First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0183

Heard at Sunderland Magistrates' Court
On 14 December 2017

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS DAVE SIVERS AND GARETH JONES

Between

DAVID MORRIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

[NB Numbers in [square brackets] refer to the bundle]

1. This is the appeal by Mr David Morris against the rejection by the Information Commissioner (the Commissioner) on 1 August 2017 of his complaint that the Department of Work and Pensions (DWP) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).

2. Mr Morris opted for an oral hearing and attended with his wife. He was not represented. The Commissioner did not attend. The DWP was not a party to the appeal.

3. Mr Morris has sent two emails to the Tribunal since the hearing. In fact, the Tribunal had already made, though not yet communicated, its decision. In any event, the emails do not advance his case.

Factual background

4. Mr Morris was a coal miner. Unfortunately, in 1991 he was injured in an accident at work. He hurt his neck and was subsequently unable to work. He was paid various benefits including industrial injuries disablement benefit and invalidity benefit. He said his employers, British Coal (BC), were to blame for the accident and sued them for damages. He was represented by solicitors, Smith & Graham of Durham. BC denied liability. BC (or its insurers) also instructed solicitors, Nabarro Nathanson of London (now known as Nabarro).

5. The case took some time to reach a conclusion. In early 1996, BC paid into court £1 to settle the case. Making a payment into court gives a defendant some protection against costs: if a claimant rejects the payment in (as it is known) and later establishes liability but is not awarded more than the payment in, he or she is responsible for all the costs from the time of the payment in. Mr Morris did not accept the payment in of £1. However, a few months later, BC increased the payment in substantially to £50,000. Mr Morris, presumably on advice from his solicitor, decided to accept this payment in. The case was therefore settled. The payment in appears to have been increased to £50,157.62 and that is the amount which Mr Morris formally accepted, on 22 April 1996 **[186]**. The apparent reason for the increase is discussed below. The discrepancy between £50,000 and £50,157.92 has caused Mr Morris a great deal of angst and has fuelled his belief that he is the victim of a conspiracy. However, as the Tribunal will explain, it has no bearing on the outcome of the present appeal.

6. The liabilities of BC were, subsequent to settlement of Mr Morris' claim, transferred successively to various government departments (not including the DWP). This explains why Mr Morris has made a series of FOIA requests of those departments, as well as subject access requests (SARs) under the Data Protection Act 1998 (DPA).

7. Mr Morris did not actually receive £50,000 (or £50,157.92). He initially received £19,231.82. This was because BC was obliged to pay a sum representing some of the social security benefits he had received to the Compensation Recovery Unit (CRU), which is now part of the DWP. The CRU clawback has also fuelled Mr Morris' belief that there has been a conspiracy against him. It is therefore necessary to explain briefly how it works.

Compensation recovery

8. At the time in question, the compensation recovery scheme was governed by Part IV of the Social Security Administration Act 1992 (SSAA). It is now governed by

the Social Security (Recovery of Benefits) Act 1997. The main difference between the two regimes relates to the mechanism for challenging recovery decisions. Mr Morris is familiar with Part IV of SSAA and has quoted some of its provisions.

9. A compensator (such as BC) may have to withhold from the settlement amount a sum representing certain social security benefits which the claimant has received (for up to five years) from the Government and pay it to the CRU. It is not in dispute that BC was, in principle, obliged to withhold and pay to the Government sums representing benefits Mr Morris received, provided the injury in question continued to be attributable to the accident. Under section 93(2) SSAA, a defendant making a payment in could either make it gross or net of the relevant benefits deduction.

10. Under the compensation recovery scheme, recovery is only made from certain heads of damages. It is not, for example, made from damages for pain and suffering (the main element of what is often known as 'general damages'). Recovery <u>is</u> made from damages representing loss of earnings. The reason is plain to see: if a claimant received damages for loss of earnings without taking into account benefits designed to replace earnings, there would be double recovery. Where damages are awarded after a trial, compensation recovery should be straightforward, because the judge will have broken down the various elements of the award, including pain and suffering and loss of earnings. Where, however, a defendant simply offers a global sum in settlement, without breaking it down or indeed admitting liability, the position may be less straightforward.

11. This is what happened in Mr Morris' case. BC continued to deny liability throughout. However, again no doubt on advice from its solicitors, it recognised that there was a risk that it would lose the case and would have to pay a significant sum to Mr Morris. It offered less than what it regarded as its likely maximum liability, calculating that Mr Morris would be advised that he, too, risked losing and that it would be better for him to accept the sum offered, albeit that it was less than the amount he would probably recover if successful at a trial. In other words, both parties and their lawyers assessed the litigation risks. The decision whether to accept BC's increased offer – represented by the payment in of around £50,000 – was, of course, Mr Morris' alone.

12. A settlement prior to trial can be effected with or without making a payment in. Before making payment (whether into court or direct to a claimant), a compensator has to ask the CRU how much it must withhold and pay to the CRU. BC made the relevant application in February 1996 **[179]**.

13. At **[91]** is a document headed *British Coal Historical Reserve Analysis*. Mr Morris obtained it in one of the previous proceedings which he has brought. It appears to represent the assessment by BC's insurers of its liability should Mr Morris win his case at trial. There is a breakdown of various types of loss. For example, 'general damages' (which would include pain and suffering) are put at £7,000, 'special

damages' (which would include loss of earnings) at £27,000 and 'Smith & Manchester' (a reference to a case which established that damages could be paid for disadvantage in the labour market caused by an accident) at £10,000. There is also a reference to 'redundancy' at £33,000. The total liability was assessed at £81,500. The loss of earnings element would have continued to increase if Mr Morris remained unable to work. It will be seen that Mr Morris, by accepting around £50,000, received something approaching 60% of what the insurers estimated he would receive were he to establish liability at a trial. Or, put another way: if Mr Morris' solicitors assessed quantum (the amount he might receive) in the same way, they were prepared to advise him to give a discount of around 40% because of the risk that he would not establish liability (in which case he would receive nothing).

14. The sum Mr Morris agreed to accept would then be further reduced by compensation recovery.

15. At the heart of the case is a letter from Nabarro to the CRU on 5 September 1996 (in other words, after the case had been settled). Under section 94(4) SSAA, a compensator had to furnish the DWP with information about the size and composition of a compensation payment and it may be that the letter was written in that connection. Page 1 is at **[54]** and page 2 at **[122]**. It is worth quoting from the letter:

> '*We can advise you that at all times liability remained very firmly in dispute in relation to this matter and both Mr Morris and his legal advisors were well aware of that fact.*
> *With regard to quantum both the medical evidence and heads of damage remained very much in dispute.*
> *You should be aware that the Plaintiff's Solicitors, Messrs. Smith & Graham, were exploring a number of scenarios including potential pension loss and potential loss of redundancy. On an entirely without prejudice basis they agreed that their client faced substantial difficulties in recovering these elements against any future loss*'.

Pausing there, it appears, therefore, that the reference to redundancy in the reserve analysis at **[91]** is to a claim that, as a result of the accident, Mr Morris lost the chance of a redundancy payment. This is presumably on the basis that his employment had terminated, because of his injury, before he might otherwise have been in line for redundancy.

16. Nabarro continued:

> '*Bearing these factors in mind a Payment into Court was effected on 11th April 1996 which was subsequently accepted in full and final settlement by Mr. Morris. This Payment into Court did* <u>*not*</u> *specifically include elements to compensate for the Plaintiff's alleged loss of redundancy or pension loss – monies were put into Court essentially to protect the defendant's position on costs and tempt the Plaintiff into accepting a risk offer to avoid trial. This Payment into Court did include elements for*

general damages, ie pain, suffering, loss of amenity, loss of earnings for a period of absence and an element to reflect risk on the open labour market'.

17. The letter went on to say that Smith & Graham had confirmed to the Mineworkers' Pension Scheme by letter dated 30 August 1996 that it was never established that Mr Morris had suffered pension loss or loss of redundancy. This is important because Mr Morris believes that the CRU was wrong to claw back from the settlement an element representing loss of redundancy: in fact, there was no such element specified. The letter concluded with the opinion that 'the CRU correctly recouped benefits form Mr Morris's settlement as per his Certificate of Deduction – there were no exempt elements and no over recovery'.

18. In brief: BC, on advice, appear to have thought that recovery had to be made in relation to benefits Mr Morris received because his compensation payment included compensation for loss of earnings.

19. In the event, BC paid £30,926.10 to the CRU against the 'certificate of total benefit' CRU would have provided. This represented an increase of £157.92 from the amount of £30,768.18 which the CRU originally certified as being due, at 5 April 1996. There seems to have been a short delay in processing the settlement. By the time it was processed, Mr Morris had received a further payment of £157.92 in respect of benefits. Both the compensation sum and the recovery sum increased by this amount: they cancelled each other out. Importantly, Mr Morris accepted at the hearing that he had not lost out as a result.

20. He had, however, in earlier proceedings challenged the recovery in a more fundamental way. This was at least in part to do with the question of causation: were the benefits which he continued to receive some time after the accident attributable to the injuries he sustained in the accident or rather to a pre-existing condition? Mr Morris argued the latter: he had contracted psoriatic spondylosis, presumably as a result of his work, prior to his neck injury (he had also been injured in a car accident before that injury). He took his case to a social security tribunal and then to the social security commissioner. The social security commissioner found in his favour, on the basis either that the tribunal had asked itself the wrong legal question or that its reasons were inadequate. The commissioner's decision is R(CR) 1/96. The commissioner did not make a final decision but rather remitted the case to the tribunal. The tribunal found against Mr Morris on the second occasion too. He puts this down to the unavailability of part of his medical records – for which he blames Nabarro, but without any supporting evidence – and his subsequent attempt to take the case back to the social security commissioner was also unsuccessful.

21. Despite this, the recovery *was* reduced by £3,957.78 later in 1996, on the basis that payment of benefit after October 1995 was not attributable to the September 1991 accident. According to a letter from the DWP to Mr Morris' MP on 8 October (the

year is unclear) **[129]**, [1] the clawback as reduced consisted of £21,718.74 invalidity benefit, £4,073.58 incapacity benefit and £1,176.00 statutory sick pay, a total of £26,968.32. The final sum received by Mr Morris was therefore £23,189.60 (the original £19,231.82 plus the £3,957.78).

22. The present Tribunal stressed to Mr Morris that it was unable to reopen any aspect of his compensation claim or the CRU clawback. It was concerned solely with whether he was entitled to the information he had requested, although that question might, in principle, be influenced by whether there was any evidence that he had been the victim of fraud or other serious wrongdoing.

23. It is worth making the point that, although Mr Morris repeatedly says that Capita, BC's claims handlers, dealt on behalf of BC with what he describes as the biggest compensation scheme in history, with around £8 billion apparently paid to some 700,000 miners and around £1 billion recovered by the CRU, [2] his own claim arising out of his neck injury was not part of this scheme (as he accepted at the hearing). He did have a subsequent claim against BC for vibration white finger (VWF) and another for chronic obstruction pulmonary disease (COPD) (it is understood that VWF and COPD claims were within the scheme): both were settled in his favour. However, the point is that the criticisms which Mr Morris has of the <u>multiparty compensation scheme</u> can have no relevance to how his <u>neck injury claim</u> was dealt with.

<u>The requests</u>

24. On 18 July 1996, Mr Morris made the following request of the DWP:

> a) *If £50,000 is incorrect personal data. Then under the FOIA provide the incorrect figures in Nabarro Nathanson's letter (6)*
> b) *Nabarro Nathanson's letter was given to HMCTS (7) by the CRU therefore it has no data protection. Under the FOIA provide the figures in Nabarro's letter (6) "note" as you can see the Judge was interested as well*
> c) *The CRU provided two different settlements of £50,000 and £50,157.92 to HMCTS, neither hearing was a closed hearing. Under the FOIA which settlement was correct?*
> d) *Who are British Coals Claims data controllers?*

25. The DWP declined to respond to the request, both initially and on review, relying on section 14 FOIA (vexatious and repeated requests). Mr Morris then made a complaint to the Commissioner, but only in respect of requests b) and d). His appeal to the Tribunal is therefore also restricted to those two requests.

26. The scope of each request is unclear. The first task of the Tribunal is therefore to construe them. It has borne in mind guidance from the House of Lords in *Common*

[1] Only p1 is in the bundle
[22] See, for example, his complaint to the Commissioner at **[33]**

Services Agency v Scottish Information Commissioner [3] that requests should be construed liberally. In these, and it would appear, previous FOIA (and DPA) proceedings, Mr Morris has represented himself, without the benefit of legal advice.

27. In relation to request (b), Mr Morris explained in response to a direction issued by the Tribunal on 6 December 2017 that the letter from Nabarro to which he was referring was that dated 5 September 1996 at **[54]** and **[122]**. At the hearing, he said that the numbers in parenthesis in his request were references to the letter from previous proceedings. When it was pointed out to him that, although he himself had handwritten some figures on the letter, the letter as sent contained no figures, Mr Morris said that what he wanted to know was the amount of the payment into Court effected on 11 April 1996. The Tribunal is prepared to construe the request in this way: it otherwise makes no sense.

28. With regard to request (d), Mr Morris confirmed, in response to the Tribunal's 6 December 2017 direction, that by 'data controllers' he meant claims handlers. When it was pointed out to him that he already knew who BC's claims handlers were – he had made several references to their being Capita (formerly called IRISC) – he explained that what he wanted to know was whether the DWP knew the identity of the claims handlers. With considerable hesitation – not least because Mr Morris had explained to the Commissioner why he needed to know the information [4] - the Tribunal is prepared to construe the request in that way: again, it makes no sense for Mr Morris to have made it otherwise. The request should be construed as relating to the identity of the claims handlers at the time of Mr Morris's compensation claim.

The DWP's initial response and review

29. The DWP replied to the whole of the original request on 29 July 2016 **[28]**. It relied on section 14 FOIA on the basis that the request was vexatious. It also said that it had answered the same or similar requests under FOIA and the DPA on many previous occasions. Section 14 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'.*

[3] [2008] UKHL 47

[4] See para 50 of the Commissioner's decision

30. Also on 29 July 2016, Mr Morris requested a review of the decision **[29]**. At the same time, he made a subject access request under the DPA of data held by the DWP on him.

31. The DWP made its review decision on 17 August 2016 **[30]**. It made two points. First, it said that it did not hold any of the information Mr Morris had requested. The DPA required that personal data should not be kept for longer than was necessary. The department's general practice was to destroy customers' records 14 months after the end of a relevant claim. The department enclosed recent correspondence to Mr Morris confirming that it did not hold any information. Second, in relation to request (d), the DWP pointed out that it was clear from Mr Morris's request that he already knew that BC's claim handlers were Capita.

Proceedings before the Commissioner

32. Mr Morris's complaint to the Commissioner is at **[33]**. It is not easy to understand but it represents an attempt to re-open the CRU clawback issue: he appears to have thought that the Court of Appeal decision in *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another* (collectively *Dransfield*) [5] permitted him to do that because (he thought) there was a dispute about material facts. It is clear that he was concerned in particular about the redundancy issue. He suggested, in an example of the conspiracy theorising which regrettably characterises his series of FOIA/DPA requests, that it was in the interests of the CRU and BC (through its liabilities unit) to work in concert. In fact, it made no difference to BC whether the whole or part of an agreed compensation sum was paid to the CRU or to the claimant: the amount leaving its bank account would be the same in either event.

33. In the second part of his complaint **[49]**, Mr Morris does indirectly address the issue whether the DWP held the information under request (b): he suggests that it should have used its powers under section 110 SSAA to obtain information. He made a wholly unsubstantiated claim about Nabarro stealing medical records and also accused the relevant minister, Kitty Usher MP, of telling a 'complete pack of lies' in a parliamentary statement about the BC compensation scheme.

34. In its letter of 28 November 2016 to the Commissioner **[76]**, the DWP reiterated that it had told Mr Morris on a previous occasion that it did not hold any records and that Mr Morris knew the identity of the claims handlers. At this stage, the department appeared to be relying on section 14(2) (repeated requests) rather than section 14(1) (vexatious requests). It provided copies of previous FOIA and DPA requests made by Mr Morris and its replies.

35. In its email of 14 February 2017 to the Commissioner **[135]**, the DWP said it would in fact like to rely on section 14(1) in relation to request (d) and gave a chronology of relevant events. In her letter of 28 April 2017 to Mr Morris **[166]**, the

[5] [2015] EWCA Civ 454 (14 May 2015)

Commissioner informed him that the department was now relying on section 14(1) rather than section 14(2). She gave him the opportunity of making a further submission, which he did **[169].** Again, the submission is difficult to follow. However, he did say: 'Granted the DWP do not hold any information, however they have sent all my correspondence to Nabarro's Solicitors where with a multitude of other material it can be accessed at any time, from what is in effect a locked room to only they and Nabarro's have the key'. This was an acknowledgment that the department did not itself now actually possess information about his claim. He also, somewhat curiously, suggested that section 14(2) still applied. He referred to a claim he brought in Gateshead County Court in 2011 against the DWP relating to the CRU clawback: the claim was struck out as disclosing no reasonable cause of action **[174]**.

The Commissioner's decision

36. The Commissioner decided that the exemption in section 40(1) applied to request (b), even though the DWP had not relied directly on it. Section 40(1) provides:

    '*Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject*'.

    'Personal data' is defined in section 1(1) DPA as:

    '*"personal data" means data which relate to a living individual who can be identified:*
    (a) from these data, or
    (b) from these data and any other information which is in the possession of, or is likely to come into the possession of, the data controller'.

37. Section 40(1) is an absolute exemption: whether the public interest in disclosing the information is greater than that in withholding it is irrelevant. The Commissioner was satisfied that the information under request (b) (assuming it was held) was personal data, because it related to Mr Morris' claim for compensation. Whether the information was now in the public domain – as Mr Morris contended, on the basis that it had been referred to at a tribunal hearing – did not matter. The Commissioner explained [6] that she had no jurisdiction on a FOIA complaint to determine whether Mr Morris was entitled to the information under the DPA.

38. In relation to request (d), the Commissioner, after referring to the Upper Tribunal decision in *Dransfield*, [7] decided that it was vexatious. This was on the bases that:

[6] Para 24
[7] http://administrativeappeals.decisions.tribunals.gov.uk//Aspx/view.aspx?id=3680

i. The request was obsessive

39. The Commissioner said [8] that she characterised a request as obsessive where the requester was attempting to re-open an issue which had already been comprehensively addressed by the public authority or had otherwise been subjected to some form of independent scrutiny. Would a reasonable person describe the request as obsessive in the circumstances? If there was a long series of overlapping requests or other correspondence, that would be a relevant factor.

40. She noted that Mr Morris had challenged the settlement amount on no fewer than eight occasions at various tribunals. He had been pursuing the issue since 1996. He had complained to the police about fraud. He had made a complaint to the Parliamentary and Health Services Ombudsman (who declined jurisdiction). In case FS50463281, [9] she had upheld reliance by another government department on section 14(1) in relation to a related request by Mr Morris. Mr Morris had, in any event, been informed that the DWP did not hold the requested information.

41. The Commissioner concluded [10] that Mr Morris was using FOIA to re-open issues which had already been comprehensively addressed. His behaviour was obsessive. Over the past year, he had been in contact with the department on an almost monthly basis, and over a number of years in total. [11]

ii. Unreasonable burden for the DWP

42. The DWP acknowledged that dealing with request (d) by itself would not be burdensome. However, it argued that the history showed that it was unlikely that Mr Morris would be satisfied with the answer if one were given and would continue to make other requests regarding the same issue. Indeed, he had made other related requests following the present requests.

43. The Commissioner said [12] that future burden was a key factor for her. Although whether information was disclosable under FOIA had to be assessed at the time a request was made, the Tribunal's decision in *Gregory Burke v The Information Commissioner* [13] showed that post-request events could confirm, for the purposes of section 14(1), the reasonableness of a public authority's apprehension at the time of the request that it formed part of a pattern which was likely to continue. In this case, there was a high likelihood that, if the DWP complied with request (d), the correspondence would continue 'with no end in sight'. [14]

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[8] Para 39
[9] 19 March 2013 https://ico.org.uk/media/action-weve-taken/decision-notices/2013/817518/fs_50463281.pdf
[10] Para 46
[11] Para 72
[12] Para 67
[13] EA/2015/0050
[14] Para 71

iii. Disruption or harassment of the DWP or its staff

44. The Commissioner noted Mr Morris had said he needed the information to prove that the DWP had committed perjury at a previous tribunal. He had accused solicitors of stealing medical records and the DWP of covering up for them. In another request in 2016, he had asked for 'covert correspondence' between the DWP and the Department for Business, Energy & Industrial Strategy (and its predecessors) and provided a Facebook 'friend request' to show that he had a friend working as a communications officer at DBEIS (such that the DWP should not, he had warned, deny having been in correspondence with DBEIS).

45. The Commissioner said that Mr Morris, in communications with her, had made serous allegations against others and had accused the DWP of giving insurance companies a free hand to use illegal practices to secure the maximum amount in CRU clawback. Mr Morris had provided no evidence in support of his allegations.

iv. Lack of serious purpose or value

46. The Commissioner noted [15] that Mr Morris said he needed to know the identity of the claims handlers to ascertain which sum - £50,000 or £50,157.92 – was paid into court. She also noted that Mr Morris had told her who the claims handlers were and had even enclosed a letter from them confirming their role. Mr Morris was seeking information he already knew. The Commissioner concluded that it was likely that Mr Morris's motive in making the request was to force the DWP to 'admit' that the previously stated settlement figure was incorrect rather than a serious intention to obtain information.

47. The Commissioner concluded that request (d) was vexatious.

<u>The Grounds of Appeal and the Commissioner's Response</u>

48. Unfortunately, Mr Morris' Grounds of Appeal **[19]** and **[22]-25]** are again difficult to follow. He again referred to Capita as being the data controllers. He argued that, if it were correct that personal data was exempt from disclosure, it followed that information given in a FOIA request was not his data. He again drew attention to the discrepancy between the figures of £50,000 and £50,157.92 and accused the DWP and Capita of lying and BC's solicitor of giving a 'second set of instructions' before he was dismissed by his firm, leaving Capita to substitute the £50,157.92 figure for that of £50,000. He accused the company of falsifying a document and suggested it was controlling HMCTS. [16] He referred to four unsuccessful appeals he had made to the Tribunal as well as the county court proceedings; he had been to the Upper Tribunal relating to information requests on two occasions.

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[15] Para 50

[16] Para 18 on **[24]**

49. No doubt because of the incoherent and unsubstantiated nature of the appeal, the Commissioner in her Response **[26]** simply relied on her Decision Notice and suggested that the Tribunal did not have the power to consider any of the issues which appeared to underlie the requests.

The Tribunal's directions issued on 6 December 2017

50. Rule 2(1) of the provides that:

> *'The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly'.*

51. Paragraph (2) then lists non-exhaustive factors relevant to dealing with cases fairly and justly. Subparagraph (a) reads: 'dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties'.

52. In particular, the Tribunal is not bound to follow the approach of the Commissioner if it believes there may be a more proportionate way of dealing with an appeal. To this end, on 6 December 2017 it issued directions. These required the Department to confirm whether it was indeed its position that, as at 18 July 2016 (the date of the request), it held, within section 3(2) FOIA, no information relating to Mr Morris's compensation claim or CRU deductions (and therefore the information under request (b)); and Mr Morris (*inter alia*) to confirm in relation to request (d) whether by 'data controllers' he meant claims handlers. Mr Morris was put on notice that he should be prepared to discuss at the hearing whether the exemption in section 21 FOIA applied, on the basis that the appeared already to know the information under request (d): information which a requester knows must be reasonably available to him. [17]

53. The DWP subsequently confirmed on 11 December 2017 that it did not, within section 3(2) FOIA, hold any information relating to Mr Morris' compensation claim or CRU deductions. Mr Morris confirmed that the letter he was referring to

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[17] Section 21 provides:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

in request (b) was that from Nabarro to the CRU of 5 September 2016. The DWP had, he said, been able to access information about the settlement figures. He was well aware that Capita were data controllers and claims handlers for BC.

Discussion

Request (b)

54. The Tribunal accepts that the DWP did not, as at 18 July 2016, hold the information under request (b) within section 3(2) FOIA. That determines the appeal in relation to that request. Although, formally, whether a request is vexatious is the first question a public authority may ask, because, if it is, the authority does not need to ascertain whether it holds the information, still less whether exemptions apply to all or part of it. However, whether a request is vexatious can be a complicated question, necessitating consideration of the history of dealings between the requester and the authority and assessment of the value of the information requested. Whether information is held is likely to be a more straightforward question. Mr Morris is not prejudiced by the Tribunal considering this question. The DWP has said on several occasions that it holds no information relating to this compensation claim (including the CRU clawback) and the Commissioner noted this in her decision.

55. Section 3(2) FOIA contains a partial definition of whether information is held. It provides:

    'For the purposes of this Act, information is held by a public authority if—
    (a) it is held by the authority, otherwise than on behalf of another person, or
    (b) it is held by another person on behalf of the authority'

    The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

56. The DWP has explained that it has a policy, consistent with its duty under the DPA, of destroying files some 14 months after the end of a claim (presumably, where the CRU is involved). There are indications that the department may not have destroyed Mr Morris' file until some time after the 14 months had expired. However, precisely when it destroyed Mr Morris' file does not matter. What matters is that it did not hold it at the time of the request. The Tribunal has no reason to doubt the department's assertion about this.

57. As already noted, Mr Morris has accepted in the course of the proceedings that the DWP does not actually hold the information under request (b). He initially repeated the concession at the hearing. He then appeared to resile from it, arguing that the DWP must still hold information about his claim because it must have alerted the Commissioner to her decision in case FS50463281 (where the public

authority was the Department of Business Innovation and Skills), in which she had summarised the history. The Commissioner drew on that summary for the present case. Mr Morris' argument does not follow. The Commissioner did not need the DWP to alert her to the earlier decision. It would be natural for her, particularly in a vexatiousness claim, to check her database for other relevant decisions.

58. Mr Morris' real argument is that the DWP could exercise its powers under section 110 SSAA to obtain information about his claim. Section 110 gives the department's inspectors wide powers to obtain information relevant to various statutes (including the SSAA). The Tribunal does not need to consider whether the powers would be available to enable inspectors to obtain information about Mr Morris' compensation claim (even assuming that the information is still held somewhere). This is because, for the purposes of section 3(2) FOIA, what matters is whether a public authority actually holds information (or someone holds it on its behalf), not whether it could obtain it.

59. Mr Morris has suggested that Nabarro hold the information on the DWP's behalf, bringing into play paragraph (b) of section 3(2) FOIA. They could only realistically do so if they acted for the DWP in Mr Morris's case. They did not: they were BC's solicitors. Similarly, the DWP made it clear in its letter of 24 July 2017 to the ICO **[177]** that Capita did not hold information on its behalf. That, too, makes sense: Capita were acting for a compensator, BC, not for the CRU.

60. Because the Tribunal has decided that the DWP did not, at the date of the request, hold the information under request (b) (as it has construed it), it is not relevant whether the exemption in section 40(1) would apply if the information were held. However, the Tribunal agrees with the Commissioner that it would: the information requested constitutes personal data. The Tribunal has also concluded that the request is vexatious (see below), although again this is academic given that the DWP does not hold the relevant information.

Request (d)

61. The request, as construed, asks whether the DWP knows who the claim handlers in relation to Mr Morris's compensation claim were. Of course, since the DWP holds no information about that claim, logically that must extend to the identity of the claims handlers. [18] The Tribunal so finds.

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[18] In an email to the ICO, it appears on 24 July 2017 **[177]**, the department says that 'again our understanding from the information provided is that Capita/IRISC were the claims handler for the compensator and again liaised with DWP in line with the legislation…'. However, the department appears to have been saying that it obtained this information as a result of Mr Morris's complaint

62. In any event, even if the DWP did hold this particular information when the request was made, in the Tribunal's judgement it does not have to disclose it because the request, like request (b), is vexatious.

63. As noted, the leading authority on section 14(1) FOIA is the Court of Appeal decision in *Dransfield*. The leading judgment was given by Arden LJ. She cited, [19] with apparent approval, this passage from the Upper Tribunal decision:

> *'27. … I agree with the overall conclusion that the [Tribunal] in Lee [Lee v Information Commissioner and King's College Cambridge] reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".*
> *28. Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (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 or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms'.*

64. Arden LJ then said::

> *68. In my judgment, the UT [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. I understood Mr Cross [Counsel for the Commissioner] to accept that proposition, which of course promotes the aims of FOIA.*

[19] Paras 18 and 19

> …
>
> 72. *Before I leave this appeal 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" (UT, Dransfield, Judgment, para. 10). 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, as Lord Sumption indicated in Kennedy [*Kennedy v Charity Commission [2014] 2 WLR 808] *(para. 2 above), been carefully calibrated*'.

65. There is, therefore, a high hurdle for a public authority to cross before it may rely on section 14(1). All the circumstances of the case have to be considered. On one side of the equation, these include the burden on the public authority, the motive of the requester and any harassment of distress caused to staff. On the other side is the value of the information to the requester or the public at large. However it is not a simple weighing of the two sides of the equation. Where information has value, that is likely to be a particularly important factor, because of the need to promote the aims of FOIA to facilitate transparency in public affairs, accountability of decision-making and so forth.

66. In the present case, there is no doubt that, as the Commissioner explains, the history shows that the series of related requests made by Mr Morris of the DWP have imposed a significant burden on the department and that there was every reason to suppose at the time of the requests that he would continue to make further related requests well into the future if it had to deal with the present requests. He routinely makes wild and unsubstantiated allegations and has convinced himself that he is the victim of a conspiracy (albeit ill-defined), justifying remorseless use of FOIA (and the DPA) in relation to his compensation claim.

67. At first sight, the two requests are clearly vexatious. The important question is whether the value of the information saves them from being condemned in this way. The Tribunal has no hesitation in concluding that it does not. Mr Morris' compensation claim and the CRU clawback has long ago been determined. He cannot now reopen those issues, save perhaps if he could demonstrate fraud or other serious wrongdoing. The Tribunal accepts that, if there was evidence of such iniquity, he might have a remedy elsewhere, or at least it would be in the public interest that the wrongdoing was exposed, especially if it was on a systematic basis (as Mr Morris contends).

68. But it is not enough to allege wrongdoing, or even sincerely to believe it. There has to be at least some evidence or rational argument to support it. Mr Morris is convinced there has been a conspiracy against him, but he does not produce any supporting evidence or rational argument to substantiate his belief. For example, at the hearing he suggested that BC's solicitor had defrauded him of a substantial sum of money for the solicitor's personal benefit. When asked what evidence he

had in support of such a serious allegation, he altered the charge to one of defrauding him for the benefit of the Government. He produced no evidence for either charge and suggested no rationale as to why the solicitor should want to defraud him not for his own benefit but for that of the Government.

69. In relation to request (b), the information – how much was paid into court – could not conceivably firm up Mr Morris' suspicions, even if there was otherwise any substance to them. True, there is some confusion as to whether the correct figure was £50,000 or £50,157.52 but he accepted at the hearing that it made no financial difference to him which it was (because of the additional week's benefit he had received). It can make no difference to anyone else either. Even if the DWP still knew the correct amount, the information has no value. There is also some confusion whether the payment into court was made gross or net of the CRU clawback, but again that makes no difference to the amount Mr Morris received or was entitled to receive.

70. Similarly with the information under request (d). Whether the DWP knows the identity of the handlers for Mr Morris' claim can make no conceivable difference to anything. In particular, it cannot, on the evidence he has produced, provide support for Mr Morris' contention that the department perjured itself in the county court proceedings; he has not suggested what conceivable benefit there would be for the department in committing this or any other perjury in relation to his claim.

71. Mr Morris' real gripe seems to relate to whether recovery was wrongly made from a part of the compensation claim representing a potential loss of redundancy. Three points can be made. First, the evidence shows clearly that the sum offered in settlement (and accepted) was not broken down into various heads of claim including, in particular, loss of redundancy. Second, in any event it is now far too late to reopen this question, absent fraud or other serious wrongdoing (for which there is no evidence). Third, neither the information under request (b) nor that under request (d) would be of any use to Mr Morris in pursuing the issue even if there were any grounds for doing so and any mechanism by which it could be done.

72. In short, the information requested has no value, either to Mr Morris or the public at large. There is, therefore, nothing to set against the unreasonable burden he has caused, and if unchecked would no doubt continue to cause, the DWP. Each request is therefore vexatious.

73. Part of the problem is that Mr Morris does not understand how compensation recovery works. That is no criticism of him. He is not a lawyer and the legislation is complicated. But he was represented by a solicitor for his claim. If he had concerns about the CRU clawback, he should have addressed them with his solicitor at the time. Spraying requests for information around various public authorities over a prolonged period in the hope that something of value will be

unearthed to show that he has been the victim of injustice, without any evidence or rationale argument to suggest that he has been, is not an appropriate use of FOIA.

Conclusion

74. The appeal is therefore dismissed. The decision of the Tribunal is unanimous.

75. A final word. Mr Morris carried out a difficult and dangerous job. His colliery extended deep beneath the North Sea. Few people would be prepared to do such arduous work. He has paid the penalty by suffering a number of debilitating conditions, which no doubt have a cumulative physical effect and quite possibly affect his mental well-being as well. Compensation cannot begin properly to compensate for his loss of health. He is entitled to recognition that he has made a real contribution, and sacrifice, to the community through his work.

76. However, he should also realise that pursuing what has every appearance of a hopeless campaign is likely simply to add to his suffering without achieving anything for him and his family or the wider community, quite apart from imposing an unreasonable burden on the taxpayer. He may, on reflection, feel that it is time to direct his qualities of energy and persistence in more fruitful directions.

Signed

Date Promulgated:
13 February 2018

Judge of the First-tier Tribunal
Date: 1 February 2018