Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case Nos. EA/2017/0190**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50670596

Dated: 31 July 2017

Appellant: Simon Price

Respondent: Information Commissioner

Heard at: Thames Magistrates Court, London

Date of hearing: 19 February 2018

Date of decision: 28 March 2018

Before

Angus Hamilton

Judge

and

David Wilkinson

and

Roger Creedon

Subject matter: s 14 Freedom of Information Act 2000

Cases considered:

Dransfield v IC and Devon County Council [2015] EWCA Civ 454 ('Dransfield')

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that the exemption provided by s.14(1) FOIA is not engaged. The appeal is therefore allowed. The Ministry of Justice is required to provide the requested information to Mr. Price within 28 days of the publication of this decision. This judgment stands as the substituted Decision Notice.

REASONS FOR DECISION

Introduction

1 Section 1 (1) of FOIA provides that:

Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

2 Section 14 (1) of FOIA provides that:

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

Request by the Appellant

3 The Tribunal members were of the view that the Commissioner had not described the somewhat labyrinthine history of this matter well at all. The Commissioner's Response of 6 October 2017 was, in particular, very hard to follow – setting out as it does several requests for information made by the Appellant without making it properly clear that the only request under consideration in this appeal was the request of 18 March 2016. Paragraph 4 of the Response refers to 'requests' in the plural when the true subject matter of the appeal was a single request. Different requests were also, without proper explanation, given different dates, which added to the confusion. Furthermore, the Response had clearly not been properly proof read and was at points very hard so understand – see, for example, paragraph 41: *'and nor did the Appellant did not refer to it during the*

Commissioner's investigation'. Whilst the Tribunal members understood that a history of requests would be pertinent where 'vexatiousness' was being asserted they felt that the history in this case could have been far better and more clearly described. The somewhat poor written documentation in this appeal was compounded, in the Tribunal members' view, by the absence of any representative from the Commissioner's office and the absence of any input at all from the Ministry of Justice (MOJ) – the relevant public authority. Having said that the Tribunal members were of the view that the Commissioner's response accurately described the relevant events from the receipt of the Appellant's request onwards and have adopted that description.

4 On 18 March 2016 the Appellant submitted a request to the MOJ in the following terms:

> 1) *If the Internal Review response* [this is a reference to an Internal Review response dated 11 March 2016 which related to an earlier request from the Appellant dated 3 January 2016] *is correct and all the Jewish faith adviser did was to confirm that the named individual was an observant Haredi Jew, please provide me with copies of the relevant data which details who and on what authority was responsible for providing the Governors of HMP Wakefield, HMP Manchester, HMP Leeds and elsewhere with the relevant instructions, guidance and advice, that allowed the named individual in question to receive a refrigerator for his personal use and a regular supply of kosher food.*
> 2) *Please provide me with the relevant data which details the relevant instructions, guidance, and advice, given to prison governors, with particular reference to the Governor of HMP Wakefield, a high security prison, which in 2015/2015 [sic] authorised a Haredi Jewish prisoner to be provided with a refrigerator for his personal use and a regular supply of kosher food.*

3) Please provide me with details of the items of additional food that the individual authorised to receive and did in fact receive. "

5 The MOJ initially responded on 7 April 2016 and refused the Request citing the exemption for repeated requests in section 14(2) FOIA. The MOJ explained that, under section 14(2) FOIA, it was not obliged to respond to any substantially similar or identical request that it received within a reasonable time period since complying with his original request. The Commissioner investigated and upheld the Appellant's complaint in a Decision Notice dated 16 January 20I7 (reference FS50627851) ('the Initial DN'). The Commissioner decided the MOJ were not entitled to rely on section 14(2) FOIA as she did not consider part 1 of the request to be identical to the Appellant's request dated 3 January 2016. The Commissioner also required the MOJ to issue a fresh response to the request. On 16 February 2017 the MOJ issued a fresh response which relied on the exemption from disclosure at section 14(1) FOIA for vexatious requests. The MOJ maintained this position after conducting an internal review.

6 On 21 March 2017 the Appellant complained to the Commissioner about the MOJ's reliance on section 14(1) FOIA and the Commissioner conducted an investigation. In correspondence dated 18 April 2017 the Commissioner asked the MOJ to provide detailed explanations for its reliance on section 14(1) FOIA. In particular, the Commissioner asked the MOJ to address criteria which the Commissioner considers when determining whether a request is vexatious: details of the detrimental impact of complying with the request, why the detrimental impact would be disproportionate in relation to the purpose or value of the request and details of any wider context and history to the request.

7 In her DN dated 31 July 2017, the Commissioner decided the MOJ was entitled to refuse the Request as vexatious for the purposes of section 14(1) FOIA.

The Appeal to the Tribunal

8 On 14 August 2017 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal challenged the Commissioner's Decision Notice on grounds that the Commissioner erred in finding that section 14(1) of the Act was applicable.

The Question for the Tribunal

9 The Tribunal judged that the sole question for them was to consider whether the request was, on the balance of probabilities, 'vexatious' within the meaning of s14(1) FOIA.

Evidence & Submissions

10 As previously stated the Ministry of Justice did not seek to be joined as a party to these proceedings and therefore provided no written or oral submissions. The Commissioner relied only upon written submissions. Only the Appellant appeared before the Tribunal and provided both written and oral submissions. This matter was considered at the same time as Mr. Price's appeal under reference EA/2017/0260.

11 On the issue of the meaning of 'vexatious' the Commissioner relied, in her Response, upon *Dransfield* in which the Court of Appeal held that there is no comprehensive and exhaustive definition of what is vexatious the purpose of section 14(1), but provided the following guidance as to the provision:

> *I consider that the emphasis should be on an objective standard and that the starting point is that the 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 request, if the request was aimed at the disclosure of important information which ought to be made publicly available.

12 The Commissioner also quoted extracts from the Upper Tribunal's judgement in *Dransfield:*

a) In Dransfield, the UT confirmed 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*". [para 10] "*the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus, the context and history of the particular request, in terms of previous dealings between the individual requester and the public authority must be considered in assessing whether it is properly to be characterised as vexatious"* [Para 29] emphasis added.

b) The UT said:

"*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" … an inherently flexible concept which can take many different forms*." [para 28] (emphasis added)

c) On how to decide whether a request is vexatious, the UT stated:

"there is … no magic formula – all the circumstances need to be considered in reaching what is ultimately *a value judgment as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA*." [para 43] (emphasis added)

13 The Commissioner also quoted the following part of the Court of Appeal's *Dransfield* judgement:

"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". [Para 68]

Because a rounded approach is required, in my view what I have

> *termed the instinctive approach of the FTT must be wrong. It involved drawing bright lines between requests which spring from some common underlying grievance and those which, for example, relate to the same subject matter although there is no underlying grievance in common. This distinction is difficult to justify in logic and there is no statutory mandate for it. If the FTT were right, the decision maker may have to disregard other evidence which may throw light on whether a request is vexatious, Just as the FTT left out of account the evidence in relation to prior requests that had led abuse and unsubstantiated allegations, of which the authority had first-hand knowledge because they had been directed to the authority's staff (FTT, Dransfield, Judgment, para. 42: para.14 above). That evidence was clearly capable of throwing light on whether the current request directed to the same matter was not an inquiry into health and safety but (say) a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority."* [paragraph 69]

14 The Tribunal members considered that the Commissioner had not tied the principles in *Dransfield* to the facts of the appeal in a particularly compelling fashion but took these quotations as an indication, that amongst other factors, it was appropriate to look at the history of correspondence between the Appellant and the MOJ as described in paragraphs 5-11 of the Response. These included requests submitted by the Appellant to the MOJ on 20 July 2015, 30 November 2015, 3 January 2016 and 18 January 2016.

15 Mr. Price accepted that there had been a significant amount of correspondence between himself and the MOJ. Some of this correspondence flowed from a declaration in the High Court in 2015 that Mr. Price was a practising orthodox Jew and must be treated as such – including in relation to the provision of kosher food. Other correspondence flowed from the fact that through distance learning, approved by the MOJ,

Mr. Price had undertaken a PhD and the MOJ was a source of information for his research.

16 In relation to the request under consideration Mr Price emphasised that he could not follow the Commissioner's reasoning in this matter - that the information was not information that had previously been provided to him by the MOJ (see paragraph 5 above) and yet a request for such information – not previously provided - could be labelled as 'vexatious'.

17 Mr Price also considered that the Commissioner's investigation into the matter had not been objective and that the investigator from the Commissioner's office had deliberately suggested to the MOJ relying of s.14(1) FOIA as a reason for refusing his request. Mr Price referred to paras 21 & 22 of the Decision Notice of 16 January 2017 which rejected the MOJ's reliance on s.14(2) FOIA (information previously provided):

> *"In its correspondence with the Commissioner the MoJ referred to the complainant's "constant rephrasing of his requests and overlapping correspondence" and the "continued burden his requests pose to the department".*
>
> *The Commissioner accepts that those are terms often used by a public authority in scenarios where it considers that section 14(1) of the FOIA (vexatious request) applies. However, the Commissioner has not been provided with any evidence, as she would require, that the MOJ told the complainant that, having revisited the matter, it considered the request vexatious and that section 14(1) applied."*

18 The Appellant also referred to previous FTT decisions which were in his favour (2016/0123 and 2016/0138) in relation to previous information requests refused by the MOJ. Mr Price accepted that such decisions were non-binding and also that they were not decisions in relation to 'vexatious'. However, he relied on them to the extent that he believed that

they showed a pattern of non-cooperation on the part of the MOJ such that the MOJ's 'knee-jerk' reaction to a request from him was to look for a reason to reject it rather than to operate within the true spirit of FOIA.

Conclusion

19 The Tribunal first considered its approach towards the term 'vexatious'. All the members of the Tribunal embraced the guidance from *Dransfield* at paragraphs 11-13 above.

20 The Tribunal noted however that the principles set out by the Upper Tribunal in *Dransfield* and described at paragraph 12 b) above were qualified by the UT emphasizing that these were not meant to be exhaustive. The UT emphasized the:

> *"Importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterize vexatious requests".* [Para 45]

21 The Tribunal sought to adopt a holistic approach in this matter – taking into account a variety of disparate but still pertinent matters.

22 The Tribunal considered the history of the correspondence between the Appellant and the MOJ as set out in the Commissioner's Response. The Tribunal accepted that there were some common themes in the questions posed by the Appellant although the Tribunal could not identify any clearly repeated questions.

23 The Tribunal also felt it was appropriate, however, to give some weight to the previous successful appeals by Mr. Price to the FTT – not on the basis that such decisions were binding but, on the basis, that this was

indicative of a certain entrenched stubbornness on the part of the MOJ when it came to responding to Mr. Price's FOIA requests. This point appeared to be acknowledged by the Commissioner in the DN for this particular appeal at paragraphs 48 and 49:

> *The Commissioner recognizes that an authority should be mindful to take into account the extent to which oversights on its own part might have contributed to the request being generated.*
>
> *If the problems which an authority faces in dealing with a request have, to some degree, resulted from deficiencies in its handling of previous enquiries by the same requester, then this will weaken the argument that the request, or its impact upon the public authority, is disproportionate or unjustified.*

Although the Tribunal acknowledged that the Commissioner does not specifically say that she has made a finding that this is what occurred in this particular case it is hard to see why such comments should be included unless the Commissioner considered there was some element of previous poor responses on the part of the MOJ.

24 The Tribunal agreed with Mr. Price's submission that if the Commissioner has concluded, as she did in DN FS50627851 (the initial DN), that the requested information had not been previously provided then it was quite hard (though not, the Tribunal felt, impossible) for the same information to be the subject of a vexatious request. The Tribunal did note that the Commissioner had held in the earlier DN that only part of the information had not been previously provided. However, the Commissioner did not seek to 'break down' the request when concluding that the whole request was vexatious and the Tribunal were not consequently inclined to adopt a more detailed analysis of the request either.

25 The Tribunal also considered that the Commissioner had gone beyond the bounds of an appropriate and objective investigation by appearing to

suggest in DN FS50627851 that the Commissioner would give consideration to whether 'vexatious' was a valid exemption in relation to the request if that exemption were argued by the MOJ (see paragraph 17 above). This, at the very least, had the appearance of the Commissioner suggesting, the public authority adopting, and the Commissioner then upholding 'vexatious' as a valid exemption. The Tribunal considered that this was not at all appropriate and that the Appellant was right to express concerns over this point.

26 Conversely, the Tribunal felt that the fact that the MOJ had not initially relied upon 'vexatious' as an exemption in relation to the original request (either instead of or alongside the originally claimed s.14(2) exemption) brought into question the validity of the MOJ's reliance on 'vexatious'. This was particularly so when the Tribunal considered the comments of the FTT in another appeal involving the Appellant and the MOJ (Appeal reference EA/2014/0241):

> *The Tribunal observes that in a case where the MOJ have provided incorrect information in relation to their use of s12 (wrongly asserting that the cost limit was exceeded in relation to element 3(i) alone), and has failed to offer advice and assistance in accordance with their duty under s16 to enable an Appellant to frame their request in such a way as to come within the costs limit; it does not consider it appropriate to attempt to limit further correspondence with the threat of treating a request as vexatious, when the further correspondence arises in part out of the MOJ's unhelpful handling of the request.* [paragraph 23]

This comment raises a number of points – first it acknowledges previous poor handling of requests from the Appellant by the MOJ – which reinforces the concerns expressed by this Tribunal at paragraph 23 above. Secondly it suggests a willingness on the part of the MOJ to place an unwarranted reliance on the 'vexatious' exemption to stifle requests from the Appellant. Thirdly, it raises the issue as to why, if the MOJ were

considering 'vexatious' in relation to the Appellant's requests as long ago 2014, it was not immediately relied upon as an exemption in 2016 in relation to the present request - if it was indeed a validly claimed exemption.

27 The Tribunal also found the Commissioner's reasoning for concluding that the request was vexatious hard to follow at various points. For example, in the DN at para 50 the Commissioner concludes:

> *In this case, however, the context and history of the request suggested to the Commissioner that a response to this request was likely to lead to further communications and more requests for other information on related matters from the complainant with a further consequential burden on MoJ staff.*

The Commissioner does not however explain what 'context and history' she has taken into account to reach such a conclusion.

28 Similarly, at paragraph 33 of the Response the Commissioner invites the Tribunal to conclude that dealing with the Appellant's requests will place an '*unreasonable burden on the MOJ'* while paragraph 45 of the DN acknowledges that the *'MOJ did not provide evidence specifically as to the burden that would be caused by this particular request….'.* The Tribunal felt that it was hard to see how they could reach conclusions for which there was no clear evidence. The Tribunal was effectively being asked to engage in guesswork.

29 Taking into account all these factors the Tribunal concluded, on the balance of probabilities, that the request was not vexatious.

30 The Tribunal's decision to allow this appeal was unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge Date: 28 March 2018