Appeal number: EA/2020/0068/V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

BETWEEN

PAUL COSTON **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

JUDGE C GOODMAN

Remote hearing by video on 17 November 2020
The Appellant appeared in person and was not represented
The Respondent did not appear

DECISION

1. The appeal is refused.

2. Decision Notice FS50840432 is in accordance with the law.

REASONS

3. The Appellant made a request for information to the Ministry of Housing, Communities and Local Government ("MHCLG") on 25 September 2018.

4. MHCLG refused the request on 23 October 2018 in reliance upon section 14(1) of the Freedom of Information Act 2000 ("FOIA") on the grounds that the request was vexatious.

5. The Information Commissioner issued Decision Notice FS50840432 on 10 January 2020, finding that MHCLG was entitled to rely on section 14(1) to refuse to comply with the request.

6. The Appellant appealed Decision Notice FS50840432 to the First-tier Tribunal on 6 February 2020.

7. The background to the request is summarised below. References to page numbers in this Decision are to pages of the appeal bundle.

Background

8. The background to this appeal starts in March 2013 when the Appellant made a complaint to the Architects Registration Board (the ARB) about an architect whom he had engaged to develop a plot of waste land behind his property.

9. The ARB was established in 1997 to regulate architects in the UK. The Secretary of State for Housing, Communities and Local Government is accountable to Parliament for the activities and performance of the ARB.

10. The Appellant agreed with the ARB the wording of five summary allegations against the architect in question to be put to the ARB's Investigations Panel. In August 2013, the Panel produced a preliminary report finding that the architect had no case to answer. The Appellant made representations in response. The Panel's final report confirmed its preliminary view.

11. The Appellant continued to correspond with the ARB throughout 2014, seeking to re-open his case. He also took legal action against the architect, incurring costs including for an expert witness. An independent review of the Panel's process, conducted by Mr Simon Monty QC found that the Panel had conducted itself in accordance with the appropriate rules. Two further complaints by the Appellant to the ARB's Registrar were rejected.

12. Through a FOIA request in November 2014, the Appellant established that his complaint had been presented to the ARB Investigations Panel behind a "Rule 6 Memo". The Memo summarised for the Panel the background to the complaint, the allegations, the architect's response and the relevant standards from the Code of Conduct (pages A56 to A58). In response to a second request for information, the ARB confirmed that this "Rule 6 Memo process" had been used by the ARB since 2006 and in relation to more than 700 complaints.

13. The Appellant was unhappy that in his view, his allegations had been re-written in the Rule 6 Memo without his consent and "completely misrepresented" to the Investigations Panel (page A27). The Panel had then "transported verbatim" the re-written allegations into its report. The Appellant continued to correspond with the ARB throughout 2015, arguing that his complaint should be re-opened on this basis. The ARB's position was that the Rule 6 Memo was an "*administrative cover sheet introducing the case to Investigations Panel members*" (page C107). It was not shared with complainants because it had no "statutory significance" and the Panel was not bound by its contents. The Panel also received a copy of the full complaint with the allegations in the form agreed with the complainant.

14. In 2015, the Appellant told the ARB that he would accept £35,000 in full and final settlement of the ongoing dispute (page D227). The ARB's Investigations Oversight Committee considered and rejected his allegations. A further request for information was refused in December 2015 on the grounds that it was vexatious. The Appellant did not complain to the Commissioner about this refusal.

15. The Appellant also complained about the Rule 6 Memo process to MHCLG as the Government department responsible for the ARB. He corresponded with MHCLG during 2015 and 2016 and on 31 January 2017, attended a meeting at MHCLG. After making enquiries with the ARB, MHCLG advised the Appellant on 23 May 2017 that it was satisfied that the ARB were operating within its rules and statutory obligations (page D240).

16. As the Appellant remained dissatisfied, he was invited to meet MHCLG's Chief Planner to discuss his concerns in July 2017. Following the meeting, the Chief Planner concluded that there were no grounds to uphold the Appellant's complaint against the ARB. The Chief Planner did not agree with the Appellant's interpretation of the Rule 6 Memo nor that his allegations had been "re-written" by the ARB (page D242). The Chief Planner responded to 16 questions posed by the Appellant about the ARB process, emphasising that the whole complaint had been provided to the Investigations Panel with the Rule 6 Memo (the response is at page D244; the Appellant has matched the responses to his individual questions at page A53).

17. The Appellant complained that the Chief Planner had failed to address his 16 questions. This was treated by MHCLG as a Stage 2 complaint. On 12 March 2018, a Director General found that there were no grounds to uphold the complaint. The Appellant then raised a Stage 3 complaint and made a request for information under FOIA which was received by MHCLG on 25 September 2018 (I will refer to this as "the Request"):

"Please provide me with the following information under the Freedom of Information Act:-

1) An organisational chart of the MHCLG Complaints/Information and knowledge Access Team, showing names, job titles and structure from most junior to most senior or where to find this information.

2) A complete list of Statutory Duties/Requirements by which the MHCLG are obliged to comply or where to find this information.

3) A complete list of Statutory Duties/Requirements relating to how the MHCLG are obliged to oversee/govern the Architects Registration Board (ARB).

4) Copies of all internal/external correspondence relating to my case going back to 1st October 2016 (Electronic copies are acceptable)."

18. On 23 October 2018, MHCLG refused to respond to the Request under section 14(1) FOIA on the grounds that it was vexatious. MHCLG said that the Appellant's correspondence contained abusive or aggressive language, unfounded accusations and futile requests. It placed a grossly oppressive burden on MHCLG, indicated a personal grudge against the Complaints Officer and unreasonable persistence with no obvious intent to obtain information.

19. MHCLG's Complaints Team responded to the Stage 3 complaint on 29 October 2018, addressing the Appellant's allegations of maladministration at MHCLG, but not his underlying complaint about the ARB on the basis that the Complaints Process did not cover actions by sponsored bodies.

20. On 14 February 2019, MHCLG refused the Appellant's request for an internal review of its refusal to respond to the Request on the basis that it was out of time.

21. On 1 May 2019, the Appellant complained to the Commissioner. He addressed each of the points made by MHCLG in their refusal of 23 October 2018 (pages A38-A52), arguing that his language and tone were in fact restrained and reasonable in the circumstances. The Appellant accused the ARB of failing to disclose the Rule 6 Memo process or explain why this was used, failing to inform him of his FOIA rights and actively discouraging and blocking his requests. MHCLG had failed to provide meaningful answers to his 16 questions, failed to respond to requests for information and incorrectly refused the Request. He said that he made the Request "*to run alongside my complaint*" because he suspected that the MHCLG Complaints Department was not independent.

The Decision Notice

22. The Commissioner agreed to investigate the Appellant's complaint.

23. On 10 January 2020, the Commissioner issued Decision Notice FS50840432. She concluded that the cumulative impact of the Appellant's requests for information and other correspondence imposed an unreasonable burden on MHCLG which was disproportionate to the wider value of the Request. She found that responding to the Request would result in further requests for information and correspondence and not resolve the ongoing issues between the Appellant and MHCLG.

24. The Appellant appealed Decision Notice FS50840432 to the First-tier Tribunal.

The Appeal

25. In his grounds of appeal, the Appellant set out the background to the Request. He said that MHCLG had engaged in "*relentless evasion of the issues at all levels*" (page A21) and described the Chief Planner's response to his 16 questions as "*quite literally meaningless*". He said that the suggestion that he was motivated by personal grievance was completely unfounded and that if MHCLG had truthfully answered his questions, there would be no burden upon them. The Appellant said that he needed the requested information to bring a complaint to the Parliamentary and Health Services Ombudsman ("the Ombudsman") and that there was a wider public interest in the requested information because over 700 complainants had been affected by the Rule 6 Memo process.

26. In her Response, the Commissioner maintained that the Request was vexatious, relying on and repeating her findings and the reasons set out in the Decision Notice. The Commissioner submitted that it was open to the Appellant to complain to the Parliamentary Ombudsman and that his objections to MHCLG's response to his 16 questions were not relevant as they preceded the Request. She concluded that any value in the Appellant's FOIA requests had diminished. The continued dialogue with MHCLG was of no value to the wider public and only serviced the Appellant's "*personal and long standing grievance*".

27. MHCLG was not joined as a party to the appeal.

Hearing of the Appeal

28. The hearing was conducted on 17 November 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.

29. The hearing was conducted by video and recorded. The Appellant attended. The Commissioner elected not to attend or be represented. The Appellant and Judge were able to hear and see each other throughout. I had before me a bundle of 272 pages.

The Appellant's Submissions

30. At the hearing, the Appellant outlined the history of his dealings with the ARB and MHCLG since 2013. He explained why the Rule 6 Memo used for his complaint

did not reflect the substance of his allegations against the architect as agreed with the ARB. His fifth allegation, for example, was that the architect had acted dishonestly and fraudulently. This had been presented in the Rule 6 Memo, and then repeated in the Investigations Panel Decision, as a failure "*to deal with the complaint/dispute about his work appropriately*". As a result, the Panel made no finding about dishonesty or fraud. The Appellant explained that he had sought compensation from the ARB in 2015 to cover costs incurred in his legal action against the architect, which he felt had been prejudiced by the ARB's handling of his complaint.

31. In relation to MHCLG, the Appellant submitted that it could not be vexatious to make use of a complaints procedure provided by MHCLG. He was frustrated that MHCLG refused to put a subject heading on its response to his Stage 2 Complaint and that he had been referred to a Stage 3 process which did not cover the ARB. The Request had been in part an attempt to "promote honesty" at MHCLG while they considered his Stage 3 complaint. The Appellant had not yet made a complaint to the Ombudsman.

32. When asked about the allegations of "abusive or aggressive language" set out by MHCLG (at A34), the Appellant said that he had described the Chief Planner's responses as stupid or meaningless, not the Chief Planner himself. He said that the responses were demonstrably untrue, evasive and meaningless. He was sceptical about the role and independence of MHCLG's Complaints Officer who also described herself as a member of the Knowledge and Information Access Team.

33. The Appellant said that his motivation was the unfairness of the Rule 6 Memo process, both to him and to the 700 other complainants unknowingly affected by it. The Appellant had hoped to set up an "ARB Action Group" to campaign on the issue, but had not been able to obtain contact details for the others affected. The Appellant said that the ARB have now changed their process, but he derived no satisfaction from this because there is no evidence that it was the result of his actions.

The Law

34. 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.*

35. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal concluded that "*vexatious connotes manifestly unjustified, or involving inappropriate or improper use of a formal procedure*" (paragraph 27).

36. The Upper Tribunal suggested four broad issues or themes to be considered when assessing vexatiousness, namely (i) the burden on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request in terms of objective public interest in the requested information, and (iv) any 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". The context and history of the request must be considered.

37. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision on the *Dransfield* case (reported at [2015] EWCA Civ 454). The Court of Appeal emphasised 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*".

38. A request arising from 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)).

39. 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."*

40. 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

41. In considering whether it is lawful for MHCLG 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 35-37 above. The Appellant disputed that it was right to take a "holistic approach" but this guidance from the Upper Tribunal is binding upon me.

42. While the Commissioner observed in Decision Notice FS50840432 that the Request was "very broad" and would require "significant work", no evidence was

presented about the burden imposed by the Request itself. However, in considering burden, I must take into account not only the Request and the Appellant's previous requests for information under FOIA, but the whole context and history of his dealings with the ARB and MHCLG since 2013.

43. The Appellant has been corresponding with the ARB and/or MHCLG since 2013: first about the Investigations Panel's decision in his case, and since 2014, about the Rule 6 Memo process. As the Appellant said in his Grounds of Appeal: "*I have spent five years trying to get a response to the seemingly straightforward question of "why do ARB re-write approved allegations?*".

44. The Appellant is entitled to query the ARB's processes for dealing with his initial complaint and to complain about the ARB to MHCLG as its sponsor department. He is entitled to make use of the organisations' review and complaints processes and to complain to the Ombudsman about matters within their jurisdiction. He is entitled to request information under FOIA. However, his complaint about the Rule 6 Memo process has now been considered and investigated on numerous occasions over a number of years by both the ARB and MHCLG. Not only have they responded to requests for information, but staff at senior levels have corresponded with the Appellant, in emails and letters, and held face-to-face meetings with him, in an attempt to resolve the issue. On each occasion when his complaint has been considered, it has not been upheld.

45. MHCLG have explained on several occasions why they do not agree that the ARB "re-writes" allegations in the Rule 6 Memo. The Appellant is unable to accept this response. He characterises their disagreement as evasion. It is clear that he will not be satisfied until the ARB and MHCLG accept his position. Even the fact that the ARB has now changed its process does not satisfy him and has not brought the issue to a close. Responding to the Request will not bring the issue to a close. As the Appellant says: "*I will never stop fighting to make sure that the authorities are eventually forced to tell these people the truth, rather than relentlessly wriggling out of doing the right thing through evasion and dishonesty*" (page A50).

46. I conclude that the Request is part of the Appellant's relentless pursuit of the ARB and MHCLG over many years which has imposed a significant burden on them, and will continue to do so, even if they respond to the Request.

47. I accept that the Appellant is motivated by a sense of injustice and unfairness. His motivation is not malicious and did not spring initially from a personal grievance against ARB or MHCLG staff. I accept that his purpose is not limited to his own complaint against an architect in 2013 (as the Commissioner suggests at paragraph 69 of her Response). His concern is to hold a public body to account for a process which is, in his view, dishonest and unfair.

48. It is not my role to comment on the Rule 6 Memo process. There may have been a wider public interest in this issue when the Appellant first raised it in 2014. However, any public interest has now been "*overshadowed and extinguished*" (as in the *Oxford Phoenix* case) by the Appellant's continued pursuit of his longstanding grievance. His

complaints have been considered, investigated and addressed comprehensively by both the ARB and MHCLG and the Rule 6 Memo process is no longer used by the ARB. I conclude that there is now no objective public interest in the issue.

49. Furthermore, the specific motivation for the Request was to put pressure on the team considering the Appellant's Stage 3 complaint. This is an inappropriate use of the FOIA regime. The requested information relates not to the ARB, but to MHCLG's staff, complaints process and dealings with the Appellant - an example of "vexatiousness by drift".

50. In refusing to respond to the Request, MHCLG said that the Appellant had used abusive or aggressive language, made unfounded accusations and held a personal grudge against their Complaints Officer. The Commissioner did not refer to these elements in her Decision Notice or Response. However, I accept that the Appellant's tone and language is unnecessarily strident and accusatory of individual members of staff at times. His correspondence may have caused some distress to more junior members of staff, especially when repeatedly demanding to know names and job titles ("*from most junior*" as in the Request). The Appellant makes accusations of collusion and dishonesty which are not supported by the evidence before me.

51. Taking into account the whole course of dealing between the Appellant and MHCLG, weighing the burden of his persistent correspondence, complaints and requests for information against the lack of public interest and strong likelihood that his campaign will continue whatever the response, I am satisfied that the Request is an inappropriate use of the FOIA regime which places a disproportionate burden on MHCLG and its staff. Applying the guidance from the Upper Tribunal and the Court of Appeal, I conclude that the request is vexatious under Section 14(1) of FOIA.

52. For all these reasons, I dismiss the appeal and uphold the Decision Notice.

MS CL GOODMAN

DISTRICT TRIBUNAL JUDGE

DATE: 05/12/2020
PROMULGATED: 08/12/20