



FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appellant: Mr Robin Makin	Tribunal Ref EA/2012/0007
Respondent: The Information Commissioner	

DECISION NOTICE

1. In 1950 the late George Kelly was wrongfully convicted of murder and executed. Mr Makin, who is a Liverpool solicitor, acted for Mr Kelly's (illegitimate) daughter first in connection with proceedings in the Court of Appeal, where the conviction was quashed in 2003, and then when arrangements were made for the body to be exhumed and reinterred.
2. There then arose the possibility of a compensation claim of up to £1 million under Section 133 Criminal Justice Act 1988. The daughter did not wish to pursue this so in 2006 the Liverpool probate registry appointed Mr Makin in her stead as personal representative (page 83).
3. The assessor under the Act, then Lord Brennan, refused an interim payment of £375,000 on 16 November 2006 because it was not clear to him which of the deceased's relatives was likely to be entitled. On 16 April 2008 Lord Brennan directed Mr Makin to identify the beneficiaries and give an acceptable time table for presenting final submissions. He warned that a failure to cooperate might lead him to decline to make a final award (pages 85-87). Then in March 2011 the assessor dismissed the application on the ground that Mr Makin had failed to take reasonable steps to pursue it. The Ministry of Justice (MoJ) notified Mr Makin of this decision by letter dated 24 March 2011 (page 91).
4. Mr Makin responded on 28 March 2011 with a subject access request and the Freedom of Information (FOI) request which is the subject of this appeal (page 71).

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5. In May 2011 the MoJ refused the request on the ground that it was vexatious. They confirmed this decision on review. On 12 December 2011 the Information Commissioner (ICO) confirmed the MoJ decisions. Mr Makin now appeals to the Tribunal.
6. The ICO has issued well known policy guidance on the question of whether a request is “vexatious” and this has been the subject of much, perhaps too much, comment in Tribunal decisions. Mr Makin kindly supplied us with a careful note of some of those decisions but at the hearing he readily agreed that we were dealing essentially with a question of fact and that we should focus on the simple wording of Section 14(1) Freedom of Information Act 2000. A public authority is not obliged to comply with a request for information “if the request is vexatious”. Mr Capewell, who appeared for the ICO agreed.
7. Mr Makin’s submissions focussed on what he called his “trump card” and asked “does the request have a serious purpose?” If it does, then it could not be considered vexatious.
8. Mr Makin accepts that the requested information would not assist him in responding to the assessor’s own requests for information. He contends that the assessor acted erroneously in wanting to know precisely where the money will end up. The money will be distributed according to the law of intestacy. He suspects that there has been secret correspondence between the assessor and the Ministry of Justice. He submits that the requested information would assist him in making representations to the Secretary of State with a view to having the matter referred back to the current assessor. He might wish to then challenge any failure to so refer.
9. For the ICO, Mr Capewell submitted that it was obvious that the assessor couldn’t make interim payments of £375,000 worth of public money without knowing where it would end up. Either Mr Makin was able to assist in providing the information requested by the assessor in which case he should do so, or he was unable to assist. Any serious purpose had now been lost in what was a pursuit of baseless allegations against the integrity of Lord Brennan. The assertion (page 82) of criminal offences under Section 77 Freedom of Information Act was indicative of the spirit in which the requests were now being pursued.

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10. At this point it is convenient to examine exactly what information is the subject of the request.

11. In the course of case management, the Tribunal analysed the request as follows:-

“The request for information would appear to fall into three parts:

(a) Information which is referred to in personal data held by MoJ about the appellant in his capacity as the legal personal representative of George Kelly, deceased, but is not itself personal data.

(b) All communications passing between MoJ and the Assessor relating to the appellant’s claim.

(c) All communications passing between MoJ and the Assessor more generally regarding his appointment and the assessment of Miscarriage of Justice cases.”

12. Mr Makin accepted that analysis subject to what he called the following “minor clarification”.

“(A) The appellant seeks the information that is held about him in connection with the George Kelly case that is not personal data (the appellant has, also, requested his personal data but that is not the subject of this appeal and is for another forum to deal with). The clarification which the Appellant has is to ensure that the request is understood to include any recorded information pre-dating the Grant of Letters of Administration to him and, also, all that may be held by the MoJ in connection with the successful appeal and matters relating to the exhumation and reburial because such is connected to and relevant to the Appellant in his capacity as the Legal Personal Representative.

(B) The Appellant seeks communications passing between the MoJ and the Assessor about the claim and, also, any recorded information about those communications including memoranda about telephone calls and meetings.

(C) The general information relating to the appointment of the Assessor and the assessment of miscarriages of justice will, also, include recorded information relating to telephone calls and meetings and memoranda and other material not in the public domain.”

He added that he was not seeking any information that had already been provided to him.

13. On any view, it seems to us, the scope of the request is very wide indeed.

14. It is also necessary to say something about the context of previous requests for information.

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15. Mr Capewell drew attention to the evidence before the ICO that the MoJ had 36 entries on its system relating to requests, internal reviews and complaints from Mr Makin not including correspondence received from his MP. The MoJ estimate that dealing with Mr Makin's requests generally takes up 20% of the time of one member of its staff. He drew attention to requests for information about Lord Brennan in 2006 on pages 192-3 and in 2007 at page 196. There are other examples of requests at page 153 and 174 of the bundle.
16. Mr Capewell also asked us to consider the ICO decision notice FS50277357 / FS50277366 dated 21 October 2010. This ruling relates to requests in the name of the late Mr Kelly's daughter. Mr Makin's firm were involved in the ICO investigation. (See paras 7 and 9). The MoJ told the ICO that in 2009 a total of 21 information requests were received from the complainant or from her representative relating to broadly the same subject matter. Three of the requests made were held to be vexatious as a result of that investigation.
17. Mr Makin accepted that he has made several Freedom of Information requests about the estate he was administering. There had been requests made by the late Mr Kelly's daughter. These, he submitted, were a red herring. He said he was unable to say how many requests for information he had made about the assessor but submitted that the number of requests he had made was not a relevant factor to be taken into account.
18. We disagree with Mr Makin's submission. In our judgement, all the previous requests to which we have referred were part of the relevant background circumstances which the MoJ, the ICO, and the Tribunal are entitled to take into account in reaching a judgement under Section 14.
19. We now turn to that question.
20. We accept that a properly targeted request for information to assist with a challenge to a decision such as that of the assessor in this case is most unlikely to be "vexatious", whatever the past history may be. One would expect, however, a solicitor to target the request properly by asking, for example, for all the material which the MoJ placed before the assessor in the course of reaching his decision. We accept that it is very important that we shouldn't try to second guess the conduct of litigation by those actually involved.

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On the other hand, the nub of the dispute, upon which the assessor's decision stands or falls, is whether he is entitled to refuse an award because he has been given no information about the ultimate beneficiaries. A targeted request would not lose sight of this objective.

21. This request goes much further. It asks for any information held by the MoJ about the appellant in his capacity as legal personal representative of the deceased. It also asks for all communications passing between MoJ and the assessor regarding his appointment and the assessment of miscarriage of justice cases generally. In our judgement in the context of the other requests to which we have referred the breadth of information sought goes far beyond the reasonable pursuit of the claim. We consider that the MoJ were entitled to regard the request as vexatious when they received it; and we agree with the ICO that they were right to do so.
22. For these reasons we dismiss the appeal.

Signed:	NJ Warren	Date:	23 August 2012
	Chamber President		
Member	J Blake		
Member	Dr M Clarke		