. It is clear that the 18 October 2017 ruling was preliminary only: the claim continued, including the complaint about normal working hours. The FOIA requests were an unnecessary distraction. If Mr Wilce was going to succeed in establishing what his normal working hours were, it would be through the ET once he had chosen to bring proceedings there. That must have been clear to him at the date of his first FOIA request. It was the reason he had initiated the ET proceedings. They took some time – and were preceded by long, fruitless discussions with DVSA, and a formal grievance – but it was never likely that the FOIA requests would produce information which the ET proceedings would not.
38. This is not to say that FOIA cannot be used where information might be available in separate legal proceedings. In *Dr Yeong-Ah Soh v Information Commissioner and Imperial College London*,⁷ the requester brought proceedings in the ET shortly after her FOIA request. One of the factors persuading the Tribunal that her request was vexatious was that she could apply to the ET for the information she had requested under FOIA. The Tribunal said: 'It would be inappropriate for this tribunal to justify disclosure in the public interest of material for the purpose of litigation before another tribunal when that Tribunal [the ET] (which is far better placed to understand the issues it needs to resolve) is in a position to make that order'.
39. On appeal to the Upper Tribunal, Judge Stockman said that that was the wrong approach:

' 87. ... The issue for the FTT was not to consider whether it was appropriate for it to order disclosure – but whether it was an inappropriate use of the FOIA to request it. By this comment, the FTT clearly appears to make the possible availability of the requested information through the ET a factor in its decision.

88. If it did, in my view, it was not entitled to do so. The issue before it was whether the applicant had a serious motive in requesting information. This was the assessment of the merits of her potential claim to the ET and its potential use as evidence in those proceedings. It might well have been that, upon sight of the requested information, she would have decided not to bring or to discontinue ET proceedings. The fact that she might have obtained the same material by way of an application to the ET does not diminish the seriousness of the purpose for which it was sought. In any event she had no right to the requested material through the ET proceedings, but a possibility that an employment tribunal judge might have ordered disclosure'.

⁷ [2016] UKUT 0249 (AAC) (10 March 2016)

https://assets.publishing.service.gov.uk/media/57865c2ce5274a0da900010e/GIA_0116_2014-00.pdf

40. However, the situation in the present case is materially different. In *Soh*, the information in question might have supported Dr Soh's ET claim but it was not the subject of the claim. The ET would have had a discretion whether to order disclosure. In Mr Wilce's case, the purpose of his FOIA request was to find out his normal working hours: this was also the subject of his ET claim. Section 11(1) ERA 1996, which Mr Wilce will have invoked, provides:

'Where an employer does not give an employee a statement as required by section 1, 4 or 8 (either because he gives him no statement or because the statement he gives does not comply with what is required), the employee may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned'.

41. Even if the ET did not itself determine what his normal hours of work were, but instead confined itself to ruling that those hours should have been included in the statement of particulars, it was overwhelmingly likely that DVSA would then specify the hours. Indeed, this is what eventually happened. The FOIA requests added nothing.

42. The Tribunal has therefore concluded that Mr Wilce's requests had little or no value and, set against the significant burden which they and the surrounding correspondence represented for DVSA, they were therefore vexatious. In the phrase approved by UTJ Wikeley in *Dransfield*, they represented a 'manifestly unjustified, inappropriate or improper use of a formal procedure'.

43. The position might well have been different had Mr Wilce chosen to use FOIA instead of, rather than in addition to, the ET. It would rarely be reasonable to expect a requester to embark on separate proceedings. But Mr Wilce had already decided to bring a claim at the ET and that was then where the issue of his normal working hours needed to be, and would be, resolved.

Conclusion

44. For these reasons, the appeal is dismissed. The decision is unanimous.

David Thomas
Judge of the First-tier Tribunal

Date: 04 April 2019

Date Promulgated: 05 April 2019