



Neutral citation number: [2023] UKFTT 512 (GRC)

Case Reference: EA/2023/0014

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

Decided without a hearing

**On: 6 June 2023
Decision given on: 20 June 2023**

Before

**TRIBUNAL JUDGE HAZELOLIVER
TRIBUNAL MEMBER KATE GRIMLEY-EVANS
TRIBUNAL MEMBER MARION SAUNDERS**

Between

DEIRDRE MURPHY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 8 December 2022 (IC-176946-L8P2, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about a historic First-tier Tribunal appeal requested from the Government Legal Department (“GLD”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can 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).

3. On 22 September 2021, the Appellant wrote to GLD and requested the following information (the "Request"):

"I am requesting the following information regarding First-tier tribunal appeal EA/2010/0055 (information rights).

Correspondence between J. Joachin (TSol) and S. Wilson (MHRA) /any other person regarding MHRA submissions (rule 14 application) to the Tribunal in Nov (6-13) 2013 about patient numbers listed in a letter dated 23/10/09, and MHRA response to the Registrars follow up questions about the letter. Correspondence between J. Joachin and S. Wilson from (Dec 17 2013 to Jan 30 2014) concerning the decision to disclose the patient numbers on January 9th 2014.

Correspondence between GLD and MHRA between (Jan1-Feb 20) 2014 about a MHRA rule 14 application dated 21 Jan 2014 concerning Dr. William's expert report.

Correspondence between M. Stock (TSol/GLD) solicitor and his clients/S. Wilson /TSol between (June 20-July 2) 2014, regarding reasons for disclosure of patient numbers in Jan 2014. The clients referred to in M. Stock's email of July 2nd, 2014? A Department, Agency, in addition to the MHRA?

Correspondence between M. Stock/GLD and counsel / MHRA /any third party in preparation for MHRA submissions to the Tribunal confirming that the patient numbers were part of the disputed information and reasons why they were disclosed in 2014, at a Tribunal hearing (17 Dec 2015) and in a written rule 14 application dated 12 Jan 2016.

Any document/pages of a report, that lists fatal reports of individual patients from study sites in countries such as US, Italy, Belgium, Italy, Germany, Pakistan, Thailand and India, (as described by solicitors and others during the appeal). The disclosed patient numbers listed in the letter 23/10/09, (cross referenced to the pages under appeal), belong to patients from three countries, Spain, Hungary and one other country."

4. GLD responded on 30 December 2021 and refused to respond to the Request on the grounds it was vexatious under section 14(1) FOIA. This was upheld on internal review.

5. The Appellant complained to the Commissioner on 20 June 2022. The Commissioner decided that GLD was entitled to rely on section 14(1) FOIA to refuse the Request. The Commissioner took account of GLD's position as set out in the letter advising the Appellant that they considered her request to be vexatious. The Commissioner's view was that there appears to be a common theme to the Appellant's requests to the GLD (and other public authorities), and he considers that they demonstrate a level of unreasonable persistence on the part of the Appellant to pursue their own private grievance, with their apparent motive being to try to reopen matters that have already been scrutinised and decided by the appeal tribunals and which appear to be of interest to the Appellant personally rather than of value to the wider public.

The Appeal and Responses

6. The Appellant appealed on 3 January 2023. Her grounds of appeal are:

- a. The Commissioner did not perform his statutory duties.
- b. The Commissioner provides no evidence to support his assertion that there is a link between previous requests and the current request.
- c. The Commissioner inaccurately describes the subject matter of the current request, insinuating that the fatal events requested was closed information considered by the Tribunals and the correspondence requested relates to 2010 Tribunal proceedings.
- d. The Commissioner relies on irrelevant information relating to another public authority to prove that the request is vexatious.
- e. The Commissioner is wrong when he states there is no public interest in the information and it is just a personal matter.

7. The Commissioner’s response maintains that the Decision Notice was correct, and simply states that the grounds of appeal do not disturb his decision. The response does not engage with the appeal points made by the Appellant. The Appellant submitted a reply which points out that the Commissioner’s response does not explain where the grounds of appeal are flawed.

Applicable law

8. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) 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.

.....

14 Vexatious or repeated requests.

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

.....

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
 the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

9. There is no further guidance on the meaning of “vexatious” in the legislation. The leading guidance is contained in the Upper Tribunal (“UT”) decision in **Information Commissioner v Dransfield** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal (“CA”) in **Dransfield v Information Commissioner and another & Craven v Information Commissioner and another** [2015] EWCA Civ 454 (CA).

10. As noted by Arden LJ in her judgment in the CA in **Dransfield**, the hurdle of showing a request is vexatious is a high one: “...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." (para 68).

11. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.*" (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

12. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

- a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. "*...the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.*" (para 29).
- b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority.*" (para 34).
- c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).
- d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive.*" (para 39).

13. Overall, the purpose of section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" (UT para 10), subject always to the high standard of vexatiousness being met.

Issues and evidence

14. The issue in this case is whether GLD were entitled to rely on section 14(1) FOIA to refuse to respond to the Request.

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, including the appeal, response and Appellant's reply.
- b. Written final submissions from the Appellant.

Discussion and Conclusions

16. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

17. We have some background factual information from the GLD's letter to the Appellant refusing the Request, the Decision Notice, and the Appellant herself. The Appellant says that some of the information provided by GLD is inaccurate. Based on the accounts of the parties, the documents in the bundle, and the published decision in EA/2010/0055, we find the following:

- a. The Appellant made a FOIA request to the Medicines and Healthcare Products Regulatory Agency (the "MHRA") in 2008. This was for mortality information in an MHRA report about a clinical trial of an antibiotic produced by Pfizer. The MHRA report annexed sections of Pfizer's report. MHRA redacted some parts of Pfizer's report when responding to this request on the grounds of confidentiality. The redacted information included patient identification numbers.
- b. The Appellant complained to the Commissioner, who found that section 41 FOIA applied to all of the requested information.
- c. The Appellant appealed to the First-Tier Tribunal in case EA/2010/0055. The Tribunal's initial decision was set aside by the Upper Tribunal and remitted to be considered afresh. The Tribunal was reheard in March 2016. The Tribunal decided that section 41 applied and upheld the Commissioner's decision. The Appellant unsuccessfully sought to appeal this decision.
- d. GLD represented and provided legal advice to the MHRA during the proceedings. There were various hearings, rulings and directions before the final hearing. Patient reference numbers had been disclosed to the Appellant by MHRA in a table contained in a letter dated 23 October 2009. This table was subsequently disclosed by GLD in 2014 during the Tribunal proceedings and was included in the open bundle. There was ongoing confusion about whether the patient numbers were part of the disputed information, and what should be redacted in the open bundle. Directions were made at a hearing on 17 December 2015 that the page containing patient numbers should be removed from the open bundle and kept in a closed bundle as it revealed the withheld information that was the subject of the appeal. The Appellant was also directed to destroy any copies of this page held by her.
- e. The final hearing had been adjourned in October 2015 due to counsel for MHRA being unwell.

- f. In 2016 (during the Tribunal proceedings) the Appellant requested emails between GLD's representative and MHRA's counsel / counsel's clerk regarding EA/2010/0055. GLD provided some redacted emails. The Appellant says she was only provided with emails to counsel's clerk. On 27 June 2018 the Appellant again requested emails exchanged between GLD's representative and counsel. This request was initially refused. On internal review some additional email correspondence with counsel's clerk was discovered by a further search and disclosed, and the Appellant was told there was no other relevant information in the possession or control of GLD which could be disclosed in response to such request.
- g. In 2017 the Appellant sent a FOIA request to GLD for correspondence between GLD and MHRA regarding patient numbers disclosed in a letter dated 23 October 2009 from 2014-2016. This was refused under section 42(1) FOIA (legal professional privilege). The Appellant complained to the Commissioner. The GLD's decision was upheld by the Commissioner in a Decision Notice dated 21 January 2019.
- h. On 1 December 2017 the Appellant sent a FOIA request to the Information Commissioner's Office ("ICO"). This requested a copy of an email from MHRA to the ICO on 20 November 2013, and any internal correspondence and correspondence to the MRHA/GLD regarding the disclosure of patient numbers in the letter of 23 October 2009. This was refused on grounds of vexatiousness, and this decision was upheld by the Commissioner in a Decision Notice on 7 November 2018.

18. We have considered in turn the Appellant's points of appeal.

19. ***The Commissioner did not perform his statutory duties.*** The Appellant complains that the Commissioner did not address GLD's failure to respond to the Request within the statutory time limits. That is not an issue that this Tribunal can deal with. The Appellant has also complained that the Commissioner did not investigate her complaint correctly and did not actually obtain information from GLD before making his decision. Again, this is not an issue that the Tribunal can deal with. Our role is not to question how the Commissioner investigated. We are reviewing the evidence and making our own decision, and we may agree or disagree with the Commissioner's decision.

20. ***The Commissioner provides no evidence to support his assertion that there is a link between previous requests and the current request.*** The Appellant says that there are mistakes in GLD's and the Commissioner's version of events. We have set out our own understanding of events in paragraph 17 above. This is slightly different from some of the information provided by GLD. However, there is a link between this Request and previous requests, because they all relate to what happened at the previous Tribunal. The requests about correspondence all relate to how closed information was treated during the proceedings. The Appellant has asked about this topic before (as set out in paragraph 17(g) above). The final part of the Request asks about additional reports in the context of what was said at the previous Tribunal hearing.

21. ***The Commissioner inaccurately describes the subject matter of the current request, insinuating that the fatal events requested was closed information considered by the Tribunals and the correspondence requested relates to 2010 Tribunal proceedings.*** The Appellant says that the final part of the Request does not relate to redacted information that had already been considered at the previous Tribunal. She says that she is not asking for information that was referred to during the previous hearing. She refers to a letter from Pfizer dated 21 December 2009 (page B60 to 62 in the bundle). This states, "Lastly, we would also reiterate the fact

that the data in relation to the individual fatal reports that were withheld do not relate to any UK patients but to individual patients from study sites outside the UK, including from the US, Italy, Belgium and Germany. The release of these data in the UK in response to this request may be contrary to data privacy and similar laws in those countries.” She says this is wider than the information considered by the previous Tribunal, and also that it relates to a different type of information. The Appellant says that the information covered by the previous appeal was redacted from 9 pages of a report, which only covered patients in Spain, Hungary and one other unidentified country. In the absence of any response to this point from the Commissioner, we accept the Appellant’s position that this part of the Request is not identical to the information that was considered by the previous Tribunal.

22. **The Commissioner relies on irrelevant information relating to another public authority to prove that the request is vexatious.** The Appellant says the Commissioner relied on a different Decision Notice that was a request for “*correspondence associated with a previous Decision by the Commissioner*”, and this has no relevance to the current request. She complains that the Commissioner does not have power to find the current request is vexatious because a previous request to a different public authority was found to be vexatious. The Appellant is correct that the fact requests to other public authorities have been found to be vexatious does not necessarily mean that a request to a different public authority is vexatious. Each request must be judged on its own merits. However, it is permissible to take account of requests to other public authorities if they relate to the same or similar topics. This can shed light on the context and history of a request, and the likelihood that a particular pattern of disproportionate requests is likely to be repeated.

23. The Commissioner has relied on a request to the ICO in 2017 (as set out in paragraph 17(h) above), which was refused on the grounds it was vexatious. This request was for correspondence about the disclosure of patient numbers. It therefore overlaps with the current request to GLD, and the previous request to GLD in 2017 (as set out in paragraph 17(g) above). The current request is not vexatious simply because the previous request to the ICO on essentially the same topic was found to be vexatious. However, the previous request to the ICO is relevant to the context and history of the current request to GLD.

24. **The Commissioner is wrong when he states there is no public interest in the information and it is just a personal matter.** The Appellant says that this is a personal issue for her, but this does not make her request vexatious – the value of the information to the requester is referred to by Lady Arden in *Dransfield*. She also says that GLD is an influential department within central government, and any information that shed light on their tactics during litigation would be of interest to the public. The Appellant has not explained any public interest in the final part of the Request.

25. **Our findings.** We have carried out our own analysis, starting with the Dransfield factors:

- a. **The burden imposed on the public authority by the request.** There have not been numerous requests to GLD. According to the information we have there were two requests about correspondence with counsel (in 2016 and 2018), a request for correspondence regarding patient numbers in 2017, and the current Request in 2021. There is, however, an ongoing pattern of requests about matters arising from the tribunal proceedings in 2016. There is not a high burden in terms of numbers of requests so far, but there is persistence in asking questions about related matters. A previous response to the very similar request in 2017 about correspondence on patient numbers was ruled on by the Commissioner, but nevertheless essentially the same questions have been

asked again. This indicates that the Appellant will continue to ask similar questions even after a response has been provided, which will cause an ongoing burden for GLD in dealing with these requests.

- b. ***The motive of the requester.*** There is nothing to suggest the Appellant has an inappropriate motive.
- c. ***The value or serious purpose.*** We note that this should not on its own indicate that a request is vexatious. However, as part of the balancing exercise it is appropriate to ask whether the request has a value or serious purpose in terms of the objective public interest in the information sought. There is very limited public interest here. The Appellant suggests that any information that shed light on GLD's tactics during litigation would be of interest to the public. We disagree. We do not find that correspondence between GLD and their client or third parties about the handling of closed material in the context of a particular case would be of any genuine public interest. The Appellant has not explained any public interest in the final part of the Request.
- d. ***Any harassment of, or distress caused to, the public authority's staff.*** There is nothing to suggest the Appellant has behaved inappropriately towards GLD staff.

26. We have also taken the holistic and rounded approach described in ***Dransfield***, and looked at the Request in all the relevant circumstances. We find that there is a clear lack of proportionality to the Request in light of the previous course of dealings between the parties.

27. As already noted, there is a pattern of requests to GLD about what happened during the 2016 tribunal proceedings. The current Request is on the same topic. The requests about correspondence overlap with and expand on the 2017 request about disclosure of patient numbers during the proceedings, which had already been refused. The final part of the Request asks for material that was described during the 2016 proceedings. This seems to be a widening of the original request to MRHA in 2008, as is shown by this material being referred to in the letter from Pfizer dated 21 December 2009. It is now addressed to GLD because they represented MHRA in the tribunal proceedings and referred to certain material during those proceedings. Looked at together, the Request is made up of requests which are all about the 2016 tribunal proceedings, addressed to GLD as the legal advisers in that case.

28. The request to the ICO in 2017 is relevant here. This was a further request for correspondence about disclosure of patient numbers during the Commissioner's investigation and tribunal proceedings, again involving GLD and MHRA. Although this is a request to a different public authority, we find that it does shed light on the context and history of the current Request. The Appellant's persistence in asking the same questions to the ICO as to GLD indicates the likelihood that the current pattern of disproportionate requests is likely to be repeated.

29. Taking all of the above matters into account, we find that the Request is vexatious within the meaning of section 14(1) FOIA. The Appellant's persistence in making requests to GLD (in their role as legal advisers) about what happened during the previous tribunal proceedings imposes an ongoing burden on GLD, and there is no real public interest in the information sought. We agree with the Commissioner that the Appellant has an apparent obsession with events during the 2016 tribunal proceedings, and this relates to a private grievance. Looked at in context, the Request is manifestly unreasonable and lacks proportionality.

30. We therefore find that GLD were entitled to rely on section 14(1) FOIA to refuse to respond to the Request.

31. By way of concluding remarks, we did find it disappointing and unusual that the Commissioner did not provide any substantive response to the appeal. We understand that the Commissioner is under considerable resourcing pressure at the moment. However, the failure to address the Appellant's points of appeal at all has meant that this Tribunal has needed to spend considerable time constructing an accurate version of events from other available material.

32. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 19 June 2023