



Neutral citation number: [2024] UKFTT 128 (GRC)

Case Reference: EA/2023/0327

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers

Heard on: 23 November 2023

Decision given on: 13 February 2024

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER WOLF
TRIBUNAL MEMBER SHAW

Between

KEITH KENNAUGH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: the Appellant was unrepresented.

For the First Respondent: the First Respondent was unrepresented.

Decision:

The appeal is DISMISSED.

REASONS

Introduction to the Appeal

1. This is an appeal against the Decision Notice of the Information Commissioner (“the Commissioner”) dated 19 June 2023, referenced IC-230120-Q7W5 (“the Decision Notice”), which found that West Yorkshire Police (“WYP”) was entitled to rely on section 14(1) of the Freedom of Information Act 2000 (“FOIA”) in refusing to provide information to the Appellant in response to his request of 10 March 2023 (“the Request”) for information relating to alleged criminal offences reported by the Appellant, on the basis that the Request was vexatious.

The Request

2. The Request was as follows:

“In the light of the revelations by the parliamentary committee into the extent of misconduct by the prime minister during the “partygate” period, we are moved to recall that we reported the offence at the time, but were not given a crime reference number.

We were told by the mayor’s office that you were going to pass the case to the Metropolitan police, in which case, they will have given you a new crime reference number.

In either case, what is the crime reference number, or if there is no such number, then what is the reason that no crime was recorded?

...

P.S. I have similar questions relating to the other two crime reports passed to you by the mayors office, given the confusion that occurred last time I asked you two things at once, how would you like me to approach this?”

3. On 13 March 2023, the Appellant supplemented the Request as follows:

“ ... Please provide the crime reference number relating to these crimes.”

4. On 31 March 2023, WYP refused the request as vexatious. In summary, it said that: the Appellant’s FOIA requests asking why the Metropolitan Police claimed not have received crime reports, and for explanations as to why WYP

may or may not have taken any action, were unreasonably persistent; the Appellant's requests were frequent and overlapping – for example, since 1 January 2023, WYP had received and processed five FOIA requests, and two requests for internal reviews from the Appellant; as at 31 March 2023, WYP were processing a further two requests, and two requests for internal reviews from the Appellant; to expect WYP to respond to each of the Appellant's requests in conjunction with the volume of other requests received by WYP was unacceptable; to confirm or deny that WYP held any information in relation to crimes the Appellant purported to have reported would indicate that the Appellant had reported a crime, thereby breaching data protection principles; the frequency of the Appellant's requests was unreasonable; the Request was vexatious; WYP would deem any future requests on the same topic as vexatious as they imposed a significant burden on WYP, were designed to cause disruption, related to personal grudges, and were futile.

5. On 3 April 2023, the Appellant sought an internal review of WYP's response. On 24 April 2023, WYP maintained its position as follows:

“Please note that disclosure under the Freedom of Information Act is disclosure to the world and not just to the individual making a request. Your request is very specific and relates to the confirmation of a crime reference number, FOI is not the correct avenue to obtain this type of information. Whilst you may feel we are being obstructive, unfortunately the Freedom of Information Act is a specific legislation which allows individuals to obtain recorded information which enables greater scrutiny and accountability, this however does not extend to personal information.

As per our response there has been a common theme in requests which have become persistent. We have tried to engage and provide you with other channels to obtain the information you are requesting to no avail.

In light of the above I have not upheld your complaint, and any future requests relating to crimes/incidents you state you have reported and/or crimes committed by Parliament/Members of Parliament of this nature will not be responded to.

6. On 28 April 2023, the Appellant complained to the Commissioner. By his complaint, he said that he suspected that the real reason for WYP's refusal of the Request, was that WYP had conspired with the mayor's office to pervert the course of justice.
7. During the Commissioner's investigation, WYP confirmed to the Commissioner that: in 2021, the Appellant had attempted to report to WYP by an online form and via a chat facility in the WYP control room, a number of alleged offences committed by prominent people during the COVID lockdown;

the reported offences had not been committed in the WYP area but in the area served by the Metropolitan Police in London; without the Appellant providing his personal details, WYP was unable formally to process any report of the offences, and the Metropolitan Police would not accept the reports without that information; the Appellant had made a complaint about the call-taker in the WYP chat facility, which had been separately investigated; WYP had received ten FOIA requests from the Appellant connected to State-based crimes and misconduct in public office, in relation to six of which he had requested internal reviews; the Request was the third matter in relation to which the Appellant had pursued a complaint to the Commissioner; several of the Appellant's FOIA requests had sought explanations rather than recorded information; the requests implied that WYP was implicit in alleged criminal behaviour; the motive of the Appellant's requests appeared to be to establish what action had been taken consequent upon the Appellant's reports of alleged offences, which information fell outwith the FOIA regime; taking all these matters together, it was appropriate to characterise the Request as vexatious.

8. The bundle before the Tribunal contained one of the Appellant's online crime reports. In it, he has provided his date of birth as 24 March 1603, his address as Buckingham Palace, London, and in the part of the form headed "Victim's wishes" he had supplied "*a return to democracy and the rule of law*". He summarised the basis of his report as follows:

"It appears that Mr Hancock has misconducted himself on multiple counts. I understand that the Metropolitan Police have stated that they do not intend to investigate his breach of the pandemic restrictions, and I think that is fair enough, except that that breach was an act of misconduct which amounts to an abuse of the public's trust.

The CPS guidelines set out the definition of misconduct in public office as follows:

The offence is committed when: a public officer acting as such;

- wilfully neglects to perform his duty and/or wilfully misconducts himself;*
- to such a degree as to amount to an abuse of the public's trust in the office holder;*
- without reasonable excuse or justification.*

In addition, it appears that the minister has neglected his duty to ensure that government contracts are given to the best contractors, nor that they are properly executed or provide fair value for money. Again, this amounts to an

abuse of the public's trust, and therefore appears to be an instance of misconduct in public office.

Finally, he has accepted financial contributions, which appear to have induced him to perform his duties improperly, contrary to the Bribery Act 2010."

9. WYP confirmed to the Commissioner that: it had informed the Appellant in 2021 that without provision by him of his personal details, WYP could not process his reports of alleged crimes; in relation to a crime where the victim was the State, such a matter would only be recorded where the points to prove to evidence the offence had been made out; in the first instance the police would wish to consider whether the matter merited investigation, and the absence of any personal details provided by the person reporting the crime, together with a use of flippant language in the report, meant it would likely be concluded that no investigation was merited.

The Decision Notice

10. By the Decision Notice, the Commissioner decided that: the Request appeared to focus on the behaviour of prominent people during the COVID pandemic and whether crimes were committed; even if the Request had a value or serious purpose, a factor which may reduce that value was the burden which the Request might place on the WYP; he did not consider that responding to the Request would impose a grossly excessive burden on WYP, not least because it would be similar to previous responses issued by the Police to previous, similar requests from the Appellant; however, when considered in the context of multiple, previous requests from the Appellant, the request could be considered sufficiently burdensome to be vexatious, even if not in isolation; the Appellant's motive, which is relevant to consideration of whether a request is vexatious, appeared to be to seek evidence of wrongdoing on the part of WYP; although the requests were not abusive or aggressive, the tenacity with which they had been pursued would be felt as harassing by Police data and information officers; the Appellant's intention was to cause a disproportionate or unjustified level of disruption to WYP, and WYP was entitled to rely on s14(1) FOIA to refuse the Request.

Notice of Appeal

11. By his Notice of Appeal dated 11 July 2023, the Appellant submitted that the basis of his appeal rested on two questions: whether (i) it is "*vexatious to make an FOI for information that is already known, in order to make that information publicly available*", and (ii) it is "*unreasonable to ask for information that has been refused when the reason for the refusal is largely semantic*". So far as it is possible to summarise his grounds of appeal, they appear to be that:

- a. WYP's explanation to the Commissioner that the crime was not recorded as the Appellant had not provided his date of birth, appears to provide the information sought, namely the report of the crime; it is not conceivable that WYP would not record the crime without the Appellant's date of birth as this would have no bearing on any investigation; there is no evidence that WYP asked for his date of birth.
- b. WYP's characterisation of the request as vexatious because he already has the information sought, is irrelevant when a request under FOIA is for disclosure into the public domain.
- c. of the ten previous FOIA requests referred to in the Decision Notice, only two were responded to in full.
- d. the reason the reported crimes were not recorded is not compatible with General Data Protection Regulation;
- e. WYP misled the Commissioner by presenting evidence as to the 'personal details' provided by the Appellant when he reported previous alleged crimes. The victim of the crimes he has reported is "the Nation" and WYP recognise this by referring to these as "State- based crimes".
- f. there is inconsistency between WYP's positions as recorded by it and by the Commissioner in another Decision Notice, IC-221022-T2K8, as to whether WYP has investigated the reported crime.
- g. WYP's positions are contradictory as between the Appellant being unreasonably persistent in requesting information, which is not held, and arguing that the Appellant has already been provided with the information sought.
- h. WYP did not record the alleged crimes for political reasons and in collusion with the Mayor's Office.

The Commissioner's Response

12. By his response to the Notice of Appeal, dated 24 July 2023, the Commissioner's position may be summarised as follows: WYP had made clear that the alleged crimes reported by the Appellant were not recorded, and why they were not recorded, resulting in the fact that the crime reference numbers sought by the Appellant were not held; of the ten previous requests referred to by WYP, WYP had only provided all information held in relation to two of those requests; in relation to the other eight requests, WYP had responded by either providing a partial disclosure (with redactions), refusing the request in full (in relation to one request refusing to confirm or deny whether information was held) or by confirming that the requested information was not held; accordingly, the Appellant's various requests had all been responded to even if the required information was not provided; the Commissioner did not consider that he had been presented with any arguments of substance which suggested any wrongdoing on the part of WYP or that he had been misled by WYP; making a request

for information already accessible to the Appellant for the purpose of making the information public did not prevent WYP from relying upon section 14(1) FOIA; given the context and history to the Request and the information being requested, a reasonable person was unlikely to consider that any purpose and value in the Request was sufficient to justify the impact on WYP of complying; taking all the circumstances of the Request in the round, and taking a holistic view, the Request had correctly been categorised as vexatious under section 14(1) FOIA.

Appellant's Reply to the Commissioner's Response

13. By his Reply to the Commissioner's Response, dated 28 July 2023, the Appellant submitted as follows: WYP have wilfully failed to investigate his reports properly or at all; the justification for use of the FOI process is to be measured by the seriousness of the wrong-doing reported; the Commissioner has failed to analyse the content of his various requests in assessing that, cumulatively, they indicate vexatiousness; the Commissioner has misapplied every test; the Commissioner's decision only made sense if the Commissioner has "*joined in on the conspiracy*", which does not seem rational, so that consideration should be given to the possibility that the Appellant is suffering from a mental illness which would amount to a disability requiring the authorities to make reasonable adjustments, which, in turn, would mean re-addressing the requests.

Application to strike out the appeal

14. By his Response to the Notice of Appeal, the Commissioner applied for the appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Tribunal Rules") on the basis that the appeal had no reasonable prospects of success.
15. On 30 June 2023, the Tribunal refused that application; given the Appellant's challenge to the Commissioner's analysis of his historic requests of WYP, and the part which that analysis had played in the Commissioner's overall assessment of vexatious conduct on the part of the Appellant, the Tribunal was not satisfied that it was appropriate to strike out the appeal. The Tribunal directed that the appeal be heard on the papers, and that the Commissioner should provide to the Tribunal and the Appellant the full run of the Appellant's requests and WYP's responses to which the Commissioner had referred.

The Applicable Law

16. The relevant provisions of FOIA are as follows:

Section 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....*

Section 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.*

...

Section 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.*

17. The import of s58 FOIA is that the right of appeal to the First-tier Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the Request is in accordance with Part 1 of FOIA (**Information Commissioner v Malnick and ACOBA** [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90].

The hearing

18. The parties were content that the Tribunal should consider the appeal on the papers. The Tribunal was satisfied that it could fairly and justly determine the issues without a hearing pursuant to Rule 32(1)(b) of the Tribunal Rules.

Analysis

19. The Tribunal has not seen, because the Commissioner did not provide, the full run of the Appellant's requests and WYP's responses to which the Commissioner referred in the Decision Notice. By email to the Tribunal dated 27 September 2023, the Commissioner explained that he had not himself had access to that information when concluding his Decision Notice. The Commissioner instead relied upon the account of matters provided to him by WYP, which included a table summarising the Appellant's previous requests and WYP's responses, when reaching his view that those requests were a relevant, contextual factor in assessing the Request as vexatious. The Tribunal set that table out in full in its decision to dismiss the Commissioner's application to strike out the appeal.
20. Without sight of all the requests and responses referred to, we do not consider that we are able to assess whether the requests are such as to indicate that the Request should properly be characterised as vexatious in their overall context. We note that it is evident from the table of the Appellant's requests and WYP's response, that WYP has disclosed some material in response to certain of the Appellant's previous requests, and that certain of WYP's initial refusals to disclose have not been upheld on internal review, that is to say, at least parts of some of the Appellant's historic requests appear to have been considered legitimate. That is not to say, of course, that viewed in the round, the full run of the Appellant's previous requests might not still justify characterisation of the Request as vexatious in context, but absent sight of all the correspondence, the Tribunal does not consider that it can reach that conclusion.
21. However, the Tribunal is satisfied that the Request may properly be characterised as vexatious in isolation. In reaching that view, we have considered the guiding principles for assessing vexatiousness espoused in **Information Commissioner v Devon County Council & Dransfield** [2012] UKUT 440 (AAC), and the observations of the Court of Appeal (**Dransfield v Information Commission & Devon County Council** [2015] EWCA Civ 454) [68], which offered no challenge to the Upper Tribunal's approach, elaborating as follows:

"...the starting point for 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."
22. We acknowledge that there is a high hurdle in establishing that a request is vexatious. We accept that the Appellant has a sincere belief in the alleged wrongdoing of prominent people in public life during the COVID pandemic.

He has sought to report crimes which he believes those people have committed. He has been informed by WYP that without provision by him of his proper personal details, it cannot record, and has not recorded, his reports of those crimes. He has been given the opportunity to provide those details. He has not done so. Moreover, the Appellant has been told that the matters to which his request relates would be classed as "State-based crimes" which would only be recorded were the points to prove to evidence the offence have been made out. On the basis that there have been no crimes recorded, there can be no crime numbers to report to him. Viewing matters in the round, we consider that the Request lacks value or serious purpose.

23. Moreover, it appears that the Appellant's motive behind the Request is to flush out what action WYP has taken in response to his reports, in circumstances where he has expressly articulated a suspicion that WYP has conspired with the Mayor of London to pervert the course of justice. We have not seen any material to support such a suspicion. The Appellant appears to wish to use WYP's response to investigate his suspicion further. In our view, in circumstances where WYP has explained to the Appellant why it has not recorded any reported crime, and that explanation does not appear unreasonable, the Appellant's motive for the Request is vexatious.
24. We find that WYP was entitled to refuse the Request pursuant to s14(1) FOIA. Accordingly, we dismiss the appeal.

Signed: *Judge Foss*

Date: 29 January 2024