THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/0171/2019
[2019] UKUT 299 (AAC)

HOME OFFICE V INFORMATION COMMISSIONER AND CRUELTY FREE INTERNATIONAL

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA/2017/0105
Decision date: 12 October 2018
Venue: Fleetbank House, London

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the decision notice FS50655799 of the Information Commissioner dated 24 April 2017 was in accordance with the law.

REASONS FOR DECISION

1. I have decided that the burden created by the request for information rendered the request vexatious. The terms of the request were a matter for the requester alone and the First-tier Tribunal had no power to take upon itself that right. Anyway, the request was clear in its terms so that no clarification was required; and, at the time, there was no duty to give advice and assistance if the request was vexatious.

A. The oral hearing

2. This appeal was the subject of an oral hearing before me on 24 September 2019. Julian Milford of counsel appeared for the Home Office. Elizabeth Kelsey of counsel appeared for the Information Commissioner. And Cruelty Free International appeared by its solicitor, David Thomas. I am grateful to all of them for their written and oral arguments.

A. Abbreviations

3. I have used these abbreviations:

CFI	Cruelty Free International
Code	Code of Practice under section 45 of FOIA
Commissioner	Information Commissioner
FOIA	Freedom of Information Act 2000

B. History and background

The request and the response

4. CFI is an organisation that is concerned for animal welfare and campaigns for the abolition of all animal experiments. One of its concerns is with the leniency of the sanctions regime imposed on those authorised to conduct experiments on animals under the Animals (Scientific Procedures) Act 1986. On 7 April 2016, it made a request to the Home Office:

> Would you please disclose the information you hold in relation to the two cases, which according to p 26 of the Animals in Science Unit Inspectorate Annual Report … were referred by you in 2014 to the Crown Prosecution Service?

The Home Office replied on 5 May 2016 that it held the information requested but relied on section 12 of FOIA on the ground that the time taken 'to read through and appropriately redact of personal or confidential information' would exceed the limit under that section. On 26 July 2016, following an internal review, the Home Office relied instead on section 14. It described the burden that the request would impose as 'huge'. It would need to check 6000 pages of documents to identify those that were within the scope of the request and any relevant exemptions. Later, the Home Office increased the estimate of the number of pages by 25% and explained that, in view of the sensitivity of the information and the risk of disclosing the identity of those involved, the information would have to be checked by two pairs of eyes. It was the work related to redactions that led the Home Office to rely on section 14, as this work would not be covered by the costs calculation for section 12. It also later identified six exemptions that might apply to different parts of the information (sections 30, 32, 38, 40, 41 and 44).

The Commissioner rejected the complaint

5. CFI complained to the Commissioner who decided that the Home Office had been entitled to rely on section 14.

The First-tier Tribunal allowed the appeal

6. The First-tier Tribunal allowed the appeal and directed the Home Office either to disclose the information or to identify any further exemptions that it relied on. Its reasons for allowing the appeal are set out in 57 paragraphs in just about 14 pages. The

tribunal began its legal analysis by deciding, on the basis of authority, that the cost burden of a request could alone make it vexatious.

7. Next, the tribunal criticised the Home Office's approach to searching for the material covered by the request. The tribunal picked two of CFI's criticisms:

- There was oral evidence that the Home Office had a Document Management System, but it had not explained why the System had not been used to search the whole of the email records of relevant staff.
- The Home Office had not made any serious attempt to identify the information relating to each of the two cases separately.

The tribunal concluded that it had serious reservations about the reasonableness and accuracy of the Home Office's cost estimate. It could have searched in a more straightforward way and thereby reduced the quantity of the material that would have to be reviewed carefully. This, of course, does not identify how much material would have been identified or justify finding that section 14 would no longer have applied.

8. The tribunal then moved on to the final stage of its reasoning with the words 'That outcome could certainly have been achieved had the Home Office complied with its obligation to provide advice and assistance to CFI under FOIA section 16.' It decided that section 16(2) did not apply, because 'It is inherent in a complaint of breach of section 16(1) that no defence is available to the public authority under section 16(2).' It said that the Home Office should have complied with paragraphs 10 and 11 of the 2004 Code and, if it had done so, 'the Request could have been handled at modest cost.' And, given the importance of the information, section 14 would not apply. Again, this reasoning and the evidence available did not allow the tribunal to find that section 14 would no longer have applied.

9. As my comments show, there are difficulties with the tribunal's reasons on the grounds that (a) they are not soundly based in the evidence and, possibly as a result of that, (b) they jump from criticisms to conclusions without the necessary analysis to bridge the gap. But there are more fundamental criticisms of the tribunal's approach. Before I come to them, it is time to set out the legislation and the Code of Practice.

C. FOIA – relevant provisions

10. These are the provisions relevant to this decision.

> **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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

8 Request for information.

(1) In this Act any reference to a 'request for information' is a reference to such a request which—

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.

12 Exemption where cost of compliance exceeds appropriate limit.

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Chancellor of the Duchy may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Chancellor of the Duchy may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

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.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

16 Duty to provide advice and assistance.

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

50 Application for decision by Commissioner.

(1) Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

52 Enforcement notices.

(1) If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with a notice (in this Act referred to as 'an enforcement notice') requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.

57 Appeal against notice served under Part IV.

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

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.

D. The 2004 Code of Practice

11. This was issued by the Secretary of State under section 45 of FOIA. Section 45(2)(a) provides that it

must, in particular, include provision relating to-

(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information from them;…

12. These are the relevant provisions of the 2004 Code, which applied at the time of the request in this case.

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.

9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.

10. Appropriate assistance in this instance might include:

- providing an outline of the different kinds of information which might meet the terms of the request;
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

Advice and assistance and fees

…

15. An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of section 14 of the Act. Guidance on what constitutes a vexatious request can be found in the DCA Handbook - 'Guidance on Processing Requests'. The Information Commissioner has also issued advice on dealing with vexatious and repetitious requests.

E. The 2018 Code of Practice

13. This Code was not in operation at the time of the request in this case. I set out its relevant provision just for completeness.

Interaction between section 12 (cost limit) and 14(1) (vexatious requests)

7.12 In some cases, responding to the request is so burdensome for the public authority in terms of resources and time that the request can be refused under section 14(1). This is likely to apply in cases where it would create a very significant burden for the public authority to:

- prepare the information for publication;
- redact the information for disclosure;
- consult third parties;
- apply exemptions.

7.13 It is not possible to use section 12 (cost limit) to refuse a request based on the above factors. In these cases, public authorities may want to instead consider using section 14 to refuse to respond to the request based on the burden that responding to the request would create.

7.14 Public authorities should avoid using section 14 for burdensome requests unnecessarily. On this basis they should always consider whether section 12 applies in the first instance. For example, if a public authority considers that locating and extracting the information in scope would exceed the cost limit, section 12 is likely to be most appropriate. However, if, for the reasons set out in paragraphs 7.12 to 7.13 above, section 12 cannot apply they should consider refusing the request using section 14(1).

7.15 An example of when this may happen may include the burden of redacting multiple entries on a large database as, although it may be possible to locate the

database easily, redacting relevant entries (if there are thousands of entries) may create an unsustainable burden for the authority.

Repeated requests

7.16 Under section 14(2) of the Act, if a public authority has previously complied with a request for information (i.e. provided the information sought), it does not need to comply with a further request for the same information made by the same person, unless a reasonable interval has elapsed between compliance with the first request and receipt of the second. A repeated request should be interpreted as an identical or substantially similar request. This will depend on the circumstances and each case should be considered on its own merits.

Section 14 responses

7.17 If a public authority considers section 14 applies in any circumstances other than that referred in paragraph 7.14 they should provide a refusal notice to the applicant. This should be issued within 20 working days and explain that the public authority considers section 14 to be engaged. Public authorities should also include details of their internal review procedures and the right to appeal to the Information Commissioner. There is no obligation to explain why the request is vexatious, though public authorities may wish to do so as part of their section 16 duty to provide advice and assistance.

F. The requester has exclusive power to formulate a request

14. The process under FOIA begins with a request for information and the terms of that request determine the response of the public authority, the Commissioner and the First-tier Tribunal. The terms of the request are a matter for the requester. No one else has any power to change it. The public authority has power to ask for more information under section 1(3)(a) in order to help it identify and locate the information requested. And it is obliged by section 16, if it applies, to provide advice and assistance to a requester. But that is all. On a complaint under section 50, the role of the Commissioner is to decide whether the request was dealt with in accordance with Part I of FOIA. The request is the request as ultimately formulated by the requester. If the Commissioner decides that the public authority did not act in accordance with Part I, there is power under section 52 to issue an enforcement notice with instructions to the authority on how to comply. That could include exercising its power under section 1(3)(a) or complying with section 16. But nowhere is there power for the Commissioner to change the wording of the request. And on an appeal under section 57, the role of the First-tier Tribunal is to decide whether the Commissioner's notice was in accordance with law (section 58(1)(a)). Again, that assumes the request as presented by the requester. Nowhere is there power for the tribunal to change the wording of the request.

15. CFI never changed the terms of their request, although the Home Office did suggest that they 'refine' it. CFI maintained their position that they were not able to do so, since they did not know what information was held. They did provide some

descriptions of the sort of information they were interested in, but never took the next step of reformulating their request or making a new one. The terms of the request were in the widest terms. It is easy to understand why, because CFI obviously wanted to catch as much information as possible. But that carried with it the risk that it would catch so much material that the Home Office would rely on section 12 or section 14. The Commissioner had to accept the request as presented, which she did. The tribunal also had to accept it as presented, but it did not. That was an error of law.

16. The tribunal criticised the Home Office for not segregating the information relevant to Case 1 from that relevant to Case 2. It is the fact that the estimate for the material for Case 2 was ten times the size for Case 1. But the request covered both and that is what the Home Office had to deal with.

G. The request was vexatious

17. The First-tier Tribunal decided that a request could be vexatious by reason of the cost burden of complying with it. Mr Thomas argued that the tribunal was wrong. I reject that argument.

18. The correct approach is to begin with the language of section 14. That identifies the correct legal question: was the request vexatious? As Upper Tribunal Judge Wikeley said in *Dransfield v Information Commissioner* [2012] UKUT 440 (AAC), [2015] AACR 34:

> 24. … section 14 carries its ordinary, natural meaning *within the particular statutory context of FOIA*. …

And later the judge said:

> 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.

I agree with all of that, especially (a) that the factors are not exhaustive and (b) that the concept is inherently flexible. As Arden LJ said on appeal from that decision at [2015] 1 WLR 5316:

> 68. … the decision-maker should consider all the relevant circumstances to reach a balanced conclusion as to whether a request is vexatious. …

And as Upper Tribunal Judge Stockman said in *Soh v Information Commissioner and Imperial College London* [2016] UKUT 249 (AAC) of burden and distress:

> 104. … these are not ends in themselves but merely pointers to indicate whether the request is a vexatious one.

Which is consistent with Judge Wikeley's remark (just quoted) that 'misuse of the FOIA procedure may be *evidenced* in a number of different ways.'

19. That is the approach I have taken. Judicial comments on vexatiousness are, of course, worthy of respect, especially those of the senior courts, but they are always made in a context and have to be read within that context. Just by way of illustration, in *Dransfield v Information Commissioner* [2015] 1 WLR 5316, Arden LJ said:

> 85. As the UT held, there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request.

But that does not mean that costs – or any other factor – are necessarily sufficient. The issue is always whether the resources required to provide the information, and therefore the costs to the authority, were such as to render the request vexatious. And that will depend on the context. It would, for example, take a much higher burden to render vexatious a request pursuing allegations of ministerial corruption than a request asking for the number of paperclips used in the minister's private office.

20. I now need to explain why the request was vexatious under the approach I have taken. I begin with what Arden LJ said in *Dransfield*:

> 68. … 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. …

I accept that the information requested was of high value in that it would help to hold to account those charged by legislation with the protection of animals. But my judgment is that that alone cannot override the burden that the request placed on the Home Office. Even taking the lower estimate of 6000 pages, that was not a final figure. Even if the tribunal was right to say that the search could have been helped by using the Document Management System – and there was no evidence of what it could and could not do – there was still an issue of whether it was sufficient to identify all relevant material, which is what FOIA requires (*Reuben Kirkham v Information Commissioner (Section 12 of FOIA)* [2018] UKUT 126 (AAC) at [13]). And finding the information was just the first step. It then had to be sifted in order to apply redactions when this would allow the information to be disclosed, and for the rest to identify other potential exemptions, which might then require a consideration of the balance of public interests. And don't forget that the sensitivity of the material and the danger that might be faced by those whose identities were inadvertently disclosed meant that two pairs of eyes were required to reduce the risk of mistakes. Finally, the request was for just two cases, which would at best have given a couple of examples of how the Home

Office exercised its power to refer cases to the Crown Prosecution Service. Those factors render request vexatious.

21. Just one point to finish this section. Mr Thomas relied on *Soh* at the first paragraph numbered 103 – there are two – where the judge said:

> I doubt that the factor of burden on the authority on its own could lead to a decision that a request was vexatious. Burden on its own can be addressed by other means, such as section 12.

The first sentence is consistent with his approach to that case: vexatiousness has to be judged in its context with all relevant factors taken into account. That is what the judge meant in paragraph 104, which I have already quoted. The second sentence is more contentious. I agree that there are other provisions that allow burden to be addressed, but I do not agree that one or other of them will deal with every eventuality. This case is an example.

H. The clarification power under section 1(3)(a) did not arise

22. Taking the request as submitted by CFI, there was no lack of clarity in what CFI wanted. Their description was sufficient to satisfy section 8(1)(c), as the Home Office was able to identify and locate the information. Consequently, the power for the Home Office to require further information under section 1(3)(a) never arose. It is this power that is dealt with in paragraph 10 of the 2004 Code. It is part of a section headed **Clarifying the request** and the first paragraph under that heading, paragraph 8, makes clear that it is concerned with the section 1(3)(a) power. The tribunal was wrong to rely on paragraph 10 in order to alter the terms of the request. Apart from any other reason, it never applied. And, as I have explained, even if the Home Office had exercised the power under section 1(3)(a), it would still have been a matter for CFI whether and, if so, how to alter the terms of their request. The Home Office could not force them to do so, nor could the Commissioner, and the tribunal had no power to take that task about itself. The Home Office did invite CFI to 'refine' their request, but in the context that meant 'narrow down', not 'make clearer'.

I. The advice and assistance duty under section 16 did not apply

23. Section 16(1) imposes a duty on public authorities, but it is subject to section 16(2). Paragraph 15 of the 2004 Code expressly provided that a public authority was not expected to assist if the request was vexatious. That is no longer in the Code (see paragraph 7.17 of the 2018 version), but it was in the Code at the time of the request and applies in this case. I do not understand the tribunal's reasoning that section 16(2) did not apply. That provision excludes the duty under section 16(1) so long as the public authority conforms with the Code. The effect of paragraph 15 of the Code was to exempt the authority from providing advice or assistance.

24. Mr Thomas argued that the Code did not apply to CFI, because they did not know, and had no reason to believe, that so much information would be covered by their request and none of the other indicia of vexatiousness were present. I accept what Mr

Thomas says, but I do not accept his argument that it takes the request outside paragraph 15.

25. For a start, I can see no way in which the language of paragraph 15 of the Code, which could not be more general, could properly be read to exclude the type of vexatiousness that he described.

26. More importantly, I do not accept that it is possible to isolate that type of vexatiousness from other types. Reality is more complicated. The vexatiousness in this case is at one end of a spectrum. At the other extreme is the case in which a requester persistently asks questions on a common theme, inundates the authority with correspondence, is bullying, intimidating and aggressive in manner, and abusive and offensive in the words used, all with the intention of being unpleasant and causing difficulties for the authority. In between, there is every possible variation. Some requesters are persistent because the information provided raises more questions. Some have a natural but unfortunate manner. Some are driven to express themselves bluntly by the frustration of dealing with an obstructive authority. Some do not realise the effect they are having and regard it as their right to have what they ask for. Some have no idea, and can have no idea, what information the authority has or how it is held. It is not possible to find a neat line that will isolate cases to which paragraph 15 applied from the rest. I find confirmation for this view in what Arden LJ said in *Dransfield v Information Commissioner* [2015] 1 WLR 5316:

> 69. Because a rounded approach is required, in my view what I have termed the instinctive approach of the FTT must be wrong. It involved drawing bright lines …

Drawing a bright line is exactly what Mr Thomas wants me to do.

J. The Convention right under Article 10

27. Mr Thomas presented an argument that CFI had a right to the information by virtue of the Convention right under Article 10:

> **ARTICLE 10**
>
> **FREEDOM OF EXPRESSION**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The First-tier Tribunal and Upper Tribunal have no jurisdiction to enforce any right to information that arises directly under that right. They are, though, by virtue of section 3(1) of the Human Rights Act 1998, under a duty to read and give effect to legislation in a way that is compatible with Convention rights so far as that is possible.

28. On the arguments I heard, I do not accept that reliance on this duty would affect the outcome of this appeal. It seems to me that the analysis required under section 14 together with the importance given to the right to information as a constitutional right produces an effect that is consistent any right recognised under Article 10, at least in the context of this case.

29. I understand that Article 10 arises in another appeal before the Upper Tribunal, where it is likely to be analysed in more detail. It may be that fuller analysis will identify circumstances in which that Convention right could affect the way that section 14 of FOIA should be read or given effect.

Signed on original
on 30 September 2019

Edward Jacobs
Upper Tribunal Judge