IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0222
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50391145/FS 50401240

Dated: 6th September, 2011

Appellant: Independent Police Complaints Commission

Respondent: The Information Commissioner

Hearing: 5th. March, 2012

Date of Decision: 29th.March, 2012

Before

David Farrer Q.C.(Judge)

and

Alison Lowton

and

Andrew Whetnall

Attendances:

For the Appellant: Philip Coppel Q.C.

For the Respondent: Michael Lee

Subject matter:

Vexatious requests - FOIA s. 14(1)

Cost of compliance - FOIA s.12(1)

Late reliance on a FOIA exemption - FOIA ss.57 and 58

Cases:

Gowers v ICO and London Borough of Camden, EA/2007/0114

Birkett v DEFRA [2011] EWCA Civ 1606

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal.

STEPS TO BE TAKEN

No steps are required to be taken by the Appellant.

Signed:

David Farrer Q.C.

Judge

Dated this 29th. March, 2012

INTRODUCTION

1. Paul Andrews, who chose not to appear on this appeal, has a keen interest in the work of the Independent Police Complaints Commission (the "IPCC"). In a period of around two years preceding the requests that give rise to this appeal he made twenty – five requests for information to the IPCC regarding their investigations. They focussed on no particular topic but appeared to range widely, even indiscriminately, over the whole spectrum of complaints that the IPCC investigates.

THE REQUESTS

2. On 17th. March, 2011 he made a request for information in these terms : – *" Please may I have copies of all IPCC managed investigation reports for the years 2008, 2009 and 2010 ?"* ("The first request")

   He followed this with a further request on 18th. April, 2011 relating to an earlier request in response to which he had received edited information. He asked for copies of -

   "(1) Evidence considered as part of this case.
   (2) Case file notes.
   (3) IPCC case management plans
   (4) Correspondence between the Met police and IPCC staff relating to this case.
   (5) Legal advice" ("The second request")

3. The first request covered 438 cases, it transpired. The IPCC responded on 1st. June, 2011, treating both requests as vexatious in accordance with FOIA s.14(1). and therefore refusing the requests. It maintained that stance when asked to review its decision.

THE DECISION NOTICE

4. Mr. Andrews complained to the ICO on 11th. and 18th. July, 2011.

5. The ICO issued the Decision Notice on 6th. September, 2011. He related the two requests to his own published guidance on s.14(1), which sets out five criteria for an assessment of vexatiousness. He indicated that he was concerned as to how many were satisfied. He accepted that both requests would impose significant burdens on the IPCC in terms of financial costs and human resources and that the nature of the second request, following six similar requests for very detailed information as to particular cases, suggested the probability of further future requests if these were satisfied.

6. He further acknowledged that the effect of these requests was to harass the IPCC, especially when considered in conjunction with public comments made by Mr. Andrews and his cooperation with others through a website to circumvent the provisions of s.12 in making requests to this authority.

7. On the other hand he concluded that the requests were not obsessive and had a serious purpose and value, since Mr. Andrews had a deep interest in the work of a public authority conducting investigations of great public importance.

8. Whilst issuing a warning that further requests might be deemed vexatious, he decided that the two requests under consideration were not and ordered the IPCC to provide the requested information or give reasons for a refusal. He referred to s.12 as a possible alternative exemption.

THE APPEAL TO THE TRIBUNAL

9. The IPCC appealed that decision, setting out in its grounds of appeal the features of these requests which, it asserted, fulfilled the requirements of s.14(1). Further, it raised for the first time the s.12 exemption as to both requests and served two witness statements establishing the time, hence the costs of complying with the requests.

10. In his response, the ICO relied, as to s.14(1), on the points made in his Decision Notice, referring also to the importance of the context in which the requests were made, that is to say the previous history. He cited the decision in *Gowers v ICO and London Borough of Camden EA/2007/0114* and other Tribunal authorities to the same effect.

11. As to s.12, he did not object to the late reliance of the IPCC on this exemption but contended that it was engaged only in relation to the first request. He acknowledged that, if it was open to the IPCC to rely on s.12, then the evidence showed that, as to the first request, such reliance was justified. The practical effect of that concession was that only the second request gave rise to any practical dispute between the parties. As already noted, the requester, Mr. Andrews, did not wish to be joined. The Tribunal nevertheless heard further oral argument on the application of s.14(1) to the facts of this appeal as well as to the outstanding s.12 issue and rules here on both exemptions claimed.

12. After the date of the ICO`s response, the Court of Appeal ruled in *Birkett v DEFRA [2011] EWCA Civ 1606* that, in the context of appeals under the Environmental Information Regulations, 2004 (which are subject to ss.57 and 58 of FOIA), a public authority had a right to rely on appeal on an exception not asserted in its refusal or at any stage thereafter before the issue of the Decision Notice. The Tribunal sees no justification, nor was any advanced, for treating differently late reliance on an exemption under FOIA, since the arguments underlying the *Birkett* ruling apply at least equally to FOIA appeals. Had this been a matter for the exercise of the Tribunal`s discretion, we should have allowed late reliance anyway.

FOIA S.14[1]

13. The ICO relied at the hearing very largely on the reasons set out in the Decision Notice and repeated in his response. Mr. Coppel Q.C., for IPCC developed in oral argument the points made in the grounds of appeal and his "Outline argument".

14. The Tribunal considers that these requests were plainly vexatious when considered in the context of earlier requests or indeed in isolation. The criteria proposed in the ICO`s

[1] 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."

guidance are very helpful as a reference point. However, an approach which tests the request by simply checking how many of the five “boxes” are “ticked” is not appropriate. It is necessary to look at all the surrounding facts and apply them to the question whether the request is vexatious, a term not defined in FOIA but familiar to lawyers.

15. A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12.

16. Equally, a request which by no means overwhelms the resources of the authority but which is clearly motivated merely by a desire to cause a nuisance may be judged vexatious without more.

17. A similarly modest request, viewed against a long history of similar requests showing no obvious serious purpose in the requester may satisfy s.14, even where, seen in isolation, it would fall far short of doing so.

18. The same applies where the clear inference to be drawn from the requester`s conduct is that he intends a future campaign of pointless requests just to keep the authority occupied or to combine with others to circumvent the cost limits providing the exemption in s.12.

19. Abuse of the right to information under s.1 of FOIA is the most dangerous enemy of the continuing exercise of that right for legitimate purposes. It damages FOIA and the vital rights that it enacted in the public perception. In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill – intentioned requests and should not feel bound to do so only where a sufficient number of tests on a checklist are satisfied.

20. The present requests were, in our opinion, not just burdensome and harassing but furthermore wholly unreasonable and of very uncertain purpose and dubious value, given the undiscriminating nature of the first request. We are by no means convinced of

Mr. Andrews` good faith in making it. Adopting the approach advocated above, we should have regarded any one of those findings as sufficient to describe these requests as vexatious, given the history of earlier requests and the public hostile comments to which the Decision Notice referred.

FOIA s.12

21. Section 12 of FOIA provides:

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

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

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

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—
(a) by one person, or
(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

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

22. Regulation 3(3) of *The Information and Data Protection (Appropriate Limits and Fees) Regulations 2004* (*SI 2004/3244*) provides in this case for an appropriate limit of £450 for the purposes of s.12(3).

23. Regulation 5 provides -

"(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority–

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

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which–
(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
(b) those requests are received by the public authority within any period of sixty consecutive working days."

24. The unchallenged evidence shows that the cost of complying with the first request far exceeds the appropriate limit but that the second, taken in isolation, does not, hence evidently the stance of the ICO on s.12. The question is whether Regulation 5(2) applies so that the cost of complying with the second request is to be regarded as the cost of complying with both.

There is no doubt that the requests were received within a period of sixty consecutive days (Reg.5(2)(b)) – see paragraph 2 above. Do they

"relate, to any extent, to the same or similar information" (Reg.5(2)(a)) ?

The ICO argued that they did not.

25. The second request was for specific details of a report which was a subject of an earlier request than those with which this appeal is concerned. It was the same kind of report as the 438 reports requested in the first request.

26. We agree with the IPCC that the wording of Regulation 5(2) (a), for good reason, requires only a very loose connection between the two sets of information, hence the insertion of "to any extent" and "similar". The information covered by the second request was quite obviously very similar in character to that described in the first. They were simply different reports.

27. We therefore rule that the IPCC was entitled to rely on Regulation 5(2) in claiming the s.12 exemption in reply to the second request.

THE DECISION

28. It is for these reasons that we allow this appeal on both grounds.

29. Our decision is unanimous.

Signed:

[Signed on the original]

David Farrer Q.C.

Judge

29th. March, 2012