



**IN THE FIRST-TIER TRIBUNAL**

**Case No. EA/2011/0208**

**GENERAL REGULATORY CHAMBER INFORMATION RIGHTS**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice No: FS50367591**

**Dated: 23<sup>rd</sup> August 2011**

**Appellant: Mr Martin Hewstone**

**Respondent: Information Commissioner**

**Heard on the papers at Field House on 13<sup>th</sup> December 2011**

**Date of decision: 16<sup>th</sup> December 2011**

**BEFORE:**

**Fiona Henderson (Judge)**

**Roger Creedon**

**And**

**Darryl Stephenson**

Subject matter: FOIA – s 14 – vexatious request

Cases:

*Rigby v Information Commissioner and Blackpool, Flyde and Wyre Hospitals NHS Trust*

*EA/2009/0103*

*Jacobs v IC EA/2010/0041*

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER**

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**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal refuses the appeal for the reasons set out in the main body of the Decision.

## REASONS FOR THE DECISION

### Introduction

1. The Richmond upon Thames Community and Police Partnership (CPP) consists of representatives from the local community, the Council and the Police and provides a forum for Police and Community Consultation. The stated aim of the CPP is to open up channels of communication between the Police and the community in order to develop a mutual understanding of their concerns and priorities. The CPP is not a Council organization, however,
  - the Chief Executive is honorary Clerk,
  - the Council is funded by the CPP to provide administrative support under a Service Level Agreement.
  - The support is provided as part of the job description of a Council employee.
  - The Council is represented at CPP meetings by both officials and Councillors.
  - It is funded by a grant of £50,000 provided by the Metropolitan Police Authority (MPA).
  
2. The Appellant has had concerns about the way that the CPP is conducted since 1996 when on his own account he was no longer permitted to attend meetings of the CPP's precursor.<sup>1</sup> He started attending meetings again in 2009. He alleges that:
  - The CPP is being run in contradiction to its terms of reference and MPA guidelines,
  - The funding supplied by the MPA is being fraudulently misappropriated,
  - The CPP's administrator falsifies the minutes of the meetings at the behest of the CPP.

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<sup>1</sup> the Police and Community Consultative Group (PCCG)

**The Request for Information**

3. On 10<sup>th</sup> November 2010 the Appellant asked the Council for the following information:

...

*I would like to make it clear that my request was about the allocation of MPA £50,000 grant to the CPP and the manner in which Council employee, [named individual] is paid i.e. who exactly pays her wages. ...*

*At this meeting, I accurately asserted that the CPP was being run fraudulently, its Chairwoman was instrumental in the fraud and [named individual], its administrator, falsified and fabricated the meeting's Minutes. My question was about who was paying her to perform in this manner. While it is perfectly understandable that [named individual] should function as an MPA tart in order to justify her wages (if they pay them), I cannot understand why this money should be laundered through the Council or the reason why she is also a Council employee. If she only performs as the CPP Administrator on a part time basis and has other duties relating to services on behalf of the public, this should be made transparent – in my opinion. I would, should it be the case, like to know what these other duties are.*

*So, there you have it. I want it made clear how [named individual] is paid, by whom and for what purpose etc. I am far more interested in the reasons, methods and underlying logic rather than the amounts – should you be willing to disclose them.*

*This request is made because of my concerns about the CPP's misappropriation of public funds while being run in contradiction to its Constitution and Terms of Reference etc. In my opinion, [named employee]'s perversions cause great harm to the public attending CPP meetings in order to raise their concerns. I cannot see how these perversions are of any benefit to local tax payers or why she should be on the council's payroll, so all related information would be nice.*

4. The Council refused the request on 17<sup>th</sup> December relying upon s 14 FOIA which provides:

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

5. The Appellant, in effect, applied for a review in an email dated 4<sup>th</sup> January in which he stated:  
*“Here I repeat my request for the information sought in my email. Copy attached. I will not bother to contradict the pig-ignorant, fallacious comments of the previous FOI refusal made by [named Council official]...”*
6. The Council did not conduct a review relying upon its refusal notice dated 17<sup>th</sup> December and indicating that it would not be responding further.

#### **The Complaint to the Information Commissioner**

7. The Appellant complained to the Commissioner on 6<sup>th</sup> January 2011 who issued Decision Notice FS50367591 on 23 August 2011 in which he found that the Council had correctly relied upon s14(1) FOIA.

#### **The Appeal to the Tribunal**

8. The Appellant appealed to the First Tier Tribunal by notice dated 12<sup>th</sup> September 2011. Attached to these were a covering letter and his skeletal argument setting out his grounds of appeal disputing that his request was vexatious and arguing that his request was reasonable in light of his concerns relating to the way that the CPP was run and administered. Specifically he argued that:
  - a. The Commissioner’s definition of vexatious is *“to be rude for no apparent reason”* this is the wrong test.
  - b. The test that he should have used from the Collins English dictionary is *“of a legal action or proceeding instituted without sufficient grounds esp. So as to cause annoyance to defendant”*. His request does not fall within this definition as he has sufficient grounds.
  - c. What the IC thinks a reasonable person would think is flawed.
  - d. While his language was *“not intended to evoke joy and happiness, my language (English) conveyed exactly what I had intended it to convey to the recipients. Any reasonable person would express themselves similarly in the same circumstances”*.

- e. The information request is itself reasonable,
  - f. The Council's response to his FOI request was way-over-the top.
  - g. He also raised issues about the independence of the Case Officer responsible for the Decision Notice.
9. Both parties agreed to a hearing upon the papers. The Commissioner relied upon his reply to the Notice of Appeal and supplied a bundle of papers at the same time which have formed the evidence before the Tribunal. The Appellant relied upon his grounds of appeal and a response to the Commissioner's reply. The Tribunal has considered all the material before it.

The Context of the information request

10. The Appellant's request of 10<sup>th</sup> November is set in the context of an earlier information request on the same topic. On 25<sup>th</sup> August 2010 he asked for details of the activities/initiatives of the CPP and a breakdown of the amounts listed as administration costs stating where and to whom they were paid.
11. On 21<sup>st</sup> September 2010 a Council Officer disclosed on behalf of the Council a table detailing the CPP's budget for April 2010 to March 2011 and a list of activities and initiatives for 2009/20 and 2010/11. On 23<sup>rd</sup> September 2010 the Appellant emailed that Council officer directly indicating that he did not consider that he had received all the information included within the terms of his request as he had wanted monetary payments for all the items listed on the 2010/11 report such as "*Staff payments (amounts) and to whom paid*". In this request he added "*If the above information is classified as top secret and not for public consumption, please advise immediately*".
12. Having not received a response the Appellant emailed the same Council Officer on 7<sup>th</sup> October 2010:

*"I suspect that you were confused by the word "immediately". Yes, it is a big word with 5 syllables but I feel certain that, if you ask nicely, a colleague whose first language is English, or a dictionary, would probably help.*

*I am only presuming you are in need of assistance because of your colourful name, so I could be way off the truth. The thing is: there are many refugees around, usually over here because they have been persecuted by bloodthirsty tyrants or have sexual leanings unpermitted in their own countries. Are you one of them? If so, may I bid you welcome, fair tidings, and good-luck with learning the language and all attempts to behave in a decent manner towards others?*

*The thing is, if you feel inadequate and useless, don't repress those honest feelings. Nobody's perfect. Strive towards being a better person. That's my motto and it's made me what I am today."*

13. On the same day the Appellant wrote to the assistant head of legal services:

*"Quite frankly [the named Council Officer] seemed just a tad on the clueless side of things and not altogether au fait with the English lingo but nobody's perfect, as I informed her".*

14. The Assistant Head of Legal Services wrote to the Appellant on 7<sup>th</sup> October 2010 indicating that the remarks were racist, offensive and had caused the Officer great distress and requiring an unreserved written apology to the named Council Officer by 5pm Friday 8<sup>th</sup> October 2010.

15. The Appellant in his email of 8<sup>th</sup> October 2010 to the Assistant Head of Legal Services did apologise "if" he had caused great distress, in an email that included the following:

*"hello [name] (are you a man or a woman or what?)*

*...*

*I am totally baffled by what you could possibly interpret as racist. Perhaps you have an over-ripe sensitive imagination or are just being deliberately perverted..."*

16. In an email to the named Officer he states:

*If I caused you “great distress”, I am full of remorse and apologise most profusely because this was far from my intention ....*

*However, the [Assistant head of legal services] also alleges that my communication was racist? Did you make that claim? If so, you will need to justify it, as nothing I wrote was ever intended to be interpreted that way.*

17. On 4<sup>th</sup> November 2010 the Council replied to the FOIA request as clarified on 23<sup>rd</sup> September 2010 providing spreadsheet details of document reproduction costs, advertising and publicity costs as well as catering costs but withholding specific staff salary details under s40(2) FOIA. The Assistant Head of Legal Services wrote separately on 5<sup>th</sup> November in the following terms:

*“... to make it absolutely clear that the Council will not tolerate any member of its staff being subjected to offensive, abusive or intimidating language or behaviour. Although you may request an internal review of the decision, a review will not take place should such language or behaviour be used .... Further FOI/EIR requests will also not be responded to ...”*

18. The Tribunal is satisfied that the correspondence as set out above was both offensive and abusive. It notes particularly the exchanges set out in paras 12 to 16 above which clearly demonstrate an unacceptable use of language on the part of the Appellant. Despite having had it pointed out to him in the letter of 7<sup>th</sup> October the distressing effect that his emails were having, the Appellant persisted in sending personal and offensive emails. It was in this context and having been told in no uncertain terms that this form of correspondence was unacceptable that the Appellant made his information request of 10<sup>th</sup> November 2010 in which he accused the Council employee responsible for clerking the CPP of being “*an MPA Tart*”. Additionally his response to the letter of 5<sup>th</sup> November to the Assistant Head of Legal states

*“I only apologised to [Council officer] because upon reflection, it occurred to me that her bad manners and incompetence may not entirely have been her own fault i.e. she was only doing what she was told”.*



## **Legal Submissions and Analysis**

### Grounds a and b

19. There is no definition of vexatious within FOIA and the Commissioner has set out a framework of 5 headings in his FOIA awareness *Guidance 22* to help determine whether a request is vexatious or not. His Decision Notice was structured around these criteria<sup>2</sup>. Whilst as noted in *Rigby v Information Commissioner and Blackpool, Flyde and Wyre Hospitals NHS Trust EA/2009/0103* “the considerations it identifies are a useful guide to public authorities when navigating the concept of a “vexatious” request” this Tribunal observes that they are not binding and may prove distracting in some cases seeming to invite submissions on all headings even if not all are relied upon.
  
20. The Tribunal does not accept that the Commissioner’s decision equates a vexatious request with being rude for no apparent reason, as he is clearly looking at the context, and effect of the correspondence. Equally the Tribunal does not accept the Appellant’s implied contention that frustration or the underlying motivation will automatically prevent abusive or offensive language from being vexatious.
  
21. The Appellant argues that the underlying motivation for the series of information requests is very serious and of sufficient importance to excuse the tone of his correspondence. The Tribunal has neither the jurisdiction nor the evidence to take a view on the Appellant’s underlying grievance in relation to the CPP, however, the Tribunal is satisfied that the use of this language is not necessary to further his case and even taking the Appellant’s underlying case at its highest it is not proportionate.
  
22. The Tribunal prefers the definition set out in *Rigby* where following a review of existing case law, vexatious was held to be defined as an activity that “*is likely to cause distress or irritation, literally to vex a person to whom it is directed*”.

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<sup>2</sup> He found that the request was obsessive and had the effect of harassing or causing distress to the Council or its staff , in light of these findings he did not consider the other guiding questions.

23. Additionally this Tribunal agrees with the approach set out in *Jacobs v IC EA/2010/0041* where the Tribunal differently constituted observed that:

*“Public authorities and the individuals representing them must expect to be exposed to an element of robust and persistent questioning, sometimes articulated in fairly critical tones. And the test of when a dialogue develops to the stage where it may be said to have become vexatious will be an objective one, not based on the particular sensitivities of the individual or individuals dealing with the person making the request”.*

The Tribunal notes that robust allegations of malpractice have been leveled at the Council and the CPP. The Tribunal has not found it necessary to determine whether these substantive allegations themselves cross the line in determining that the request is vexatious.<sup>3</sup>

#### Grounds c and d

24. The Appellant argues that the Commissioner has struck the wrong balance in applying an objective standard to whether the request was vexatious. His argument on this are:

- i) The Appellant believes it was reasonable,
- ii) Only the named Officer actually said she was distressed.
- iii) There is no evidence for what the reasonable man would think.
- iv) The level of frustration at failing to obtain the information and underlying motivation would cause any reasonable person to express themselves similarly.

25. This Tribunal is satisfied that allegations made in relation to the operation of the Council as an organization are different in nature to personal allegations made against individual Council employees. Additionally whilst a criticism of the way in which a Council employee has performed their role may be a legitimate complaint, the Tribunal is satisfied in this case that the correspondence has

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<sup>3</sup> Unless the allegation crosses into the personal e.g. paragraph 25 below

become abusive, personal and is in disproportion to the criticism leveled at the employee.

26. In terms of the evidence from individuals or the reasonable man, the Tribunal is satisfied that the test for the Tribunal is the likely effect of the activity or behaviour and whether it is likely to vex. There is sufficient evidence on the face of the documents before it to enable it to conclude that objectively the request is vexatious, this judgment being made in the context that the Appellant has been told what is considered abusive and offensive and continues to pursue his information request in those terms. The Appellant argues that a reasonable person would express themselves similarly in the same circumstances. However, the Tribunal rejects this, noting that the letter to the named Officer of 7<sup>th</sup> October was in the context of:

- there having already been a response under FOIA,
- the Appellant's clarification of 23<sup>rd</sup> September.
- The grievance precipitating the letter was a 2 week wait for a substantive response to that clarification.

The personal remarks went beyond the failure to respond to a letter in a timely fashion and speculated at length and in offensive detail upon the personal circumstances of the individual. Similarly the terminology of the Council employee tasked with Clerking the CPP as an "*MPA tart*" in relation to this request goes beyond an allegation relating to the performance of her role and becomes a term of personal abuse.

#### Ground e

27. The Appellant argues that it was reasonable to request the information that he asked for, in that he was seeking to reconcile conflicting accounts as to the funding of the Council administration of the CPP. The Commissioner argues that this must mean no proper or justified cause for that request in its particular form (i.e. when couched in these terms). In concluding that this request is vexatious, the Tribunal does not find that fulfilling the terms of the request would have been

onerous or that the Appellant had no reason for asking for the information. The Tribunal's conclusion is based entirely upon an objective assessment of the way that the information has been asked for in the context of this case.

Ground f

28. The Tribunal is satisfied that in the context of this case whilst protecting its employees the Council has not overreacted to the information request. Despite the Appellant's email to the named Council Officer of 7<sup>th</sup> October, and the contents of the "apology" emails, the Council did not at that stage treat that request as vexatious and indeed provided detailed information relating to the information request<sup>4</sup>. The Appellant had been given clear notice of what the Council considers to be offensive and abusive and the consequences of using this type of information in the context of a freedom of information request, before s14 FOIA has been relied upon.

Ground g

29. The Appellant raises various complaints in relation to the conclusions drawn by the Commissioner in his decision notice and his possible motivation for this. S58 FOIA provides:

*(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,*

*...*

*<sup>5</sup>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.*

Consequently an appeal to the Tribunal constitutes a complete rehearing of the

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<sup>4</sup> The appellant alleges that this information was only 5% of what was asked for within that information request. The appellant did not appeal that information response to the Commissioner, and consequently the sufficiency of the response to that request is not before this Tribunal.

<sup>5</sup> This Decision Notice did not involve the exercise of the Commissioner's discretion.

facts. The Tribunal is only able to interfere with this Decision Notice if it concludes that it is not in accordance with the law. The Decision Notice held that the request was vexatious. The Tribunal agrees with this conclusion on its own analysis of the facts as set out above and therefore this ground must fail.

Was the request obsessive?

30. The Tribunal notes that the Commissioner in his Decision Notice found that the Appellant's request was obsessive. The Tribunal does not consider that it has sufficient evidence on this point to make a determination in relation to this aspect of the Commissioner's case having only the correspondence from 25<sup>th</sup> August 2010 before it. Additionally the Council have not been joined as a party. However, the Tribunal does not consider it necessary to seek further information to determine this point as it is satisfied for the reasons set out above that the request was vexatious.

**Conclusion**

31. The Tribunal is satisfied for the reasons set out above that the request was vexatious and that s14 FOIA was properly applied by the Council. The appeal is therefore dismissed.

Dated this 16<sup>th</sup> day of December 2011

Fiona Henderson  
Judge