



Neutral citation number: [2024] UKFTT 297 (GRC)

Case Reference: EA/2023/0120

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

**Heard by: remote video hearing (cloud video platform)**

**Heard on: 25 January 2024  
Decision given on: 16 April 2024**

**Before**

**TRIBUNAL JUDGE STEPHEN ROPER  
TRIBUNAL MEMBER JO MURPHY  
TRIBUNAL MEMBER PAUL TAYLOR**

**Between**

**ANDREW DUNCAN**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) THE CHIEF CONSTABLE OF NORTHUMBRIA POLICE**

Respondents

**Representation:**

For the Appellant: David Hirst of Counsel, instructed by Gillian Scribbins of Muckle LLP

For the First Respondent: did not appear and was not represented

For the Second Respondent: Edmund Garnett of Counsel, instructed by Louise Silverton, solicitor for the Second Respondent

**Decision:** The appeal is Dismissed

**REASONS**

**Preliminary matters**

1. In this decision, we use the following terms to denote the meanings shown:

Appellant: Andrew Duncan.

*Cabinet Office* case: *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 208.

Commissioner:	The Information Commissioner.
Decision Notice:	The Decision Notice of the Commissioner dated 8 February 2023, reference IC-181036-K2B7, relating to the Request.
<i>Dransfield</i> case:	<i>Information Commissioner v Devon County Council &amp; Dransfield</i> [2012] UKUT 440 (AAC).
<i>Dransfield</i> case in the Court of Appeal:	<i>Dransfield v Information Commissioner and Devon County Council</i> [2015] EWCA Civ 454.
Fees Regulations:	The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004.
FOIA:	The Freedom of Information Act 2000.
<i>McInerney</i> case:	<i>McInerney v Information Commissioner and the Department for Education</i> [2015] UKUT 0047 (AAC).
Northumbria Police:	The Chief Constable of Northumbria Police.
Request:	The request for information made by the Appellant dated 11 April 2022, as referred to in paragraph 5.
Requested Information:	The information which was requested by way of the Request.

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision to numbered paragraphs are to paragraphs of this decision so numbered.

## **Introduction**

3. This is an appeal against the Decision Notice, which (in summary) held that section 14 of FOIA applied in respect of the Request and accordingly that Northumbria Police was entitled to refuse to provide the Requested Information. The Commissioner did not require Northumbria Police to take any steps.

## **Background to the Appeal**

4. The background to the appeal is as follows.

### ***The Request***

5. On 11 April 2022, the Appellant sent an email to Northumbria Police, requesting information in the following terms (original emphasis retained):

*“This is a further request for all the case information available related to the murder of Eileen McDougall in January 1969 in South Shields under the Freedom of Information Act (FOIA) 2000.*

*Her body was discovered on 24th June 1979 at Velva Liquids, South Shields. Ernest Adolphus Clarke was charged and convicted of this murder and then released under license when it was determined the evidence him was insufficient and the case substantially flawed.*

*We are currently producing a Netflix show about this case and have uncovered further information as to further suspects / perpetrators potentially [sic] involved in this case which we believe were either missed by the police at the time, not pursued in any detail or ignored.*

*We would also like to know the name of the person (and contact details) or department responsible in the Northumbria Police who would be the point of contact for further information relating to this case.*

*This information we seek is:*

- all witness and interview statements*
- full list of witnesses and formal suspects interviewed*
- forensic evidence and reports*
- audio or film interviews*
- photographs*
- any available details of the legal agreement made with Ernest or further information received from him prior to his early release under license.*
- internal police memorandums*

*Please note we have requested this information previously and been denied access without any real justification.*

*We believe it is in the public interest to review this case in detail.”.*

### ***Northumbria Police's reply and subsequent review***

6. Northumbria Police responded on 1 June 2022 and refused to disclose the Requested Information, citing section 30(1) of FOIA (investigations and proceedings conducted by public authorities), section 38(1)(a) of FOIA (health and safety) and section 40(2) of FOIA (personal information).
7. Following an internal review, Northumbria Police contacted the Appellant on 18 October 2022, upholding its position.
8. On 14 July 2022, the Appellant contacted the Commissioner complaining about Northumbria Police's response to the Request.

### ***The Decision Notice***

9. During the course of the Commissioner's investigation, Northumbria Police changed the grounds on which they were relying to refuse disclosure of the Requested Information. They removed reliance on section 30(1) of FOIA and instead cited sections 31(1)(a) and 31(1)(a) (b) of FOIA. They maintained reliance on sections 38(1) and 40(2) of FOIA and also cited section 14 of FOIA on the basis that the Request was vexatious.
10. As Northumbria Police had sought to rely on section 14(1) of FOIA in respect of the entire Request, the Commissioner considered that he needed to determine if Northumbria Police correctly determined that the Request was vexatious. The Decision Notice accordingly addressed only that exemption.
11. In assessing the burden imposed on Northumbria Police by the Request, the Decision Notice set out Northumbria Police's position concerning the nature and extent of the Requested Information and their estimates of how long it would take to prepare the Requested Information for disclosure under FOIA. In summary, Northumbria Police's

estimates were as follows:

- a. an 'indexing' estimate of 500 hours, comprising: (i) an estimated number of 10,000 documents; (ii) an estimate of 3 minutes per document for indexing; and
- b. a 'contact card assessment' estimate of 200 hours, calculated using: (i) a sample assessment of 20 cards, in which each one took about 8 minutes to "copy, redact, check, and then prepare a clean version for Disclosure"; (ii) an estimated number of at least 1,500 contact cards.

12. The Decision Notice summarised Northumbria Police's estimates as follows:<sup>1</sup>

*"In conclusion, Northumbria Police stated that to prepare the data for disclosure would require indexing, assessing, copying, redacting, checking, preparing a final document, and producing that document or data in a format where it can be disclosed. It estimated that it would take on average approximately 12 minutes per item to prepare the data for disclosure. Accordingly, Northumbria Police estimated that to comply with the scope of the request, the assessment and preparation of 10,000 documents for disclosure would take approximately 2,000 hours."*

13. The Commissioner concluded in the Decision Notice that the Request was vexatious and that Northumbria Police was entitled to rely on section 14(1) of FOIA to refuse to provide the Requested Information.

14. The Commissioner also decided in the Decision Notice that:

- a. by relying on the exemption in section 14 of FOIA, which they had not mentioned to the Appellant at or before their internal review, Northumbria Police breached section 17(1) of FOIA; and
- b. Northumbria Police breached section 10 of FOIA by failing to respond to the Request within 20 working days of receipt.

## **The appeal**

### *The grounds of appeal*

15. The Appellant's position was, in essence, that the Decision Notice was wrong to allow Northumbria Police to rely on section 14(1) of FOIA in refusing to provide the Requested Information. The relevant points raised in the Appellant's grounds of appeal were (in summary):

- a. The Appellant disputed the extent of the burden imposed by the Request, in respect of both Northumbria Police's presentation of the evidence to the Commissioner via video link and their calculations of the time involved in preparing the Requested Information for disclosure.
- b. The Appellant questioned whether the Commissioner had sufficient evidence of the workload on Northumbria Police's staff which deal with FOIA requests or of the impact which the Request would have.
- c. The Appellant had not requested a specific timeframe by which the Requested Information could be provided and the Appellant was content for it to be

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<sup>1</sup> Paragraph 38 of the Decision Notice.

provided as part of a longer-term project.

- d. The Appellant offered to “greatly reduce the scope of information being requested”. In particular, the Appellant stated that he would accept the photographs and diagrams available from the case file and he had the names of just five individuals he would like to ascertain were either on index cards or had given witness statements.
- e. The Appellant considered that his modified request for information would take a maximum of 100 hours for Northumbria Police to deal with.
- f. The Appellant also stated that he was willing to pay for some of the time spent by Northumbria Police’s staff, or to pay for extra resources, to deal with the Request.

### ***The Tribunal’s powers and role***

16. The powers of the Tribunal in determining the appeal are set out in section 58 of FOIA, as follows:

*“(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. In summary, therefore, the Tribunal’s remit for the purposes of the appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.
18. We consider that it is important to stress what is outside of the scope of the appeal. Various allegations were made in the Appellant’s grounds of appeal regarding the conduct of Northumbria Police and the Commissioner, but any such matters are outside of the Tribunal’s remit referred to above. Accordingly, we have no power to determine any such matters and our observations and findings are relevant only for the purposes of determining the appeal before us.

### ***Mode of hearing***

19. The proceedings were held by the cloud video platform. The Tribunal panel and the parties (with the exception of the Commissioner) joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
20. The Appellant was represented by David Hirst of Counsel. Northumbria Police was represented by Edmund Garnett of Counsel. The Commissioner did not attend the

hearing and was not represented (having previously indicated that he would be content to rely on his written submissions if there was an oral hearing).

### *The evidence and submission*

21. The Tribunal read and took account of an open bundle of evidence and pleadings. We also received a separate bundle of authorities from the Appellant and from Northumbria Police.
22. The open bundle included a witness statement from the Appellant in support of his appeal. The Appellant attended the hearing but did not give evidence orally, relying on the contents of his written witness statement.
23. The open bundle also contained a witness statement provided on behalf of Northumbria Police. This witness's statement was given in their capacity as Northumbria Police's Head of Information Management Department and Data Protection Officer. It is not necessary for us to identify this witness personally in this decision - therefore we merely refer to them below as "the witness" and we mean no disrespect to them in doing so.
24. The witness also gave evidence in person at the hearing. They had also made a further witness statement prior to the hearing, which clarified certain points in their first witness statement. The Tribunal had not received the further witness statement at the time of the hearing (but did subsequently receive it), although the main points in the further statement were also addressed orally during the hearing.
25. We heard oral submissions from Mr Hirst on behalf of the Appellant and from Mr Garnett on behalf of Northumbria Police.

### *Outline of relevant issues*

26. In accordance with the remit of the Tribunal to which we have referred, the fundamental issue which we needed to determine in the appeal was whether the Commissioner was correct to conclude, in the Decision Notice, that the Request was vexatious under section 14(1) of FOIA.
27. We will also address the following issues, with regard to the Appellant's grounds of appeal:
  - a. The 'Burden Issue': the burden placed on Northumbria Police having regard to the nature and extent of the Requested Information and Northumbria Police's resources (as referred to in paragraphs 15.a and 15.b).
  - b. The 'Timing Issue': the timescales within which the Requested Information could be provided (as referred to in paragraph 15.c).
  - c. The 'Scope Issue': the scope of the Request and the Appellant's proposal to reduce it (as referred to in paragraphs 15.d and 15.e).
  - d. The 'Payment Issue': the Appellant's proposal to make payment in connection with Northumbria Police's handling of the Request (as referred to in paragraph 15.f).
28. We will deal with those arguments in turn (under those headings), but first we set out

the applicable legislation and summarise the relevant caselaw.

## **The law**

### ***The relevant statutory framework***

#### *General principles*

29. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

*“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.”.*

30. In essence, under section 1(1) of FOIA, a person who has requested information from a public authority (such as Northumbria Police) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

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

31. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold, nor an unconditional right even to be told if the information is held by the public authority. The rights contained in that section are subject to certain other provisions of FOIA, the relevant aspects of which (for the purposes of the appeal) we address below.
32. We deal with section 14 of FOIA first, before turning to the other applicable provisions of FOIA.

#### *Section 14 of FOIA – vexatious or repeated requests*

33. Section 14 of FOIA provides:

*“(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.”.*

34. The term ‘vexatious’, used in section 14(1), is not defined in FOIA, but it is evident from that section that it applies to the request itself (and not to the person making the request). This point was also confirmed in the *Dransfield* case, which we refer to further below.

Section 10 of FOIA – time for compliance with request

35. So far as is relevant, section 10(1) of FOIA provides:

*“...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”.*

Section 11 of FOIA - means by which communication to be made

36. So far as is relevant, section 11 of FOIA provides:

*“(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –*

*(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,*

*(b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and*

*(c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,*

*the public authority shall so far as reasonably practicable give effect to that preference.*

*...*

*(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.*

*(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.*

*(4) Subject to subsections (1)..., a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.”.*

Section 16 of FOIA – duty to provide advice and assistance

37. Section 16(1) of FOIA provides:

*“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.”.*

Section 17 of FOIA – refusal of request

38. So far as is relevant, section 17 of FOIA provides:

*“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –*

*(a) states that fact,*



(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

...

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”.

39. Where section 17 of FOIA refers to the time for complying with section 1(1), this means the timescales set out in section 10 of FOIA (set out above, subject to some exceptions which are not relevant for current purposes).

### ***Relevant Case law***

#### Section 14

40. As we have noted, the term ‘vexatious’ is not defined for the purposes of section 14(1) of FOIA. However, guidance on applying that section is given in the *Dransfield* case and in the *Dransfield* case in the Court of Appeal.
41. The judgment of the Upper Tribunal in the case of *CP v Information Commissioner*<sup>2</sup> helpfully summarises the main principles in the *Dransfield* case and relevant extracts from that summary are as follows (omitting, for ease of reference, the paragraph numbers in that summary and the cross-references to the paragraphs in the *Dransfield* case):

“(i) *The Upper Tribunal in Dransfield*

*In the Upper Tribunal decision of Dransfield..., the Upper Tribunal gave some general guidance on the issue of vexatious requests. It held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if ‘the high standard set by vexatiousness is satisfied’...*

*The test under section 14 is whether the request is vexatious not whether the requester is vexatious. The term ‘vexatious’ in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA. As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account. The IC’s guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause*

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<sup>2</sup> [2016] UKUT 427

*was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request.*

*Four broad issues or themes were identified by Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations were not exhaustive and were not intended to create a formulaic check-list. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.*

*As to burden..., the context and history of the particular 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 the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. However if the public authority has failed to deal with those earlier requests appropriately, that may well militate against holding the most recent request to be vexatious. Equally a single well-focussed request for information is, all things being equal, less likely to run the risk of being found to be vexatious. Wide-ranging requests may be better dealt with by the public authority providing guidance and advice on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.*

*A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request.*

*Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests.*

#### *(ii) The Court of Appeal in Dransfield*

*There was no challenge to the guidance given by the Upper Tribunal in the Court of Appeal. In the Court of Appeal, the only issue relevant to this appeal was the relevance of past requests. Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the Dransfield case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority.*

*Arden LJ gave some additional guidance...:*

*'In my judgment the 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...'*

*Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor."*

42. The Upper Tribunal took the view in the *Dransfield* case that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. As the Upper Tribunal observed: "*There is...no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.*"<sup>3</sup>
43. It should also be noted that the Upper Tribunal in the *Dransfield* case concluded that the purpose of section 14 of FOIA was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*".<sup>4</sup> However, in the *Dransfield* case in the Court of Appeal that conclusion was qualified. Arden LJ stated: "*...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"... 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 FOIA have...been carefully calibrated.*"<sup>5</sup>
44. The *Cabinet Office* case also confirmed the approach in the *Dransfield* case to the effect that the Tribunal should, in assessing the application of section 14 of FOIA, undertake a holistic assessment of all the circumstances. Accordingly, the Tribunal should adopt a rounded approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is vexatious.
45. In the *Cabinet Office* case, the Upper Tribunal also stated: "*Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument*".<sup>6</sup> Similarly, in the *Dransfield* case in the Court of Appeal it was stated: "*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*

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<sup>3</sup> Paragraph 82 of that case.

<sup>4</sup> Paragraph 10 of that case.

<sup>5</sup> Paragraph 72 of that case.

<sup>6</sup> Paragraph 27 of that case.

*current request*".<sup>7</sup>

46. Accordingly, a request for information can be vexatious under section 14 of FOIA purely on the basis of the resource burden placed on the public authority by a request, even if there is a significant public interest in the information requested and there is a 'reasonable foundation' for the request. However, this should be considered in the context of the 'high standard' set by vexatiousness as referred to in the *Dransfield* case in the Court of Appeal. As noted above, in that case Arden LJ stated, with regard to the term 'vexatious': "*Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one...*".

### **Discussion and findings; application of the law**

47. We acknowledge that the four broad issues or themes outlined in the *Dransfield* case are not exhaustive and are not intended to create a formulaic checklist for the Tribunal to address when determining whether or not the Request was vexatious for the purposes of section 14(1) of FOIA. However, we recognise that those issues or themes are a helpful tool for the Tribunal in considering potentially relevant issues as part of our broad assessment of all the circumstances in evaluating whether or not the Request was vexatious. Accordingly, we considered those issues or themes in our deliberations, but we should stress that we have not been constrained or confined in any way by considering them.
48. We turn first to the issue or theme of the burden placed on Northumbria Police and its staff by the Request, as this is relevant to the Burden Issue we have referred to.

### ***The Burden Issue***

#### *The burden of the Request*

49. The witness revised their initial estimate (referred to in the Decision Notice) of the quantity of the Requested Information from 10,000 documents and subsequently believed that there were approximately 40,000 documents. In referring to 'documents', the witness stated that they were referring to each item or page and that they had taken a 'holistic approach' to their estimate.
50. The witness explained that their estimated time for preparing the documents for disclosure distinguished between contact cards (which they stated were the shortest and the easiest to copy and redact) and the remainder of the documents (which they stated were much lengthier and more difficult to copy and redact).
51. In respect of the contact cards only (which the witness estimated numbered approximately 1500), the witness estimated that it would take 8 minutes to prepare each card for disclosure. The estimate of 8 minutes was calculated as follows:
- a. Indexing: 1 minute;
  - b. Cross-referencing: 1 minute;
  - c. Copying: 1 minute;
  - d. Assessing (scanning copied document onto system to enable redaction, assessing

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<sup>7</sup> Arden LJ, in paragraph 85.

relevance, recording data set, recording disclosed yes/no etc): 1 minute;

e. Redacting: 2 minutes;

f. Admin check: 1 minute;

g. Preparing for disclosure (creating a pdf of the document, protecting the document, referencing and saving): 1 minute.

52. In respect of other documents, the witness estimated that it would take 12 minutes to prepare each document for disclosure. The estimate of 12 minutes was calculated as follows:

a. Indexing: 1 minute;

b. Cross-referencing: 1 minute;

c. Copying: 2 minutes;

d. Assessing (scanning copied document onto system to enable redaction, assessing relevance, recording data set, recording disclosed yes/no etc): 1 minute;

e. Redacting: 5 minutes;

f. Admin check: 1 minute;

g. Preparing for disclosure (creating a pdf of the document, protecting the document, referencing and saving): 1 minute.

53. As can be seen, the difference between the two estimates of 8 minutes and 12 minutes related to the time for copying and redacting, with the estimate for documents other than the contact cards being 1 minute longer for copying and 3 minutes longer for redacting.

54. The witness stated that the bulk of the Requested Information was not contact cards. They explained that the contact cards were small, rigid card items which could be copied fairly easily via a photocopier (but could not be scanned), with the ink quality being generally good and therefore the content could be read. Also, the contact cards had the same format and therefore the person applying redactions would know what to look for when redacting. In contrast, the witness's view was that the other documents were significantly more difficult as the person making redactions would generally need to read each page when redacting. In addition, there were other difficulties with some of those other documents, such as large photographs (which would need additional, specialist copying equipment), a "significant amount" of handwritten notes (much of which was illegible), the fragility of some documents such as newspaper clippings and an "extensive" number of statements being recorded on 'onion skin' paper. The witness explained that 'onion skin' paper was a type of thin paper which was used at the time, which was extremely fragile and did not lend itself to copying or digital scanning as it often results in a copy where the content is illegible.

55. The witness considered that some documents could actually be copied, scanned and recorded easily or only required minimal redactions (such as site drawings), but that these were less numerous in volume than the other documents. The witness also stated that they undertook the preparation work outlined on some samples of the Requested

Information and they considered that the estimated time was very conservative, as some of the sample documents took between 18 and 22 minutes each to complete.

56. Applying the estimate of 12 minutes per document to prepare them for disclosure, the witness estimated that complying with the Request (based on an estimate of 40,000 documents) would take approximately 8,000 hours.
57. The Appellant disputed Northumbria Police's estimate of the volume of documents and the time taken to prepare them for disclosure under FOIA. Asked by Mr Hirst why their estimate of the volume of documents had changed so radically (see paragraph 49), the witness stated that when they had checked the documents, they realised that they had underestimated the volume - especially the documents on 'onion skin' paper which looked like a few pages and could in fact be hundreds of pages, because they were so thin. The witness also stated that they had originally only assessed one box of documents but they realised that they had underestimated the volume when they looked at another box.
58. The Appellant contended that it was insufficient for the Commissioner to assess the evidence of volume of the Requested Information via video link. In the bundle (exhibited to the witness's witness statement) was a significant number of photographs of the Requested Information, showing the storage boxes in which it was contained, as well as some of the contents spread out on a table and samples of the different types of documents (such as the contact cards and the onion paper referred to). We find that this was a sufficient way of evidencing the nature and extent of the Requested Information for the purposes of the appeal. We also find that the Requested Information comprised an extensive amount of material, at least to the amount of the witness's original estimate.
59. In respect of the extent of the Requested Information and the time needed to prepare it for disclosure, the Appellant referred to a book, published in 1985, written by people who had previously investigated (and produced a television programme regarding) the alleged miscarriage of justice in respect of the conviction of Ernest Clarke for the murder of Eileen McDougall. This was following the authors' review of files held by Northumbria Police. The Appellant quoted the authors stating, in that book, that "[w]e did our usual routine of getting our hands on every available piece of paper. Then we read ... and read ... and read. **It takes four and a half hours just to read the documents in the Clarke case, never mind digest the contents**" (emphasis as added by the Appellant). The Appellant's position was that this was "positive evidence" which showed that Northumbria Police's estimates could not be relied on.
60. During the hearing, Mr Hirst postulated that the total records held by Northumbria Police (as shown in the photographic evidence) amounted to no more than 12 lever arch files of material. He also submitted that we should accept that the authors of the aforementioned book had, in referring to four and a half hours, probably over-stated the amount of time taken to read the records on the basis that they were trying to impress with their thoroughness (so that the time needed to read all of the documents was actually likely to be less).
61. If we were to take the four and a half hours cited by the authors to read the material (even as an over-statement of the amount of time) and apply it to Mr Hirst's estimate of the volume of the records, that produces an interesting result. Assuming that one lever arch file holds around 250 pages of A4, then that would result in reading time of

just 5.4 seconds per A4 page.<sup>8</sup> We understand that a large lever arch file can hold around a ream of A4 paper, or 500 pages, so if that were the case then the result from that example (with double the pages) would be just 2.7 seconds reading time per page. Also, in either case, the calculation assumes that the contents are on one side of the page only.

62. That example of ours is, of course, hypothetical – but it illustrates the difficulty with the evidence which the Appellant is asking us to take into account. There are three particular issues here:
- a. The first is that there was no evidence before us to ascertain whether the amount of the information reviewed by the authors was comparable with the Requested Information held by Northumbria Police as evidenced in the appeal. Therefore we don't know how much material was provided to the authors; it may not be the same as the material which Northumbria Police has presented in evidence (the authors may have had access to less).
  - b. The second issue is that the activity of 'reading' can have different interpretations depending on the context. Some people would refer to 'reading' when they were just skim-reading (flicking quickly through pages, hoping to see something 'jump out') if they are looking for particular information. In another context, people would refer to 'reading' as carefully reviewing, or even analysing, each line of text that they see. The quote from the authors cited above would appear to suggest that their approach to the relevant reading was the former (i.e. skim-reading), because they distinguished reading from 'digesting the contents' – whereas, in contrast (based on the calculation in our example above) it seems unrealistic to assume that they could have read the contents carefully. However, either way, this is just supposition. The point is that we don't know what the authors meant when they referred to the time that they had taken to read the papers, nor what papers they had access to.
  - c. The third issue is that there were three authors and we don't know whether the four and half hours quoted was the total aggregate time for the three authors to read the documents, or whether it was referring to the time needed for each of the three authors with the documents shared between them (meaning thirteen and a half hours in total). The latter perhaps seems more likely, particularly as the quote referred to the authors in the plural ('we' and 'our') and they stated that "*we read ... and read ... and read*", which seems to emphasise how laborious they considered the activity was (and which is consistent with Mr Hirst's view that the authors would not have underplayed the amount of time involved). Again, though, the point is that we are faced with conjecture regarding the evidence which the Appellant wished us to take into account regarding the amount of the material comprising the Requested Information.
63. To be clear, Mr Hirst did not use his estimate of 12 lever arch files in the context of the four and a half hours reading time cited by the authors. Rather, he drew a comparison between his estimate of the amount of the Requested Information and the volume of documentation which may be seen by a lawyers and he considered (with regard to Northumbria Police's estimate) that a lawyer would be "laughed out of the room" if

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<sup>8</sup> 250 pages per lever arch file x 12 files = 3000 pages. 4.5 hours = 270 minutes. 270 minutes ÷ 3000 pages = 0.09 minutes per page. 0.09 minutes (0.09 x 60 seconds) = 5.4 seconds.

they said it would take them a year to read that volume.

64. However, even considering the applicable context from Mr Hirst's submissions, we still have the difficulty outlined in our example regarding the time it might take to read the papers. It would still mean (on the same assumptions given for our example) that the lawyer in Mr Hirst's scenario would be reading one page in just 5.4 seconds. More importantly, the actual context here is potential disclosure under FOIA - not just 'reading time'. Disclosure of the Requested Information under FOIA would involve preparing documents for disclosure, which (for reasons we will address) would involve more than mere reading time.
65. In short, we find that the evidence which the Appellant has asked us to take into account regarding the volume of documents and the time involved to just read them is unreliable. In contrast, the witness was able to provide a first-hand account not only of the extent of the Requested Information but also of its nature. The witness explained how the estimates had been calculated, with reference to the process which would be followed for preparing documents for disclosure. The witness also provided a considered estimate of the time which would be involved in preparing the Requested Information for disclosure, including based on exercises actually undertaken on samples, as we have referred to.
66. That said, we do not agree with the inclusion of the 'indexing' element in the witness's estimates of the time to prepare the documents for disclosure. The witness had explained during the hearing that this was the time taken in connection with recording what was held and ensuring that each document had been assessed and logged, and for cross-referencing against what had been disclosed. We find that that exercise would not be necessary, not least as we would expect that a copy of the disclosed information (once copied and scanned) would simply be retained by Northumbria Police. We also consider that some of this exercise was covered by the elements of 'assessing' and/or 'preparing for disclosure' referred to by the witness. However, the 'indexing' part of the estimate was, of course, only one minute and therefore even disregarding that would have no material effect on the overall estimate.
67. We accept the witness's evidence regarding the nature of the Requested Information and in particular the difficulties with the documents recorded on onion paper and by way of the index cards. We find that it would be challenging to prepare those records for disclosure. The witness gave a clear explanation of the process which would be involved and (with the exception of the indexing element) we accept that explanation as being a fair representation of the practicalities and timescales involved in preparing the Requested Information for disclosure, especially when taking into account the different types of documents and the time taken alone just to copy or scan the documents and then save them as pdfs ready for disclosure. We therefore find that (apart from the indexing element) the witness's estimates for the preparation of the Requested Information for disclosure are conservative and fairly reached.
68. Excluding the indexing element of the two estimates for the contact cards and the other documents, we are left with estimates of 7 minutes and 11 minutes, respectively, to prepare each document for disclosure. Even if we disregarded the witness's revised estimate of the quantity of documents comprising the Requested Information and only took the original (lower) estimate of 1,500 contact cards and 10,000 documents, this



would mean a total estimated preparation time for disclosure of over 2,000 hours.<sup>9</sup> We therefore find this to be at least the amount of time required to prepare the Requested Information for disclosure.

69. The Appellant had argued (primarily in the context of the potential application of section 40 of FOIA) that personal data would not need to be redacted in the Requested Information before disclosure, on the basis that the case file concerned a murder which took place 54 years ago and accordingly that Northumbria Police was not entitled to make an assumption that the file must contain the data of living persons. However, we do not agree with that analysis – in part, because equally it cannot be assumed that no data subjects referred to in the Requested Information are still living (indeed, the Appellant’s submissions asserted that “many persons” will be dead, therefore accepting the possibility that many would still be alive).
70. The Appellant also argued that some data subjects would not be identifiable on the basis that many female witnesses are likely to have changed their surnames on marriage. Again, though, this is not necessarily the position for all female witnesses and, in any event, in our view a person would still be identifiable (for the purposes of the relevant legislation) by reference to their maiden name.
71. For those reasons, we find that some redactions of personal data would be necessary before there could be any disclosure of the relevant Requested Information under FOIA. We do not consider it necessary, though, to set out a detailed analysis in this regard – this is because, in any event, we find that the Request would constitute a significant burden on Northumbria Police, such that it would be vexatious, even discounting any time for redaction of personal data. Taking our calculations in paragraph 68, if we also excluded the redaction element of the two estimates for the contact cards and the other documents (therefore deducting a further 2 minutes and 5 minutes’ redaction time from the contact cards and other documents, respectively, from the estimates in paragraphs 51 and 52) we would be left with estimates of 5 minutes and 6 minutes, respectively, to prepare each document for disclosure. This would therefore mean a total estimated preparation time for disclosure of over 1,125 hours<sup>10</sup> and we would still consider that to be a disproportionate burden on Northumbria Police such as to make the Request vexatious.
72. A further point made by the Appellant was that Northumbria Police had accepted that no exercise had been undertaken to ascertain whether, and the degree to which, the Requested Information did indeed contain personal data. However, we consider that those arguments do not assist the Appellant’s case – this is because if that exercise was to be conducted then this would simply add to the burden imposed by the Request.
73. Regarding Northumbria Police’s resources for dealing with the Request, we note the Upper Tribunal’s words in the *Dransfield* case<sup>11</sup> (albeit made in the context of the issue or theme of ‘motive’) that section 14 of FOIA: “*serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources*”. Accordingly, regard must be had to the resources available to public authorities for dealing with requests for information. This is so even where the requests relate to

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<sup>9</sup> 7 minutes x 1500 contact cards = 10,500 minutes (175 hours), plus 11 minutes x 10,000 documents = 110,000 minutes (c.1,833 hours), resulting in a total of 2008 hours.

<sup>10</sup> 5 minutes x 1500 contact cards = 7,500 minutes (125 hours), plus 6 minutes x 10,000 documents = 60,000 minutes (1,000 hours), resulting in a total of 1,125 hours.

<sup>11</sup> Paragraph 35 of that case.

matters of public interest (see also our comments in paragraph 78).

74. The witness stated that Northumbria Police has two full time individuals, working 37 hours per week, employed to manage FOIA requests, with support provided by a supervisor and the witness. We accept that evidence as representing the available resources within Northumbria Police to deal with the Request. Based on our calculations in paragraph 68 of around 2000 hours to respond with the Request, this would mean one member of staff taking over one year (approximately 54 weeks) just to work on the Request. Even with the lower figure of 1,125 hours referred to in paragraph 71, this would mean more than half a year (over 30 weeks) for one member of staff to work on the Request. In either case, we find, adopting the above words from the *Dransfield* case, that this would be an undue and disproportionate burden on Northumbria Police's resources.
75. For the reasons given, we find that the burden of the Request meant, in and of itself, that the Request was vexatious for the purposes of section 14(1) of FOIA.

*Other issues or themes from the Dransfield case*

76. The Appellant made various submissions in respect of the other issues or themes from the *Dransfield* case (namely the motive of the requestor, the value or serious purpose of the request and whether there was any harassment of, or distress to, the public authority's staff). We considered those submissions and those other broad issues or themes from the *Dransfield* case in our deliberations but, having reached the above conclusion, our views on those would have no effect on the outcome of our decision either way. Moreover, the Upper Tribunal in the *Dransfield* case emphasised that the four broad issues or themes were not intended to create a formulaic checklist for the Tribunal to address. We therefore consider it unnecessary to set out our thoughts on those other issues or themes in respect of this appeal. We would, though, just offer some additional comments of particular note.
77. We recognise that a potentially relevant factor in assessing whether or not the Request is vexatious is whether there is any public interest in the Requested Information.<sup>12</sup> We accept that there is potential public value in the Requested Information, having regard to the alleged miscarriage of justice in respect of the conviction of Ernest Clarke for the murder of Eileen McDougall, and likewise that there is a serious purpose behind the Request. However, we should also take into account the fact that the Court of Appeal concluded (following a review of evidence which, obviously, was not before us) that there was no such miscarriage. That is not to say that we have decided that there is no possibility of any miscarriage of justice, as this is not a matter we have any power to determine either way, but rather that the burden imposed by the Request is so significant that we consider that we would need much stronger evidence of any potential miscarriage of justice to justify concluding that it outweighed that burden.
78. In any event, as we have noted (paragraph 45), even if there is a compelling public interest in the disclosure of information held by a public authority, that does not necessarily prevail over the issue of the resource burden involved in complying with a request for the disclosure of that information. In other words, even if there is considerable public interest in the information which is the subject of a request, that does not (of itself) take precedence over, or override, any consideration that there is a

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<sup>12</sup> See, for example, *Home Office v Information Commissioner and Cruelty Free International* [2019] UKUT 299 (AAC), in addition to the *Dransfield* case.

such a burden placed on a public authority by the request that it might be vexatious wholly or partly because of that burden. In the context of this appeal, we find that the burden of the Request was sufficient to make the Request vexatious for the purposes of section 14(1) of FOIA, notwithstanding the potential public value in the Requested Information or any serious purpose behind the Request.

79. We also find (whilst recognising the mantra that FOIA is both ‘motive blind’ and ‘applicant blind’) that the Appellant had a genuine motive in making the Request and that there was no harassment of, or distress to, Northumbria Police’s staff. However, for the same reasons as noted above, these findings do not alter our conclusion that the Request was vexatious because of the burden it imposed on Northumbria Police.

### *The Timing Issue*

80. As we have noted, section 10(1) of FOIA provides that (subject to certain exceptions which are not applicable for current purposes) a public authority must respond to a request for information promptly - and in any event no later than twenty working days following the date of receipt of the request.
81. It is therefore irrelevant that the Appellant did not request a specific timeframe for the provision of the Requested Information and was content for it to be provided as part of a longer-term project. FOIA does not provide for a person making a request to be able to stipulate when they would like the information to be provided. Likewise, the period for compliance with a request is as set out in FOIA and a public authority cannot determine its own timescales, even with the agreement of the requester.

### *The Scope Issue*

82. In his grounds of appeal, the Appellant offered to “greatly reduce” the scope of the Requested Information. However, it was not open to the Appellant at this stage to modify the Request or the extent to which Northumbria Police could respond to it. Our remit relates to the Decision Notice, which addressed the Request as formulated (not any reduced scope which the Appellant subsequently considered would be acceptable as an alternative).
83. Under section 16(1) of FOIA, there was a duty on Northumbria Police to provide advice and assistance to the Appellant in respect of the Request, so far as it would be reasonable to expect Northumbria Police to do so. The provision of such advice and assistance is typically required where there is some doubt about a request for information, such as an ambiguity as to what is being sought, or where there is a multifaceted request which could be reformulated to make the request more focussed. However, that duty does not generally require a public authority to probe into, or seek to simplify, what is a clear and obvious request, especially in the context of section 14 of FOIA. As noted by Upper Tribunal Judge Jacobs in the *McInerney* case when considering the interaction of sections 14 and 16 of FOIA: “...when presented with what on its face is a single request, the public authority should not be obliged to dissect it to see whether it could be severed”.
84. We acknowledge that, in the *McInerney* case, Upper Tribunal Judge Jacobs also stated that section 16 of FOIA cannot be ignored by a public authority and that the circumstances might allow a public authority to extract one part to create a non-vexatious request.<sup>13</sup> However, he also considered that such cases may well be

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<sup>13</sup> Paragraph 56 of that case.

exceptional, noting that the duty imposed by section 16(1) of FOIA only applies “so far as it would be reasonable to expect the authority to do so”.

85. In that regard, we remind ourselves that the Request expressly stated that the Appellant was seeking “all the case information available” related to the murder of Eileen McDougall. We find that the relevant remaining wording of the Request simply elaborated on the sorts of records and information which the Appellant considered would be held by Northumbria Police, but that there is no doubt that the Appellant was seeking everything which was held by Northumbria Police regarding the Eileen McDougall murder case. The clear nature of the Request is reinforced by the fact that the Appellant had previously made two requests for information in almost identical terms in 2016 and 2018 (as also noted in paragraph 24 of the Decision Notice).
86. Also germane is that, as we have noted, section 16(1) of FOIA only required Northumbria Police to provide advice and assistance so far as it was reasonable to expect Northumbria Police to do so. We find that it would not be reasonable to expect Northumbria Police to provide advice and assistance in the circumstances, given that the Request was clear and obvious (and taking into account our comments at paragraph 83). Accordingly, we find that there was no obligation on Northumbria Police pursuant to section 16(1) of FOIA to provide any advice and assistance relating to the Request - and consequently that there was no breach by Northumbria Police of section 16(1) of FOIA.
87. Whilst it is not relevant for current purposes that the Appellant sought to modify the Request as part of his appeal, we would also comment briefly on the Appellant’s assessment of his proposed modification of the Request. As we have noted, the Appellant considered that his modified request for information would take a maximum of 100 hours for Northumbria Police to deal with. Even if that were the case, then it is likely that we would still find that such modified request would be vexatious based on the burden it would impose on Northumbria Police. This is on the basis that this would still take a full-time person (working 37 hours per week) over two and a half weeks to work only on the modified request. However, we had no evidence on this point (it may be that the actual time to deal with the modified request would be greater) and, as we have noted, this was not an issue we needed to determine, given our conclusion above that the Request was clear and could not subsequently be severed.
88. A related point for the Scope Issue is that of section 11 of FOIA. As we have noted, section 11 of FOIA provides that (in summary) a public authority must, so far as reasonably practicable, give effect to any preference which is expressed by a requestor as to the means by which the information requested is to be communicated. It goes on to also provide that the public authority may have regard to all the circumstances, including the cost, in determining whether it is reasonably practicable to communicate information by any particular means. The public authority is then required to notify the requestor of its reasons when it determines that it is not reasonably practicable to comply with the requestor’s expressed preference.
89. Those provisions are applicable only where the person making a request for information specifies their preference in the request. We would reiterate that section 11(1) of FOIA states (with emphasis added): “Where, on making his request for information, the applicant expresses a preference for communication...”. In the Request, the Appellant did not express a preference as to any means by which the Requested Information was to be communicated. In the absence of any such expressed

preference, section 11(4) of FOIA provides that a public authority may comply with a request by communicating information “*by any means which are reasonable in the circumstances*”. Accordingly, the Appellant’s subsequent suggestion in his grounds of appeal that the scope of the Request could be reduced has no bearing on the lawfulness of the Decision Notice in concluding that the Request was vexatious.

90. Another related point is that the Appellant had also argued that he had not asked Northumbria Police to copy the documents but merely wanted to inspect them. Again, the Appellant did not state this in the Request and accordingly section 11(1) of FOIA is not applicable. In any event, we considered evidence from Northumbria Police about the practicalities of allowing personal access to the Requested Information, which included the need to obtain security clearance for an external person to attend Northumbria Police’s premises and for that person to be accompanied at all times whilst on site. We accept that evidence and find that it would not have been reasonable for Northumbria Police to allow physical access to and inspection of the Requested Information, on the basis that this would also impose an unacceptable burden on Northumbria Police. This is because Northumbria Police could only comply with the Request if access was provided to all of the Requested Information (not just part of it, for the reasons we have given above regarding the Request not being severable) and a person would need to be in attendance for the duration of the access. We also consider that Northumbria Police would, in any event, need to redact any personal data prior to such access, for the reasons we have referred to.

### *The Payment Issue*

91. The Appellant’s grounds of appeal included a proposal to make payment in connection with Northumbria Police’s handling of the Request. A subsequent offer to make any such payment is not relevant to the lawfulness of the Decision Notice (nor, incidentally, to the lawfulness of Northumbria Police’s decision to refuse the Request). Even if such an offer were made before either Northumbria Police or the Commissioner made their respective decisions regarding the Request, it would not be a relevant factor regarding the lawfulness of any such decision. This is because, similar to our points on the Timing Issue, there is no provision in FOIA permitting a person making a request for information to offer payment in order to reduce or offset the burden that such request may place on the public authority. Equally, a public authority is not legally bound to accept any such offer – section 13(1) of FOIA makes provision for a public authority to be able to charge a fee where the estimated cost of complying with a request would exceed the appropriate limit in the Fees Regulations, but this is an option for the public authority and it can choose not to comply with that request pursuant to section 12(1) of FOIA. Moreover, there is no legal basis (in both FOIA and case law) for a request which would otherwise be vexatious to cease to be so simply because the requestor had offered to pay to assist with the disclosure of the relevant information. A further point is that our remit in the appeal is to consider the Decision Notice, which related to the Request as formulated – and the Appellant’s subsequent offer to make payment is accordingly not relevant to the lawfulness of the Decision Notice.
92. We would also comment that we consider that the Fees Regulations are not relevant to the Payment Issue. This is partly because the Decision Notice did not determine that Northumbria Police could refuse the Request pursuant to section 12 of FOIA (in respect of which the Fees Regulations are applicable). This is also because, pursuant to the Fees Regulations, Northumbria Police would not be able to include the cost and

effort associated with considering exemptions or redacting exempt information in applying section 12 of FOIA, which (for the reasons we have given) we consider to be relevant to the burden of the Request. Therefore we find that the Commissioner correctly concluded in the Decision Notice that section 14 of FOIA (rather than section 12) was the most appropriate exemption, having regard to the applicable circumstances of this case.

### *Other issues raised by the Appellant*

93. For completeness, we now briefly address some other issues raised by the Appellant in his grounds of appeal.
94. The Appellant stated that Northumbria Police had previously sought to rely on sections 30(1), 38 and 40 of FOIA and relied on these in their internal review, before changing their position to reliance on section 14 of FOIA during the Commissioner's investigation of the Appellant's complaint. Even if a public authority does not rely on certain exemptions when refusing a request for information under FOIA (or on any subsequent internal review by it), it is entitled to rely on new exemptions on an appeal before the First-tier Tribunal.<sup>14</sup> This is also the case in respect of the public authority's dealings with the Commissioner prior to the issue of a decision notice. Accordingly, whilst we understand the Appellant's concerns regarding the change in Northumbria Police's position, it was nevertheless lawful for Northumbria Police to rely on new exemptions, even at a late stage.
95. The Appellant also made submissions regarding whether Northumbria Police could properly rely on the exemptions which it originally sought to rely on. As we have noted, our remit relates only to the Decision Notice. Accordingly it is not within our power to determine matters relating to previous decisions of Northumbria Police in respect of the Request.
96. The Decision Notice stated (in paragraphs 5 and 62-65) that Northumbria Police had breached section 17(1) of FOIA by later relying on a new exemption which it had not mentioned earlier. We do not agree with those findings. In the *McInerney* case, Upper Tribunal Judge Jacobs stated:<sup>15</sup>

*"...section 17(1) does not prevent late reliance. It is concerned with the position when the request is being considered by the public authority, not when the case is before the Commissioner or the tribunal. The same is true of section 17(5)-(7), which refer to section 12 and 14. And the same reasoning applies to section 16 and the Code of Practice, both of which are concerned (like section 17) with the time the request is before the public authority."*
97. It follows that a public authority cannot have breached section 17(1) of FOIA where its response pursuant to that section sets out the exemptions which it is relying on at the time of that response. Therefore we do not agree with the Commissioner that Northumbria Police breached section 17(1) by subsequently relying on an alternative exemption and we consider that the Commissioner erred in that regard.
98. A further point raised by the Appellant in his grounds of appeal was that Northumbria

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<sup>14</sup> See the cases of *Information Commissioner v Home Office* [2011] UKUT 17 (AAC) and *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC). The Upper Tribunal's decision in the *Birkett* case was upheld in the Court of Appeal, in respect of the Environmental Information Regulations 2014 - *Birkett v Department for the Environment, Food and Rural Affairs (DEFRA)* [2011] EWCA Civ 1606.

<sup>15</sup> In paragraph 39 of that case.

Police undertook its internal review “after the required statutory deadline” and faced no consequences for that delay. Whilst the Environmental Information Regulations 2004, which deal with access to environmental information held by public authorities, provide<sup>16</sup> that a public authority must offer an internal review and must respond to any valid request for an internal review within a specified period, there is no equivalent provision in FOIA. We recognise that the Code of Practice issued by the Commissioner pursuant to section 45 of FOIA does include best practice recommendations regarding the existence of, and timescales for, an internal review procedure. However, compliance with the Code of Practice is not a statutory requirement. It follows that there can be no statutory breach by Northumbria Police as alleged by the Appellant.

## **Final conclusions**

99. For all of the reasons we have given, we find that the Decision Notice was correct in determining that the Request was vexatious for the purposes of section 14(1) of FOIA and accordingly that Northumbria Police was entitled to refuse to provide the Requested Information.
100. We also agree with the conclusion in the Decision Notice that Northumbria Police breached section 10 of FOIA by failing to respond to the Request within 20 working days of receipt. This is because the Request was dated 11 April 2022 and Northumbria Police only responded on 1 June 2022.
101. However, we find that the Commissioner was wrong to conclude that Northumbria Police breached section 17(1), for the reasons we have given. This finding does not, however, affect our decision regarding the ultimate conclusion reached in the Decision Notice, given that our decision results in the same outcome – namely, that Northumbria Police can rely on section 14(1) of FOIA to refuse to provide the Requested Information. As we are accordingly dismissing the appeal, we conclude (having regard to the provisions of section 58 of FOIA) that there is no basis for us to substitute the Decision Notice notwithstanding that finding.
102. We therefore dismiss the appeal.

Signed: Stephen Roper  
Judge of the First-tier Tribunal

Date: 15 April 2024

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<sup>16</sup> Regulation 11.