Appeal number: EA/2020/0030/V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ALEX CONWAY	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**Respondent**

TRIBUNAL: JUDGE CL GOODMAN

Remote hearing by video on 14 October 2020
The Appellant appeared in person
The Respondent did not appear

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DECISION

1. The appeal is allowed. Decision Notice FS50870070 is not in accordance with the law.

2. I substitute the following Decision Notice:

> *1. UK Research and Innovation (UKRI) was not entitled to refuse Mr Conway's request for information made on 25 June 2019 on the grounds that the request was vexatious under section 14(1) of the Freedom of Information Act 2000 (FOIA).*
>
> *2. To ensure compliance with FOIA, UKRI must issue a fresh response to the request which does not rely on section 14(1) FOIA.*
>
> *3. UKRI must take this step within 35 calendar days of the date of this Decision Notice.*

3. I refuse the Appellant's application for the Powerpoint slides which he presented at the hearing on 14 October 2020 not to be shared with the Commissioner (see paragraphs 64-68).

4. The slides shall be sent to the Commissioner 14 days after issue of this Decision unless an application for permission to appeal my refusal of his application is received, with reasons, from the Appellant in that time. As noted at paragraph 38, I place no weight upon the slides in reaching my decision on the appeal.

REASONS

5. The Appellant made a request for information to UK Research and Innovation ("UKRI") on 25 June 2019.

6. UKRI refused the request on 23 July 2019 in reliance upon section 14(1) of the Freedom of Information Act 2000 ("FOIA") on the grounds that the request was vexatious.

7. The Information Commissioner issued Decision Notice FS50870070 on 19 December 2019, finding that the request was vexatious and that UKRI were entitled to rely on section 14(1) FOIA.

8. The Appellant appealed the Decision Notice to the First-tier Tribunal on 14 January 2020.

9. The background to the request is summarised below. References to page numbers in this Decision are to pages of the appeal bundle. I have used the numbering used by the Commissioner in its Response to identify the various requests for information made by the Appellant.

Background

10. UKRI is the UK national funding agency for science and research with an annual budget of more than £6 billion. UKRI was established as a new non-departmental public body in April 2018, bringing together the former UK research councils, including the Medical Research Council (MRC), lnnovate UK and Research England, as one organisation.

11. The Appellant has a background in corporate finance. He is Chief Executive Officer of Mental Illness Research in Children and Young Lives (Miricyl), a Scottish charity which he founded in 2017. According to its website, Miricyl aims to fund research and campaigns for infants, children, young people and their families affected by mental illness. The Appellant himself has a mental health condition which causes him to be more affected by stress and memory loss.

12. The Appellant has made a number of requests for information from the MRC and UKRI about funding strategy and expenditure on different areas of medical research and in particular mental health.

13. In its Response to the appeal, the Commissioner identified 11 requests between 26 May 2017 and 22 June 2018. On 23 August 2018, UKRI refused a twelfth request made on 27 July 2018 on the grounds that it was vexatious (some information was provided on internal review). The Appellant complained to the Commissioner.

14. The Appellant continued to make requests for information from UKRI while the Commissioner was dealing with his complaint. In its Response, the Commissioner identified another 9 requests between 24 August 2018 and 18 April 2019 (see also the UKRI spreadsheet at page 62).

The Request

15. On 7 May 2019, the Appellant made the following request (identified by the Commissioner as Request 22):

> *"[1] Please could you send me MRC spend by illness for 2018. In your 2018 annual report you produce this chart on p24. It is labelled 2017 but I am looking for the underlying £ values for 2018 in xls and the information I require to separate neurological and mental health spend.*
>
> *[2] My objective is to ascertain % spend by illness for illness specific funding if you cannot produce this using the methodology above please attempt to get close to producing this and provide narrative as to where data is not comparable. Ie you have MeSH and or HRCS data.*
>
> *[3] If you cannot produce the data as per question 1 please can you explain why.*
>
> *[4] Please complete this once you have fulfilled 1 and/or 2 above, with respect to the FOI time limits. I understand you provide some information on mental health spend at UKRI level. If you can provide the information as requested in 1*

for the other Research Councils and / or Innovate UK and/or at an aggregate level please do so."

16. The chart referred to in question [1] is reproduced at page 22 of the bundle. It shows proportion of total MRC expenditure by Health Research Classification System (HRCS) category, with a combined percentage for neurological and mental health.

17. UKRI responded to Request 22 on 23 May 2019. In response to question [1], UKRI provided a spreadsheet entitled "MRC research by health category 2011-12 to 2017-18" (page 39 of the bundle). The information requested in question [4] was not held.

18. The Appellant responded on 24 May 2019, querying why the figures for 2016/2017 and 2017/18 in the spreadsheet differed from the figures for gross research expenditure in the MRC's annual report for 2017/18. He asked: "*please could you account for the difference and also any difference in prior years, time permitting going back to cover all 5 years. With particular reference as to how the difference can also be allocated by illness (HRCS, MeSH or otherwise)*".

19. UKRI responded on 14 June 2019, explaining how the figures were calculated and why they were not equivalent. It explained why the figures used to calculate the percentages in the chart referenced by the Appellant in his request of 7 May 2019 differed from gross research expenditure.

20. In response on 25 June 2019, the Appellant submitted the request which is the subject of this appeal ("the Request"):

> "*Please see attached FOl. As mentioned previously I would be happy to discuss this ínformation request on the phone if that would expedite it. I believe that you breached FOI legislation not contacting me previously as I had requested. lf you had done this with the initial request I would already have the answers to this FOIA*."

21. A spreadsheet attached to the Request contained columns for each of the years 2014 to 2018 (page 30). The Appellant inserted figures in rows headed "Gross", "HRCS" and "Unaccounted spend". He left blank cells headed "Accounting for unaccounted spend" and asked:

> "*please list total spending by each centre, institute and unit and split this using the following 3 categories (use management estimates from the centres, units and institutes as appropriate to split out their spending")*"

22. On 15 July 2019, the Commissioner issued Decision Notice FS508077193 finding that UKRI had correctly applied section 14(1) FOIA to Request 12 (see paragraph 13 above). The Commissioner found that the Appellant's requests for information were often multipart, overlapping and repetitive, and imposed a significant and disproportionate burden on UKRI. The Appellant appealed Decision Notice FS508077193 to the First-tier Tribunal (see paragraphs 29-31 below).

23. On 23 July 2019, UKRI refused to respond to the Request on the grounds that it was vexatious under section 14(1). UKRI said that the following indicators from the Commissioner's Guidance on vexatious requests applied: (1) burden on the authority, (2) unreasonable persistence; and (3) frequent or overlapping requests. The Request was seeking information in the same subject area as Request 12 and responding would add further to the burden on UKRI which had been recognised by the Commissioner in Decision Notice FS508077193.

24. On 30 August 2019 the Appellant complained to the Commissioner about UKRI's refusal to respond to the Request.

Other correspondence with UKRI

25. The Appellant engaged in correspondence with UKRI outside his requests for information. In July 2018, he sent a "Guardian Matrix test" to the UKRI Chief Executive and to each Research Council Executive Chair. This was a "test" devised by the Appellant asking 7 questions about the organisation's compliance with its public sector equality duty, applying the Nolan Seven Principles of Public Life. The Appellant's letter warned that if recipients "failed" the test, their "misconduct" would be made public and escalated to his MP, to the "Public Health Service Ombudsman" and to the Equality and Human Rights Commission.

26. The Appellant also made and pursued a number of complaints about the UKRI Information Governance team and their handling of his requests for information and a subject access request he made in December 2018. The Appellant complained on 30 January 2019 that UKRI had shared his personal information with the Department for Business, Energy & Industrial Strategy. He made at least two phone calls to the Information Governance team at the end 2018 or early 2019. His tone in correspondence was increasingly strident and critical (see paragraph 59 below).

The Decision Notice

27. After receiving submissions from UKRI and the Appellant, the Commissioner issued Decision Notice FS50870070 on 19 December 2019. She concluded that the Request was vexatious because the patterns of behaviour identified in her first Decision Notice FS508077193 had "*persisted and, if anything, intensified*". While she acknowledged that the number of requests since the first Decision Notice was not high, the requests were often complex and required coordination across UKRI departments. The Request was a follow up to a previous request because the Appellant did not get "*the answer that suited him*". He was submitting broad requests to find evidence to support a predetermined conclusion and his campaign for fairer funding for mental health research. The Commissioner asserted that the Appellant's "Guardian Matrix Test" indicated that he was using his FOIA rights in an "inappropriate manner".

28. The Appellant appealed Decision Notice FS50870070 to the First-tier Tribunal.

First Tribunal Decision (EA/2019/0286)

29. On 6 March 2020, a First-tier Tribunal allowed the Appellant's appeal against the first Decision Notice FS508077193, finding that UKRI was not entitled to refuse Request 12 on the grounds that it was vexatious.

30. The Tribunal considered whether Request 12 was vexatious as at the date of the relevant internal review, 19 October 2018. The Tribunal accepted that UKRI had spent a significant amount of time dealing with the Appellant's requests for information, but did not accept UKRI's assertion that this amounted to 370 hours. The Tribunal noted that this was not a case where the Appellant was "relentlessly bombarding" UKRI with emails. In general, his requests were months rather than days apart and while his language was critical and directed at individual members of staff, it did not amount, at the relevant time, to harassment nor cause distress.

31. The Tribunal found that the information requested by the Appellant was valuable to inform public debate on the important issue of the allocation of large amounts of public money to medical research and the impact of funding decisions, which was the focus of Miricyl's charitable purpose (paragraph 81 of the Decision). In this context, the burden was not disproportionate.

32. Neither party applied for permission to make further submissions in light of the Tribunal decision in EA/2019/0286.

Present Appeal (EA/2020/0030)

33. In his Notice of Appeal for these proceedings, the Appellant said that his purpose was to ensure that information about UKRI and the MRC's allocation of research expenditure by illness and protected characteristic was in the public domain. He disputed that the time spent by UKRI on his requests had intensified and alleged that the ICO staff responsible for the Decision Notice had been dishonest in presenting the facts of the case – for example, by not mentioning his appeal against the first Decision Notice FS508077193.

34. The Commissioner's Response set out the history of the Appellant's requests and maintained that the Request was vexatious pursuant to section 14(1) FOIA for the reasons given in the Decision Notice. The Appellant's multiple requests placed a significant burden on UKRI and there was little public interest to outweigh that burden. The Appellant was hounding UKRI and using FOIA as a means to criticise and harangue the organisation. The Commissioner was entitled to take into account the Appellant's conduct, in particular his accusations of incompetence, requests for staff names and the "accusatory" Guardian Matrix letter. By contrast, UKRI had continued to be helpful and accommodating in line with the letter and spirit of FOIA.

35. UKRI was not a party to the appeal and did not provide a Response. On 4 March 2020, a Registrar declined the Appellant's application for the Equality and Human Rights Commission to be required to attend the hearing.

Hearing of the Appeal

36. The hearing was conducted on 14 October 2020 by a Judge sitting alone. It was appropriate to compose the panel in this way, having regard to paragraph 6(a) of the Senior President's Pilot Practice Direction of 14 September 2020 and the desirability of determining cases by the most expeditious means possible during the Coronavirus pandemic.

37. The Commissioner did not wish to attend the hearing or be represented. The hearing was conducted by video and recorded. The judge and Appellant were able to hear and see each other throughout.

38. The Appellant did not request any specific reasonable adjustments before the hearing. I gave the Appellant permission to share a Powerpoint presentation during the hearing in light of his mental health condition as this helped him to structure his submissions. Although the slides had not been provided in advance and therefore the Commissioner had no opportunity to respond, they contained no material new evidence and I placed no weight upon them in reaching my decision. The Commissioner had elected not to attend the hearing and respond to the Appellant's oral evidence and submissions.

39. I encouraged the Appellant to inform me if he required any other reasonable adjustments or breaks to enable him to participate in the hearing.

Appellant's Submissions

40. The Appellant said that the purpose of the Request was to identify what UKRI and MRC had done with a £735 million "bridge" or unaccounted expenditure which the Appellant had identified from its response to his previous request for information, Request 22. £735 million was the total spend unaccounted for, in the Appellant's view, for each of the years from 2015 to 2018, as set out in the spreadsheet attached to the Request.

41. The Appellant's aim was to establish whether UKRI had complied with its public sector equality duty ("PSED") under section 149 of the Equality Act 2010 and its specific duty to publish information to demonstrate compliance with its PSED under the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017.

The Appellant explained the context for his requests for information. He said these were a relatively small percentage of the requests he had made to all UK funders of medical research (22 out of 130). He explained how the requests supported the charitable work of Miricyl to highlight inequalities in funding of mental health research. The Appellant had used information from FOIA requests as evidence for articles in the Times and British Medical Journal, Parliamentary questions by UK and Scottish MPs, submissions to a House of Commons Select Committee and direct engagement with Professor Chris Whitty, Chair of the NIHR Strategy Board. The Appellant worked with a leading firm of solicitors at the end of 2018 on judicial review proceedings in relation to UKRI's compliance with the Equality Act. This had resulted, in his view, in UKRI committing in May 2018 to carry out an equality impact assessment (EIA) for Research England funding.

42. The Appellant alleged that UKRI had harassed him and Miricyl Trustees and breached section 77 FOIA by concealing information about the Research England EIA. The ICO had failed to deal with his complaints against UKRI and to comply with its own PSED. He also alleged that the Commissioner and its counsel had committed perjury by including false statements in Decision Notice FS50870070 and the Response.

The Law

43. Section 14 FOIA provides that:

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

44. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal interpreted "vexatious requests" as being manifestly unjustified, or involving inappropriate or improper use of a formal procedure. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic and broad approach. The "*present burden may be inextricably linked with the previous course of dealings*".

45. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider "*all the relevant circumstances*". Arden LJ noted that by using the word "vexatious", "*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*".

46. A request arising from a genuine public interest concerns may become "*vexatious by drift*" where that proper purpose is "*overshadowed and extinguished*" by the improper pursuit of a longstanding grievance against the public authority (*Oxford Phoenix v Information Commissioner* [2018] UKUT 192 (AAC)). Public interest is not a trump card (*CP v Information Commissioner* [2016] UKUT 0427 (AAC)).

47. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

48. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law, or involved an inappropriate exercise of discretion, rests with the Appellant.

Conclusion

49. In considering whether it is lawful for UKRI to refuse to provide the requested information under section 14(1) FOIA, I have had regard to the guidance from the Upper Tribunal and the Court of Appeal in *Dransfield* set out at paragraphs 45-47 above. While taking a holistic approach, I have considered the question of vexatiousness in particular as at the date of that refusal, 23 July 2019.

50. The Commissioner did not submit that the Request was vexatious of itself nor that responding would place a disproportionate burden on UKRI. The Commissioner relied rather upon the previous course of dealings between UKRI and the Appellant.

51. Much of that 2 year history was considered by the previous Tribunal. I am not bound by its decision. However, I take into account that the Tribunal found as a fact that while the Appellant's requests for information up to 19 October 2018 created a significant administrative burden, overall and taking into account the Appellant's disability, the burden was not disproportionate. The Appellant was not "relentlessly bombarding" UKRI and in general, his requests were months rather than days apart.

52. The evidence before me does not suggest that the burden of dealing with the Appellant's requests for information increased materially between 19 October 2018 and the date when UKRI refused the Request, 23 July 2019. UKRI's spreadsheet at page 65 identifies five requests in this nine month period, including the Request. While some may have been complex, UKRI responded to two saying that information was not held in the form requested and could not be identified and extracted within FOIA time limits. There is no breakdown or evidence to support the hours which UKRI claims to have spent on the requests. I note that the Appellant continued to make requests for information after July 2019, but according to the UKRI spreadsheet, these continued to be no more than one a month up to the end of 2019.

53. The Appellant did engage in other correspondence with UKRI during the relevant period outside his requests for information (see paragraphs 25-26 above). However, even taking this into account, I find that the burden on UKRI was not disproportionate to the significant public interest in the information which the Appellant sought.

54. I do not accept the Commissioner's submission that there was "little public interest" in the information sought by the Appellant. I find that there is a substantial

public interest in the allocation of billions of pounds of public money by UKRI and the MRC and in how these public authorities complied with their PSED. This is evidenced by the level of engagement which the Appellant and Miricyl have had with newspapers and academic publications, with members of Parliament and senior health figures, and in initiating judicial review proceedings with a leading law firm.

55. I accept that the Appellant's motive in making the Request was "*to determine the % of funding allocated to different illnesses by MRC*" and to clarify and understand figures provided by UKRI about their expenditure in order to inform public debate on this issue. The Appellant was open (for example, in an email on 28 November 2019 (page 45)) about the fact that he intended to use the information to challenge MRC about the fairness of their funding allocation. Using FOIA to obtain information to challenge a public body about its activities and compliance with its statutory duties may be uncomfortable, but it is not a manifestly unjustified, inappropriate or improper use of a constitutional right to information.

56. Although the Request was a second follow up to Request 22, it did continue to focus on this public interest issue and had not become "vexatious by drift". If UKRI did not hold the specific financial information and/or it could not be identified and extracted within FOIA time limits, UKRI could have refused the Request on those grounds as it did other requests from the Appellant.

57. In line with the Upper Tribunal and Court of Appeal guidance in *Dransfield*, I have considered whether there was harassment of or distress to UKRI staff. In its Response, the Commissioner submits that the Appellant began to display open hostility to both junior and very senior UKRI staff. The first Tribunal warned the Appellant that his increasingly critical language and personal criticism of staff at UKRI and the ICO greatly increased the risk of future requests being classified as vexatious.

58. The Appellant's Guardian Matrix letter to senior executives in July 2018 is accusatory and threatening in tone, including a warning that it is "*difficult to conceive that you have complied with the Duty*" and that if the recipient did not have compelling evidence of compliance, the Appellant would "*complain about you on the basis of a lack of selflessness, objectivity, honesty and leadership*". In his correspondence with UKRI's Information Governance team after they refused Request 12 in August 2018, the Appellant repeatedly demanded to know the names of staff he was dealing with. In December 2018, he described a staff member as "incompetent". In February 2019, he accused the (un-named) board member responsible for the team of being a "failed leader" who lacks integrity, acts in self-interest and has harassed the Appellant with rude, arrogant, intimidating and consistently unwanted behaviour (page 107).

59. This language and behaviour is intemperate, unnecessary and undermines the integrity of the Appellant and Miricyl's pursuit of their public interest objectives. It risks harassing and distressing individual staff, in particular when aimed at more junior staff. The Appellant believes that providing staff names is basic customer

service, but if this is not an organisation's policy, it is potentially harassing and distressing to continue to demand to know individual names.

60. However, there is insufficient evidence that the Appellant engaged in harassing and distressing behaviour in the months leading up to the refusal of the Request on 23 July, even when further requests for information are refused. His continuing requests and correspondence with the ICO in this period are generally framed in a neutral tone. The "Guardian Matrix" letter was sent in July 2018, a year before the request, to senior public officials who may be expected to be robust about such correspondence. The Appellant's personal attacks on ICO staff came, as the Commissioner has acknowledged, after UKRI's refusal of the Request. Significantly, neither UKRI in its initial refusal nor the Commissioner in her Decision Notice relied upon the indicators of abusive or aggressive language, personal grudges or unfounded accusations.

61. I have taken a holistic and broad approach to considering whether the Request was vexatious, taking into account all the circumstances and factors outlined above. I have taken into account in particular the significant public interest in the information sought and Arden LJ's view that given the constitutional nature of the right to information held by public authorities, the hurdle of vexatiousness is a high one. While there has been a significant administrative burden on UKRI and some potentially harassing and distressing behaviour, I conclude that on the evidence before me and for the reasons given above, that the Request was not vexatious under s.14(1) FOIA.

62. I have no jurisdiction to consider the Appellant's allegations about breach of the Equality Act. Proceedings in relation to section 77 FOIA can only be instituted by the Commissioner or by or with the consent of the Director of Public Prosecutions.

Section 14 Application for Non-Disclosure

63. After the hearing, the Appellant asked the Tribunal not to share his Powerpoint slides with the Commissioner. He submits that disclosing to the Commissioner the allegations of perjury in his slides could result in the destruction of evidence and interference with a police investigation.

64. I treat this as an application for a non-disclosure direction under Rule 14(6) of the First-tier Tribunal (General Regulatory Chamber) Rules. As set out in the Practice Note on Closed Material in Information Rights Cases dated May 2012 "*it is a general principle of tribunal practice that hearings are in public with all parties entitled to be present throughout; and that the documents provided to the tribunal by any party are seen also by all the other parties*". Although only the Appellant, judge and clerk were present at the remote hearing on 14 October 2020, it was a public hearing. The Appellant did not apply for a non-disclosure direction before the hearing. His allegations have therefore already been made in a public forum and his slides have been made available to the public.

65. I find it unlikely in any event that the Commissioner, her staff or counsel would take steps to destroy evidence or interfere with a police investigation. I find it unlikely

that the statements in the Decision Notice and Response identified by the Appellant amount to perjury. There may be errors and statements which the Appellant disagrees with, but the test of "knowingly and wilfully" making false statements is a high bar. The offence under section 5 of the Perjury Act 1911 referred to by the Appellant applies only to certain specific statutory declarations. The statements were not made on oath nor in testimony.

66. I therefore refuse the application for non-disclosure. However, I direct that the Powerpoint slides are not shared with the Commissioner until 14 days after issue of this Decision to allow the Appellant an opportunity to dispute my refusal. There is no disadvantage to the Commission as I placed no weight on the slides in reaching my decision on this appeal (see paragraph 38).

67. I considered whether the application constitutes an application under Rule 7A and section 61 FOIA for the Tribunal to certify an offence to the Upper Tribunal. I find it unlikely that the acts complained of amount to contempt of court and in any event, the application is out of time. The allegations relate to statements made in the Decision Notice and Response which were issued more than 28 days before the hearing. It is not in the interests of justice to extend time in the circumstances.

68. The Appellant also asked the Tribunal not to share the recording of the hearing with the Commissioner. If either party wants a copy of the recording, an application must be made to the Tribunal in the normal way.

MS CL GOODMAN **DATE: 16/11/2020**

DISTRICT TRIBUNAL JUDGE **DATE PROMULGATED: 17/11/2020**