First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Appeal Reference: EA/2019/0363**

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Dr Malcolm Clarke
Ms Jean Nelson

Heard at the Leeds Tribunal Centre on 13 March 2020

Between

David Blundell

Appellant

-and-

The Information Commissioner

Respondent

Attendances:

For the Appellant: In person

For the Respondent: No appearance

DECISION AND REASONS

THE REQUEST AND DECISION NOTICE

1. On 3 December 2018, the Appellant wrote to the Financial Conduct Authority (FCA) and requested information in the following terms about Bradford and Bingley Building Society (B&B):

> "details of all communications, electronic or otherwise, from or to the Treasury regarding B&B on the 29.09.08"

2. The FCA responded on 3 January 2019 refusing to provide the information and cited section 14(1) FOIA.

3. Following an internal review, the FCA wrote to the Appellant on 12 February 2019 and upheld its refusal, however, at that time, it cited section 14(2) of the FOIA as its basis for doing so. The Appellant contacted the Commissioner on 7 March 2019 to complain about the way his request for information had been handled. In correspondence with the Commissioner, the FCA confirmed that it was relying on section 14(1) FOIA and that was the basis upon which the case was considered.

4. The Commissioner explains the background to the request, in the decision notice dated 9 September 2019, as follows: -

> 4. The bank was formed in December 2000 by demutualisation of the Bradford & Bingley Building Society following a vote of the building society's members, who swapped their nominal share of the building society for at least 250 shares of the newly formed bank. Former members of the Society each received a minimum of 250 shares worth £567.50 at the time, and savers with more savings receiving more shares worth up to £5,000 each.
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> 5. In 2008, partly due to the 'credit crunch' the bank was nationalised and in effect split into two parts; the mortgage book and investment portfolios remained with the now publicly owned Bradford & Bingley plc, and the deposits and branch network (and a licence to use the B&B name for those aspects) was sold to Abbey National, itself owned by the Spanish Santander Group. The branch network was rebranded Santander on 11 January 2010 and the Bradford & Bingley name now solely relates to the nationalised section of the bank.
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> 6. Shortly afterwards the decision was made to suspend the bank and there was then a statutory compensation scheme which

resulted, effectively, in no compensation being given to the shareholders.

5. In the decision notice the Commissioner explains the Appellant's position. He is concerned about events of 27 September 2008 to 29 September 2008 when the FCA (then the Financial Services Authority (FSA)) imposed a requirement on B&B not to take new deposits from 7am on 29 September 2009. That original time of 7am was amended to 9am, and the Appellant is of the view that the timing of this extension is critical when considering whether the nationalisation of the bank at 8am on the same day was legal, with the actions of several public authorities, including the FCA and the Treasury under brought under scrutiny by the Appellant through a number of FOIA requests.

6. The Commissioner also sets out the FCA position in the decision notice. The FCA recognises the concern that the Appellant has about the nationalisation of B&B in 2008, and the public interest in understanding the events and reasoning behind the nationalisation. However, the FCA notes that the events occurred 10 years ago and have been explored in several different fora, and the public interest in the issue is now low. The FCA notes two court cases – in the Upper Tribunal (UT) and in the county court, in 2012 and 2017 respectively- where the circumstances were set out and explored, especially in the UT case. The Appellant has made 16 requests for information held by the FCA in relation to the issue, between 2011 and 2018. In relation to this current request, there have been three similar requests, all of which exceeded the cost limit in section 12 FOIA. The FCA has considered whether the request can be further refined to comply with the cost limit, but has concluded that it cannot. It says it will need to review over 6000 files for the period in question which will cause a significant burden to the FCA for no useful purpose (even though it accepts there is no improper motive in the request, nor an intention to cause harassment or distress to FCA staff). Given the time elapsed since

B&B was nationalised the FCA considers it has exhausted all avenues to bring satisfactory closure to the case, and the request can be fairly characterised as obsessive and unreasonable.

7. The Commissioner expresses her conclusion in four short paragraphs as follows: -

> 34. The complainant's stated purpose is to 'prove' that the nationalisation of B&B was illegal. The complainant has already been advised, in a legal judgement that the time for any legal action has long since passed and that any such action or claim would have no prospect of success i.e. a claim for misfeasance in public office has to be made against a person rather than an organisation.
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> 35. It is clear that the complainant does not accept either this conclusion or that the matter has been investigated thoroughly. Using the FOIA to pursue matters which have already been investigated and addressed is an abuse of the process. It is clear that the complainant has a keen personal interest in the information that the FCA might hold. However, the Commissioner can see little wider public interest in the request.
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> 36. The Commissioner acknowledges the strength of feeling the complainant has about this matter, and his dedication to establishing the facts. However, it is only the Commissioner's remit to consider if a public authority has correctly cited an exemption and, where applicable, considered the public interest. Continuing to submit requests is unlikely to serve a useful purpose and the FCA has expended extensive resources in dealing with the complainant's requests and correspondence over a number of years.
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> 37. Given the number of files that would need to be reviewed, and the time spent dealing with previous requests, the Commissioner is satisfied that this would impose a significant burden on the FCA. She therefore concludes that the FCA was entitled to rely on section 14 of the FOIA to refuse the request.

THE LAW

8. Section 14(1) FOIA states that "(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is

vexatious". Vexatiousness is not defined in section 14 FOIA, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.

9. Amongst other things, the Commissioner's guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

10. The approach to vexatiousness is based mainly around the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC). The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in *Dransfield* when it defined the purpose of section 14 as follows:

> 'Section 14…is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)…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…' (paragraph10).

11. Also in *Dransfield,* the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. As the Upper Tribunal observed:

> 'There is…no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.

12. *Dransfield* was also considered in the Court of Appeal *(Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454) where Arden LJ observed at paragraph 68 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… The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.'

13. The recent Upper Tribunal case of *Cabinet Office v Information Commissioner v Ashton* [2018] UKUT 208 (AAC) made clear that s14(1) FOIA can apply purely on the basis of the burden placed on the public authority, even where there was a public interest in the request being addressed and where there was a 'reasonable foundation' for the request.

14. The case also confirmed the approach in *Dransfield* to the effect that the Tribunal should take a holistic approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is vexatious: see especially paragraph 27 of the UT judgment in *Ashton*, where the UT said as follows: -

> 27. The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument. As Mr Armitage put it in the Commissioner's written response to the appeal (at §18):
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> *a. In deciding whether a request is vexatious within the meaning of section 14(1), the public authority must consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.*

b. The burden which compliance with the request will impose on the resources of a public authority is a relevant consideration in such an assessment.
c. In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

15. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance. In brief these consist of: abusive or aggressive language; burden on the authority; personal grudges; unreasonable persistence; unfounded accusations; intransigence; frequent or overlapping requests; deliberate intention to cause annoyance; scattergun approach; disproportionate effort; no obvious intent to obtain information; futile requests; frivolous requests.

16. As the Commissioner notes in the decision notice, the fact that a request contains one or more of these indicators will not necessarily mean that the request is vexatious.

THE APPEAL

17. The Appellant filed an appeal dated 3 October 2019 which argued that his request was not vexatious and had a serious purpose. The Appellant emphasised the public interest in the B&B nationalisation and the search for the truth as to what happened, argued that previous requests were irrelevant to this appeal, and criticised the Commissioner for accepting at face value the claim that the FCA would have to check over 6,000 files to fulfil the request.

18. The Commissioner's response included an application to strike out the appeal on the basis that it had little prospect of success and criticises the Appellant for using the FOIA to find out the 'truth'.

19. There is an annex of the 16 requests the Appellant has made over the years to the FCA. It can be seen that in 2011 the Appellant made similar requests to the present request, other than that the Appellant sought information over a much longer time frame, and in relation to more public authorities, than he is currently asking for.

20. On 26 November 2019, the Registrar refused the application to strike out the appeal, on the basis that the appeal was not so unlikely to succeed that it should be struck out. The Registrar asked for further representations in relation to the claim that 6,000 files would need to be checked, and noted that was the figure used in relation to a previous request covering a wider time period and concerning communications with a greater number of bodies.

21. There is a letter dated 20 December 2019 from the FCA to the Registrar which addresses these issues. Effectively, the FCA states that its predecessor (the FSA) arranged its affairs so that each business area within the organisation would have its own file management system. The letter does not say how many 'business areas' there were, but refers to four in the letter. It is explained that a search by date 'would not identify all relevant information held' given the nature of the filing systems, and that no standard naming conventions were used, meaning that all 6,000 files would need to be viewed to identify communication with the Treasury on the relevant date. It says it has sampled one business area – the General Counsel's Division (GCD) – under the project codename for the B&B nationalisation which revealed over 2,000 items. The FCA states that it is clearly regrettable that its filing system in relation to B&B is so complex and that it is difficult to find material within it.

THE HEARING

22. The Appellant represented himself at the hearing We explained to the Appellant that the Tribunal had read the background documents in the case, and understood the history of the matter. The Appellant told us some more about the background and emphasised his long involvement with the issue, the fact that large numbers of people had been affected, and that people were still coming forward and contacting him as chair of the 'action group' on the issue.

DISCUSSION

23. On the face of it, it would not seem an unreasonable request to make for all the communications between the FCA and another public body on a single day, that day being the date which a highly significant financial event took place. The Appellant's previous requests had related to much longer periods and had included more than one recipient public authority.

24. The Tribunal has no way of knowing whether the FCA holds information which would allow the Appellant to progress his case that something went wrong in September 2008, and it is not our job to offer a view. But it~~s~~ seems clear that there are many aggrieved people who feel that the events around the nationalisation and sale of the B&B need to be investigated. The fact that the Appellant seeks to find the 'truth' as to what happened does not seem to us to be an invalid reason for using the FOIA, as disclosure does have the potential of doing that.

25. The fact that the events occurred over a decade ago does not seem to be a crucial aspect of the case. There have been a number of recent and ongoing inquiries in this country which arise from significant events much longer

ago, where it has belatedly been thought worthwhile and in the public interest to investigate what happened. We are not saying that there should be an inquiry into the B&B nationalisation, but these other inquiries make it clear that the passage of time does not necessarily take away the serious purpose of a request.

26. The FCA has focussed on two sets of proceedings in arguing that the matter has been dealt with already. Sir Stephen Oliver QC in the UT proceedings BB0001/2011 ONWARDS starts by saying that 'The great majority of grievances expressed by ex-shareholders in Bradford & Bingley plc. are understandably grounds for concern' (paragraph 1), before explaining that the grievances were not admissible issues that could be dealt with by the Tribunal. That was because the Tribunal was an appeal against the Independent Valuer for the Bradford & Bingley plc Compensation Scheme. As the UT Judge said: -

> 2. The authority given to this Tribunal has, as I have just mentioned, been limited. The Tribunal has been given no authority to, for example, challenge the decision to take the shares of Bradford & Bingley Plc into public ownership: or to question either the manner by which the Valuer was appointed or the rules governing his approach to valuing the compensation. As already observed, the law requires the Valuer to make certain assumptions when valuing the compensation. The Valuer and the Tribunal have to take the law underlying the Compensation Scheme as they find it and to apply it properly.

27. The other case was a county court claim for misfeasance in public office (amongst other things) brought against a number of public bodies (including the FCA) by Irene Blundell. The case was struck out by HHJ Gosnell on 8 November 2018 on the basis that it was 'woefully out of time' and because there was no prospect of success as, said the judge, a misfeasance case needs to be brought against an individual rather than a public authority.

28. Although primary limitation periods for the action have expired we are aware of the possibility (we say no more than that) that these can be extended if new information is discovered. Neither of these cases, it seems to us, deal determinatively with the issues raised by the Appellant (about which, we accept, he might be wholly mistaken).

29. Thus, it seems to us that the request still has a reasonable foundation even if it does relate to events that happened over a decade ago. There has been a certain degree of persistence by the Appellant over the years, and some overlapping requests, but the Appellant has attempted to narrow his request, and now seeks communications from the FCA on a single day to a single authority. The FCA accepts that there is no deliberate intention to cause annoyance and no abusive or aggressive language used.

30. Thus, a main issue in this case for finding that the request is vexatious is the burden that the request places on the FCA. We note what the FCA says about its file management systems in relation to information from 2008, and the difficulties that will exist in locating the information, and we accept the situation as it is described. However, for section 14 FOIA the burden on the FCA is only one of the factors for us to take into account, although in some cases the burden on the authority can be enough in itself to make the request vexatious. In this case we note the continuing public interest in the subject matter of this request as described by the Appellant. We also note that, on the face of it, the request is a limited one.

31. Further, the FCA's letter of 20 December 2019 states that information is held in different business areas, and it may be that there are business areas which are of more interest to the Appellant than others. This raises the prospect that if, for example, the FCA considered this case under s12 FOIA it could give a further indication of what, if any, information could be provided within the cost ceiling.

32. All in all, we conclude that this request is not 'a manifestly unjustified, inappropriate or improper use of FOIA' (see *Ashton* paragraph 27). The potential burden on the FCA is an important factor, but taking into account both the lack of other indicators of vexatiousness and the continued public importance of the subject matter involved (the Appellant told us he was still being contacted by people affected) , and considering the matter holistically (which includes the possibility of advice being given about the request being further focussed when s12 FOIA is considered), in our view this case does not meet the high standard that needs to be satisfied for the vexatiousness test in s14 FOIA to met.

CONCLUSION

33. On that basis, we would allow this appeal and the FCA will now need to either release the information requested or claim appropriate exemptions.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 March 2020