



NCN: [2023] UKFTT 00541 (GRC)

Case Reference: EA/2023/0005

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 19 May 2023

Decision given on: 23 June 2023

Before:
Judge Alison McKenna
Tribunal Member Paul Taylor
Tribunal Member Marion Saunders

SIMON BROWN

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondents

DECISION

1. The appeal is dismissed.

REASONS

Mode of Hearing

2. Although the Appellant initially requested an oral hearing, on 23 March 2023 he requested a determination on the papers. The Respondent and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of this Chamber's Procedure Rules¹.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 184. The Tribunal also considered a number of additional documents provided by the Appellant.

Background to Appeal

4. The Appellant made a request to the Defence Infrastructure Organisation (part of the Ministry of Defence), ('MOD') for disclosure of information about offences committed under certain military bye laws.
5. MOD refused to disclose the requested information on the basis that the request was vexatious within the meaning of s. 14 (1) of the Freedom of Information Act 2000 ('FOIA'). The Appellant complained to the Information Commissioner.
6. The Information Commissioner issued a Decision Notice on 5 December 2022, upholding MOD's reliance on s. 14 (1) FOIA. The Appellant appealed to the Tribunal.

The Law

7. Section 14 (1) of FOIA provides that:

"Section 1 (1) does not oblige a public authority to comply with a request for information if the request is vexatious".
8. The Court of Appeal considered the question of identifying vexatious requests in *Dransfield v Information Commissioner* [2015] EWCA Civ 4543, and approved the approach of the Upper Tribunal, reported at [2012] UKUT 440 (AAC) 4. The Upper Tribunal's approach was 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)*" It also emphasised the importance of adopting a "holistic and broad approach" to the determination of whether a request is vexatious or not.
9. The powers of this Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

¹<https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

*(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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

10. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

The Decision Notice

11. The Decision Notice accepted that there is a serious purpose behind the Appellant’s requests, in seeking to obtain transparency and accountability. However, it also noted that the Appellant is using FOIA as part of a concerted campaign against MOD and that this served to reduce the seriousness of his purpose in all the circumstances of the case.
12. The Decision Notice concluded that the Appellant’s request in this instance had crossed the threshold of what was reasonable so as to engage s. 14 (1) FOIA.

Submissions and Evidence

13. The Appellant’s Notice of Appeal dated 28 December 2022 relied on grounds that:
(i) the Decision Notice was one-sided, accepting uncritically the MOD’s version of events; (ii) there was public benefit in access to the MOD lands; (iii) that he had a serious purpose or motive in requesting the information.
14. The Respondent’s Response dated 3 March 2023 maintained his analysis as set out in the Decision Notice. In response to the grounds, it was submitted that: (i) the first ground fell outside of the Tribunal’s jurisdiction; (ii) the information requested did not assist with the public benefit described; (iii) the motive must be balanced against the burden to the public authority, and, in this case, the burden outweighed the value of the information requested.
15. The Appellant has made a number of lengthy submissions in reply. The scope of his submissions and the other documents submitted is somewhat wider than our statutory remit. He has explained that he represents an organisation known as Trail Action Group (‘TAG’) which campaigns for greater public access to local MOD land, in particular for mountain bikers, and he states that the campaign has significant public support. The Appellant describes TAG’s campaign as aiming to end MOD’s policy of the “prejudicial criminalisation of cycling”. He states that TAG has engaged with local government and Parliamentary representatives over the issue of access, demonstrating its serious purpose. He submits that greater access to the MOD lands is a public benefit because of the health benefits of outdoor

exercise. In relation to this particular information request, he states that there is a concern amongst local people that they could be arrested under military bye laws while using the land, whereas he has received advice that the relevant power of arrest has been repealed so that any such arrest would be unlawful.

16. The Appellant accepts that he had made 33 previous information requests, as submitted by MOD. He submits that they all had a serious purpose and value and that many of them resulted in the disclosure of information useful to his campaign. He submits that the mere volume of requests ought not to be considered a burden on the MOD where the requests have not themselves been vexatious. He submits that the Tribunal has not seen full information about the previous requests, but this is incorrect because a schedule of the requests and responses appears in our bundle at D178.
17. We have received no witness statements in this appeal, but we have seen the correspondence between MOD and the Information Commissioner's Office. We note from this that MOD initially regarded the request with which we are concerned as a repeated request because it is similar to one that it had responded to earlier that same day. However, the Respondent has not relied on it as being a repeated or substantially similar request for the purposes of this appeal.
18. MOD informed the Information Commissioner's Office that the volume of requests made by the Appellant between July 2020 and December 2021 represented a burden on its resources. Further, MOD complained about the harassment of its staff by TAG in identifying them by name in its publications. Further, MOD referred to the Appellant having published an article which states his desire to "bury them in FOI requests". The Appellant has not denied these assertions.

Conclusion

19. It is clear that TAG has engaged in entirely legitimate public campaigning to increase access to MOD lands for cyclists, including lobbying elected representatives and conducting a survey of local attitudes. It is also clear that it will be able to contribute a robust response to the planned consultation about access to the MOD lands which is anticipated. To that extent, we agree that the Appellant's motive in making this request was to further TAG's campaign for greater access.
20. Nevertheless, it is possible for an otherwise legitimate campaign to cross the line into an inappropriate use of FOIA. In this case, we note that the Appellant has campaigned for the healthful benefits of access to open space, but that this clearly expressed public benefit has only a tenuous connection to the information requested on this occasion. We conclude that the value of this request is diminished by the drift away from TAG's core campaign into a tangential issue about the hypothetical use of military bye laws.
21. An otherwise legitimate campaign which seeks to 'bury' a public authority in FOIA requests is, in our view, engaging in an inappropriate use of FOIA. We regard the number of requests made by the Appellant over a relatively short period as excessive and agree with the Decision Notice that it has placed a burden on the MOD. We also accept that the Appellant has engaged in personal harassment of MOD's staff by naming them publicly on TAG's website and criticising their

conduct. He admits in his own submissions to the Tribunal to having tape recorded his interaction with a member of MOD staff.

22. It does not seem to us that the motivational factors relied upon by the Appellant are, in this case, sufficient to outweigh the burden placed on MOD by the volume of his requests, the harassment of its staff, and the reduced value of a request which has a tenuous connection to the main motives of TAG's campaign.
23. We agree with the Respondent that the Appellant's first ground of appeal goes beyond the Tribunal's statutory remit. The remaining grounds of appeal relate to the balancing exercise between the purpose of the request and the burden it places on the MOD.
24. In taking a holistic and broad approach to the issues, we conclude that the request on this occasion did cross the line so as to satisfy the indicia of vexatiousness and that it engages s. 14(1) FOIA. We find no error of law in the Decision Notice and so we dismiss this appeal.

(Signed)

JUDGE ALISON McKENNA

DATE: 22 June 2023

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