



Appeal Number: EA/2023/0213

Neutral Citation Number: [2023] UKFTT 01004 (GRC)

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

DAVID CHOW

Appellant:

And

THE INFORMATION COMMISSIONER

Respondent:

Date and type of Hearing: - 17 November 2023. – On the papers.

Panel: Brian Kennedy QC, Marion Saunders and Pieter de Waal.

Date of Decision: - 17 November 2023.

Result: The Tribunal dismiss the Appeal.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 22 March 2022 (reference IC-181949-H8G9), which is a matter of public record.
2. Details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN and not repeated here, other than to state that, the appeal concerns the question of whether the public authority in this case, i.e. part of the Council of the University of Cambridge (“Cambridge”), was correct to rely on section 14(1) FOIA.

The Request:

3. On 25 December 2021, the complainant made the following request for information relating to the book “Exact Solutions in Three-Dimensional Gravity”:
“I request the following information regarding reuse in Chapter 20 (<https://doi.org/10.1017/9781316556566.021>):
(1)(a)(i) Any dates on which Chapter 20 was analysed using plagiarism detection services, such as Thenticate.
(ii) The corresponding results of the plagiarism detection service for Chapter 20.
(b) Any other reports concerning analysis of Chapter 20 (e.g. by editorial staff or academics), from 1 September 2017 onwards, conducted proactively, i.e. analyzed before the University received any specific allegations of reuse in this chapter.

I request the following information concerning reuse permissions in general:

(2)(a) *Excerpts of any contract, i.e. legally binding mutual agreement, between the University and the book author specifying which party would be responsible for obtaining permissions for any reuse of copyrighted material.*

(b) *Information communicated from the University to the book author, after initial publication of the book:*

(i) *Instructing, requesting or advising the book author to obtain explicit reuse permissions for any copyrighted material reused in the book.*

(ii) *Instructing, requesting or advising the book author to provide the University with evidence that reuse permissions had been obtained for any copyrighted material reused in the book. The remaining parts of the request relate to the University's handling of concerns, communicated to members of the Academic Publishing Committee of the Press Syndicate and/or editorial staff, of wholesale verbatim reuse of copyrighted material.*

(I) *In Chapters 9 and 10*

(<https://doi.org/10.1017/9781316556566.010> and <https://doi.org/10.1017/9781316556566.011>) *from reference [1] (communicated to University on 18 August 2019)*

(II) *In Chapter 13 (<https://doi.org/10.1017/9781316556566.014>) from reference [2] (communicated to University on 17 August 2019)*

(III) *In Chapter 20 (<https://doi.org/10.1017/9781316556566.021>) from reference [3] (communicated to University on 7 February 2018) from the references*

[1] *A. A. Garcia, A. Garcia-Quiroz, M. Cataldo and S. del Campo, "Relationship between (2+1) and (3+1)-Friedmann–Robertson–Walker cosmologies; linear, non-linear, and polytropic state equations", *General Relativity and Gravitation* 37(4), 685 (2005)*

(<https://doi.org/10.1007/s10714-005-0056-5>)

[2] *A. A. Garcia-Diaz "Dilaton field minimally coupled to 2+1 gravity; uniqueness of the static Chan-Mann black hole and new dilaton stationary metrics", *AIP Conference Proceedings* 1577, 220 (2014)*

(<https://doi.org/10.1063/1.4861958>)

[3] *A. A. Garcia, F. W. Hehl, C. Heinicke and A. Macias, "The Cotton tensor in Riemannian spacetimes", *Classical and Quantum Gravity* 21, 1099 (2004)*

(<https://doi.org/10.1088/0264-9381/21/4/024>).

I request the following information:

(3) *Any information demonstrating that concerns (I), (II) and*

(III) have been investigated in accordance with COPE publishing

guidelines, as defined by the flowcharts "Plagiarism in a published article"

(<https://publicationethics.org/files/plag...> <https://doi.org/10.24318/cope.2019.2.2>)

and "Redundant (duplicate) publication in a published article"

(<https://publicationethics.org/files/dupl...> <https://doi.org/10.24318/cope.2019.2.13>).

In particular, any information corresponding (adapted to a book rather than a journal article, as referred to in the Press's "Publishing Ethics: Academic Research" document) to the following aspects of the flowcharts:

(a)(i) "Contact corresponding author in writing, ideally enclosing signed authorship statement (or cover letter) stating that work is original/the author's own and documentary evidence of plagiarism".

(ii) "Contact corresponding author in writing, ideally enclosing signed authorship statement (or cover letter) stating that submitted work has not been published elsewhere and documentary evidence of duplication".

(b)(i) "Contact author in neutral terms expressing disappointment/explaining journal's position. Discuss publishing correction giving reference to original paper(s) if this has been omitted".

(ii) "Contact author in neutral terms expressing concern/explaining journal's position. Explain that secondary papers must refer to original. Discuss publishing correction giving reference to original paper."

(c)(i) "The instructions to authors should include a definition of plagiarism and state the journal's policy on plagiarism."

(ii) "The instructions to authors should state the journal's policy on redundant publication."

(4) Information confirming that reuse permissions had been obtained for reuse of copyrighted material from references [1],[2] and [3] within each of the time periods below (excluding (a) for [1] and [2], because of the University's previous negative response):

(a) Before sales of the book resumed in spring 2019.

(b) After sales of the book resumed in spring 2019, and before the time of this request."

4. Cambridge responded on 25 January 2022. It stated that it was withholding the information requested in parts 1(a)(i),1(a)(ii) and all of part 3 under section 21 of FOIA and it did not hold any information falling within the scope of part 1(b) and all of part 4. It was withholding the information requested for all of part 2 under section 41 of FOIA.
5. The Appellant requested an internal review of Cambridge's response on 10 March 2022. Cambridge provided the outcome of its internal review on 19 April 2022, revising its position. It's revised position was that all the information requested was exempt, on the basis that the request was vexatious under section 14(1) of FOIA.
6. The Appellant contacted the Commissioner on 18 July 2022 to complain about the way their request for information had been handled.

7. The Commissioner considered whether Cambridge was correct to refuse to comply with the request under section 14(1) of FOIA and concluded that the request was vexatious setting out his reasons in paragraphs 10 – 19 of the DN.
8. The Grounds of Appeal dated 19 April 2023 demonstrate that the Appellant strongly disagrees with the Commissioner’s assessment of the facts, of his application of the FOIA, and the Commissioner’s understanding of how it can, or should, in this case be used. He accuses Cambridge, and by direct implication the Commissioner, of prejudice and of unreasonable conduct. He in effect argues that the Commissioner erred in law and in the exercise of his discretion in his reasoning and conclusion in the DN.

The Relevant Law:

9. S.1 FOIA General right of access to information held by public authorities:
 - (1) 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.
10. S14 FOIA Vexatious or repeated requests:
 - (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
 - (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.
11. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was

subsequently upheld in the Court of Appeal. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious. *Dransfield* also considered four broad issues at paragraph [45]:

“(1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained 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 characterise vexatious requests.”

The Burden:

12. First, 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 the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.
13. As to the *number*, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. Volume, alone, however, may not be decisive. Furthermore, if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against a finding that the new request is vexatious.
14. As to their *breadth*, a single well-focussed request for information is, all other things being equal, less likely to run the risk of being found to be vexatious. However, this does not mean that a single but very wide-ranging request is necessarily more likely to be found to be vexatious – it may well be more appropriate for the public authority,

faced with such a request, to provide advice or guidance on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.

15. As regards the *pattern*, a requester who consistently submits multiple FOIA requests or associated correspondence within days of each other, or relentlessly bombards the public authority with e-mail traffic, is more likely to be found to have made a vexatious request.
16. Likewise, as to *duration*, the period of time over which requests are made may be significant in at least two ways. First, a long history of requests e.g. over several years may make what would otherwise be, taken in isolation, an entirely reasonable request, wholly unreasonable in the light of the anticipated present and future burden on the public authority. Second, given the problems of storage, public authorities necessarily have document retention and destruction policies in place, and it may be unreasonable to expect them to e.g. identify whether particular documents are still held which may or may not have been in force at some perhaps now relatively distant date in the past.
17. In this case the Tribunal note that, during investigations, the Commissioner considered that Cambridge provided sufficient information in its internal review to the Appellant dated 19 April 2022. We agree that Cambridge has dealt with an undoubtedly burdensome request with some patience, diligence and courtesy culminating in the decision to rely upon s.14(1) FOIA which was in our view justifiably made.

The Motive:

18. Second, the motive of the *requester* may well be a relevant and indeed significant factor in assessing whether the *request* itself is vexatious. The FOIA mantra is that the Act is both “motive blind” and “applicant blind”. There is, for example, no need to provide any reason for making a request for information under section 1; nor are there any qualifying requirements as regards either the identity or personal characteristics of the requester. However, the proper application of section 14 cannot side-step the question of the underlying rationale or justification for the request. What may seem an entirely reasonable and benign request may be found to be vexatious in the wider

context of the course of dealings between the individual and the relevant public authority. Thus, vexatiousness may be found where an original and entirely reasonable request leads on to a series of further requests on allied topics, where such subsequent requests become increasingly distant from the requester's starting point.

19. In this context it is important to bear in mind that the right to information under FOIA is a significant but not an overriding right in a modern democratic society. As has already been noted, it is a right that is qualified or circumscribed in various ways. Those restrictions reflect other countervailing public interests, including the importance of an efficient system of public administration. Thus section 14 serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources. In that context it must be relevant to consider the underlying motive for the request. As the FTT observed in *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222) (at paragraph 19):

“Abuse of the right to information under s.1 of FOIA is the most dangerous enemy of the continuing exercise of that right for legitimate purposes. It damages FOIA and the vital rights that it enacted in the public perception. In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill-intentioned requests and should not feel bound to do so only where a sufficient number of tests on a checklist are satisfied.”

20. This approach should not be seen as giving licence to public authorities to use section 14 as a means of forestalling genuine attempts to hold them to account. For example, an investigative journalist may make a single request which produces certain information, the contents of which in turn prompts a further request for more information, and so on. Such a series of requests may be reasonable when viewed both individually and in context as a group. The same may also be true of a request made by a private citizen involved in a long-running dispute or exchanges with the public authority. As the IC's Guidance for public authorities helpfully advises (p.3).

“Many previous cases of vexatious requests have been in the context of a longstanding grievance or dispute. However, a request will not automatically be vexatious simply because it is made in the context of a dispute or forms part of a series of requests. There may be genuine reasons for this. For example, a series of successive linked requests may be necessary where disclosures are unclear or raise further questions that the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the individual. You should not use section 14 as an excuse to avoid awkward questions that have not yet been resolved satisfactorily. You must always look at the effect of the particular request and consider the questions [the five factors] set out below.”

21. However, in other circumstances a series of requests may suggest that later requests have become disproportionate to whatever the original inquiry was. This phenomenon has been described as “spread”. The term now often used is “vexatiousness by drift” where the Appellant whose conduct becomes wholly disproportionate to their original aim. However, “drift” is not a prerequisite to a finding that section 14 applies, as by definition it may only arise where there is a previous course of dealings. A single well-defined and narrow request put in extremely offensive terms, or which is expressly made purely to cause annoyance or disruption to the public authority rather than out of a genuine desire for the information requested, may be vexatious in the complete absence of any ‘drift’.

22. In this case while the motive was reasonable the email exchanges clearly indicate that the underlying complaint of the Appellant was dealt with by Cambridge. Commencing with the Appellant’s lengthy message to Professor Toope on 17 July 2022, which resulted in responses from Dr. Rhys Morgan and later Professor Armstrong on 18 September 2022 demonstrate that the public authority satisfied the need for action by reference to investigation and the application of the university’s Misconduct in Research Policy.

The value or serious purpose:

23. Third, and usually bound up to some degree with the question of the requester's motive, is the inherent value of the request. Does the request have a value or serious purpose in terms of the objective public interest in the information sought? In some cases, the value or serious purpose will be obvious – say a relative has died in an institutional setting in unexplained circumstances, and a family member makes a request for a particular internal policy document or good practice guide. On the other hand, the weight to be attached to that value or serious purpose may diminish over time. For example, if it is truly the case that the underlying grievance has been exhaustively considered and addressed, then subsequent requests can become disproportionate to whatever the original inquiry was. See the references to “spread” or “vexatiousness by drift” above. In other cases, the value or serious purpose may be less obvious from the outset. Of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14, unless there are other factors present which raise the question of vexatiousness. In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident.
24. Cambridge in this case wholly recognised the value and serious purpose of the request and took appropriate action. However, this was not enough for the Appellant who did persist in an obsessive manner to the extent that in our view it became wholly disproportionate.

Causing harassment of, or distress to, staff:

25. Fourth, vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive (e.g. the use of unacceptable language). As noted previously, however, causing harassment or distress is not a prerequisite for reaching a conclusion that a request is vexatious within section 14.

26. On examination of the exchanges and evidence before us we are satisfied that the staff at Cambridge who were required to deal with this request were caused harassment and distress to an unacceptable degree.

Conclusion

27. As the interpretation of a vexatious request has developed over the years the Tribunal and higher courts take a holistic view of all the circumstances in a case to arrive at what admittedly can be a difficult decision. Proportionality is key in this sense and on the evidence before us, the Tribunal take the view that the Appellant's expectations of Cambridge in relation to the request in question was disproportionate, manifestly unjustified, inappropriate and an improper use of a formal procedure or the use of FOIA.

28. Accordingly, we also accept the reasoning in the DN and find no error in law or in the exercise of discretion by the Commissioner therein.

29. For all the above reasons and in all the circumstances of this case we must dismiss the appeal.

Brian Kennedy KC

27 November 2023.

Promulgation Date : 30 November 2023