IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2014/0002

B E T W E E N:-

CHRISTOPHER COLLINS

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

and

HER MAJESTY'S TREASURY **Second Respondent**

Date of Decision: 26th November 2014

Date of Promulgation: 27th November 2014

DECISION

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1. This is an appeal by Mr Christopher Collins ("the Appellant") arose from a request to Her Majesty's Treasury ("HMT") on 8 January 2013, under the Freedom of Information Act 2000 ("FOIA") seeking the following information:

> *"You previously released to me a list of Chancellor and Chief Secretary's Private Office files in Excel, via Mr Nick Dippie. Last year you reviewed for release all the files in that collection dated up to the end of 1981. An agreement was reached between us to cover the cost of scanning the files, which has only been partially completed.*
>
> *Please now review for release all files from that list dated up to the end of December 1982."*

2. The *"list"* above was of the Chancellor's and Chief Secretary's Private Office files which had, the year before, been released to the Appellant by HMT. The Appellant and HMT reached an agreement whereby the Appellant contributed £600 towards the costs of scanning 77 of those files dated up to 1981 which had been reviewed by HMT for release to The National Archive ("TNA"). The Appellant told the Tribunal that initially, he had thought he would reach a similar agreement with HMT for the provision of the files from 1982. HMT told the Tribunal that it was now of the view that its voluntary provision of the 77 files had been a mistake – in the sense that it was not obliged in law to have provided this information and in retrospect, this had placed considerable strain on the Department's resources.

3. On 5 February 2013, HMT advised that it did not consider that *"…broad requests of this kind sit comfortably within the remit and the spirit of the Act…".* It nevertheless suggested it would deal with the request outside the Act. HMT's information rights team advised it would liaise with HMT's records management team to deal with the Appellant's request. HMT went on to advise that if the Appellant could identify a particular subject which he considered would be contained within the files, it would consider this more explicit request under the Act.

4. On 7 February 2013, the Appellant asked HMT to treat his request as a valid information request under FOIA and either provide the information or issue a valid refusal notice. On 14 February 2013, the Appellant contacted HMT and provided a spreadsheet containing 66 files which he asked to be declassified. On 21 March 2013, HMT stated that its records management team had advised that it did not have the capacity to deal with large scale file reviews and that wide-ranging information

requests had the effect of circumventing the Public Records Act. Accordingly, HMT refused the request on the basis that it was a "vexatious" request by virtue of section 14(1) FOIA.

5. On 4 June 2013, the Appellant complained to the Commissioner. After an investigation, the Commissioner issued a decision notice on 9 December 2013, reference number FS50500101.

6. The Commissioner found that section 14(1) was engaged on the basis that compliance with the request would give rise to a "grossly oppressive" burden on HMT which was not outweighed by the serious purpose/motive behind the request. On 6 January 2014, the Appellant submitted a Notice of Appeal.

The Legal Framework

7. Section 14 of the Act provides:

> *"14. – (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".*

8. The Act does not define the term "vexatious". However, when considering the application of section 14, the Commissioner now looks to the binding decision of the Upper Tribunal in the case of the Information Commissioner v Devon County Council & Dransfield GIA/3037/2011.

9. By way of overview, Judge Wikeley stated at §10 of that judgment that:

> "*The purpose of section 14…must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*"

10. Therefore, and whilst making it clear that they were *"not intended to be exhaustive, nor … meant to create an alternative formulaic check-list"* Judge Wikeley took the view that it was helpful to approach the question of whether a request was truly vexatious by considering four broad issues or themes which were set out at §28 as follows :-

(1) The burden placed on the public authority and its staff;

(2) The motive of the requester;

(3) The value or serious purpose of the request; and

(4) Any harassment of, or distress caused to, the public authority's staff.

11. The parties agreed, as did the Tribunal, that given the Appellant's always courteous dealings with HMT and the clear historical/educational purpose behind the request, that factors (2) and (4) were not at issue here.

12. Judge Wikeley commented at §43 that:

> *"…The question ultimately is this – is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?"*

The Appellant's Grounds of Appeal

13. First, the Appellant states:

> *"…I would be entirely happy to see the processing of my FOI request delayed until the departmental policy transfer has taken completed in March 2013* [sic] *and have always been reasonable, patient and polite in my dealings with the Treasury, ready to give ground on such questions and to provide funds … Insofar as the finding of vexation rests on this question of phasing, it is unfounded…"*

14. Second, the Appellant disputes HMT's estimate of the amount of work it would take to action his request saying:

> *"…I question that the resource estimate of 198 hours accurately assesses the net cost of the work. It is surely a gross figure. Since it is conceded that the files will be reviewed for release 'in due course' processing the FOI request will reduce costs when the Private Office files are reviewed. No estimate is given of net costs…"*

15. The Appellant goes onto say:

> *"…There is what you might call also a kitchen-sink element to the Treasury estimate of costs which the ICO sadly upholds. Should the cost of escorting a member of the public to a room at the*

Treasury constitute grounds for laying aside a right created by primary legislation? I am certain that Treasury staffing is sufficient to absorb such minor costs if the department chooses…"

16. Third, the Appellant says:

> *"…The Private Office files constitute the immediate archive of the second most powerful figure in British Government (and of his deputy, the Chief Secretary)…Much Treasury business that was politically sensitive originated in, and never left, the Private Office. The thinking and actions of ministers are recorded in greater detail there than in any part of the Treasury's archive. In truth, both sets of files are needed to maintain a definitive record…*
>
> *…The Private Office files are an integral part of the definitive record and contain a great deal of valuable material absent from the departmental policy files…*
>
> *…It is quite possible that the Treasury has no very great grasp of what the files contain, despite having physical custody…"*

17. In light of the above, the Appellant argues that the Commissioner *"…incorrectly weighted…"* the value and purpose of his request.

Evidence and Analysis

18. HMT provided witness statements from Kate Jenkins the Head of the Information Rights Unit and Mr Jan Booth, the Departmental Records Officer at HMT. Both attended the oral hearing to give evidence.

19. The Tribunal was told that the essential background to this appeal was that HMT was due to have transferred the eligible records in the 1982 Private Office files to the TNA by 2013. It was not disputed that HMT was behind in meeting its obligations under section 3(4) of the Public Records Act 1958 to transfer the files after 20 years. HMT's resources in the Records Office was extremely stretched (just a few officers) and the Department's priority was expressly to achieve the transfer of Departmental policy files first. The policy files were seen as the "definitive record" of the Government of the time, consisting as it did of the main documents underpinning all policy, action and legislative matters. Further, HMT's evidence was that prior to 1987 the Private Office documents which were the focus of the material requested largely

contain less comprehensive or less informative information given that they relate to the day-to-day running of the Private Office, e.g. responses to invitations; summaries of meetings; letters to MPs. Thus, it was argued that the likely content of the Private Office files were ephemeral and relatively unimportant matters from a historian's and public interest point of view.

20. Somewhat inconsistently it was HMT's position, supported by the Information Commissioner, that the Appellant's request had a serious purpose and that there was public interest in the disclosure of these files. It was moreover acknowledged by both parties, that notwithstanding the burden which may be caused by compliance with a FOIA request, section 14(1) may not be engaged where the burden is outweighed by the serious purpose or motive behind the request.

21. The Tribunal was told that whilst HMT would have been content to process the Appellant's request over a slower time, under FOIA, there was a 20 working day limit for compliance which would seriously distort and undermine the Records Office's planned and prioritised work. The estimate given for the 66 requested box files, on the basis of there being 2 - 3 files per box, and it taking one hour for an officer to read a file to consider FOIA application, was that the task would take approximately 198 hours. This amounted to five and a half weeks for one individual working on a full time basis to review the material. HMT had arrived at this figure based on recent checks carried out on boxes relating to the Chief Secretary.

22. Finally, HMT argued that the significant burden and distraction from its core duties was evidenced by the effects of complying with the Appellant's previous request for the 1981 files. HMT advised that staff at the time had been failing to meet daily targets and its response to that earlier request was unavoidably delayed until it could find additional internal resources to assist it with the scanning element of the task.

23. In light of the above, the Information Commissioner had concluded that the amount of time required to review and prepare the information for disclosure would impose a "grossly oppressive" burden on HMT (see Information Commissioner guidance on section 14 and the case of *Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC)*).

24. Thus, both HMT and the Information Commissioner had accepted that there was a serious purpose behind the Appellant's request but that this was limited in nature

given HMT's assessment of the relative rarity of significant material in the Private Office files as against the amount of ephemeral information as to the day to day running of the Ministerial Private Office. Moreover, weight was given to the fact that the policy files would transfer to TNA in the forthcoming years and that the public interest in access to information on the governmental matters of the day would be largely met by public access to those documents.

25. It was HMT and the Information Commissioner's view in turn that this serious purpose did not outweigh or justify the burden which would be caused by reviewing and releasing the Private Office documents in response to the FOIA request within its required timescale for compliance, namely within 20 working days of the request.

26. Whilst the number of hours effort required to comply with this request would on the face of it have exceeded the costs threshold under section 12 FOIA, this exception could not apply given that the main task would be assessing the application of the exemptions. The cost involved in that task could not be taken into account, under FOIA, for this purpose. Thus, the consideration of the resources burden that this request might create, could only arise under section 14 FOIA. The Upper Tribunal had however held in the case of *Craven v Information Commissioner*, that a request could be held as vexatious under section 14 on the grounds of burden alone despite section 12 not being relied upon or applying. This was not a matter in dispute in this appeal

27. What was disputed by the Appellant was essentially:

(i) The weight given by the Commissioner to the purpose behind the request;

(ii) The assessment of the burden that would be placed on HMT.

28. The Appellant argued that HMT and the Information Commissioner in turn had not appreciated the importance of the information contained in the Private Office files from an historian's and public interest point of view. The Appellant adduced evidence from Lord Howe, the Chancellor of the Exchequer in 1982, Sir Adam Ridley, his then Special Advisor, and other eminent individuals to this effect. Sir Adam had attended the hearing to support the Appellant. The Appellant also drew the Tribunal's attention to various documents which he had been given from the 1981 Private Office files, which were clearly of particular historical interest, but which had not been transferred to TNA in the policy file documents. His fear appeared to be twofold: first that the particular historical significance of a document on the Private

Office file might not be appreciated by the records reviewer working to the established view that documents in these files were generally not of much value, and secondly that those documents not transferred to TNA might be destroyed. On this latter point, HMT clearly stated during the hearing that their intention was to retain any documents from Private Office files not transferred to TNA, for the relevant former Minister to consider and potentially retain his or herself and failing that, private collections might be an appropriate home. HMT repeatedly declared that they had no intention to destroy any documents not transferred to TNA.

29. With regard to the potential historical value of documents contained within the Private Office files, the Tribunal were persuaded in the light of the particularly authoritative and contemporary evidence adduced by the Appellant that HMT and the Information Commissioner in turn had indeed underestimated the serious purpose and public interest behind this request. Whilst the Tribunal took seriously the evidence of the former Departmental Records Officer who had sampled the Chief Secretary's Private Office files, it accepted the Appellant's argument that the majority of the files requested were those of the then Chancellor of the Exchequer, likely to contain matters of a weightier nature. Kate Jenkins had, for the purposes of the hearing, carried out sampling of a few of the Chancellor's files from 1982. The exercise carried out however had, by HMT's own admission, been of a very limited nature.

30. With regard to the asserted number of hours that compliance would take, the Appellant argued that this was not a reliable estimate. The Tribunal had in fact not been able to make sense of the first estimate as put forward in a witness statement and considered at a paper hearing, thereby necessitating the reconvening of the Tribunal at an oral hearing. The confusion that had been created as between what was a box and what was a file was clarified at the hearing. Nevertheless, the Appellant suggested that HMT should have used as its comparator the documents provided to him in relation to the 1981 files. The 77 files disclosed had resulted in 8,000 scanned images. Both HMT witnesses had attested that on average a file took one hour to review. Kate Jenkins had estimated that a file would contain on average 250 documents. On this basis the Appellant argued that given the number of documents disclosed from the 77 files, 66 files containing 250 documents would only take something in the region of 30 hours to review. The Tribunal took the view however that given the consistency of evidence from both HMT witnesses, senior officials in terms of FOIA and record keeping respectively, to the effect that reviewing

a file would take on average one hour and given there was no evidence to undermine that assertion, this was the essentially reliable parameter, regardless of the number of documents within a particular file. Thus, the Tribunal saw no reason not to accept the HMT assessment of the potential work involved in compliance with the request and also accepted as reasonable the Information Commissioner's reliance upon the same. Finally, on this point, the Tribunal did not accept the Appellant's argument that the assessment of burden should be 'net' of the resources that would be required for TNA sensitivity review. The processes followed in the two different regimes although similar in scope, would be carried out at different times and for different purposes.

31. The question then for the Tribunal was essentially a balancing exercise between the serious purpose of the request and the potential burden. The other factors listed in Dransfield were not relevant to this case, the Appellant having at all times conducted himself with impeccable politeness. The Tribunal took the view that even with the increased weight given by it to the purpose, common sense dictated, once the number of hours had been substantiated, that this would, in light of the resources available for FOIA compliance and their other routine work, be a "grossly oppressive" burden on HMT. It was made clear by Kate Jenkins that, had the Appellant not asked for such a large amount of information in one request but had made a number of smaller request spread over the year, the balance would have come down differently. In these circumstances however, HMT had been entitled and the Information Commissioner correct in turn, to conclude that section 14 applied.

Conclusion

32. The Information Tribunal concluded that section 14 FOIA was engaged and that the request was vexatious in the sense that there would be a grossly oppressive burden placed upon the HMT were it to comply within the FOIA timeframes. In this case, the serious purpose behind the request did not outweigh the likely burden upon the authority. The Tribunal agreed that the appeal should be dismissed.

33. It had however been troubled by this case in that it might have been thought that if documents were not available to the public yet under the Public Records Act 1958 when they should have been, FOIA would remain the appropriate way to secure public access. However, it appeared that the lack of resources being relied upon by HMT to explain its failure to comply with its legal obligations to transfer historical files to TNA after 20 years was at the same time, an essential part of its rationale in refusing to comply with a request under FOIA. This sat very uneasily with the

Tribunal, but within the strict letter of the law, HMT was entitled to act in this way. FOIA did not dictate the level of resources that were allocated to records maintenance and disclosure, this being essentially the Government's prerogative.

34. HMT had offered to the Appellant to voluntarily arrange access to the information in the Private Office files outside of FOIA, if he chose to proceed in that way. The Tribunal, having read the correspondence, concluded that there had been a misunderstanding between HMT and the Appellant and that had he realised that this was genuinely an alternative, this whole case might have been avoided. Another alternative, mentioned by HMT during the appeal, might have been a series of requests by the Appellant under FOIA but over a period of time. The Tribunal hoped that given the evident willingness of HMT to assist the Appellant in his historical enquiries, resources permitted, that one of these two options could now be pursued.

Judge Carter

Date: 26th November 2014