Neutral citation number: [2023] UKFTT 817 (GRC)

Case References: EA/2022/0250, EA/2022/0251

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: determination on the papers

Heard on: 27 March 2023
Decision given on: 03 October 2023

Before

TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER AIMÉE GASSTON
TRIBUNAL MEMBER DAVE SIVERS

Between

KIRSTY READ

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: Both appeals are Dismissed

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appeals:	The First Appeal and the Second Appeal.
Appellant:	Kirsty Read.
Board:	NHS Norfolk and Waveney Integrated Care Board.
Cards:	The Moonpig greetings cards which were the subject of the Requests (and as referred to in paragraph 13);
Commissioner:	The Information Commissioner.

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Decision Notices:	The First Decision Notice and the Second Decision Notice.
Disputed Elements:	As defined in paragraph 76.
First Appeal:	The appeal referred to in paragraph 5.
First Decision Notice:	The Decision Notice of the Information Commissioner dated 30 August 2022, reference IC-126014-G5X4, relating to the First Request.
First Request:	The request for information made by the Appellant dated 16 May 2021, as referred to in paragraph 15.
NCCG:	NHS Norwich Clinical Commissioning Group.
NWCCG:	NHS Norfolk and Waveney Clinical Commissioning Group.
PHSO:	The Parliamentary and Health Service Ombudsman.
Requested Information:	The information which was requested by way of the First Request and/or the Second Request (as the context permits or requires).
Requests:	The First Request and the Second Request.
Second Appeal:	The appeal referred to in paragraph 6.
Second Decision Notice:	The Decision Notice of the Information Commissioner dated 30 August 2022, reference IC-138314-N2R9, relating to the Second Request.
Second Request:	The request for information made by the Appellant dated 13 September 2021, as referred to in paragraph 19.

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the time of the Decision Notices, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Requests and the Appellant's subsequent complaints to the Commissioner.

3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. The Tribunal heard two joined appeals: case references EA/2022/0250 and EA/2022/0251. This decision relates to both appeals.

5. Case reference EA/2022/0250 is an appeal against the First Decision Notice, which held that certain elements of the First Request comprised the Appellant's own personal data and was therefore exempt under section 40(1) of FOIA and that certain other

elements of the First Request were vexatious and that the Board was entitled to rely on section 14(1) of FOIA to refuse them. The First Decision Notice did not require the Board to take any steps.

6. Case reference EA/2022/0251 is an appeal against the Second Decision Notice, which held that the Second Request was vexatious and that the Board was entitled to rely on section 14(1) of FOIA to refuse it. The Second Decision Notice did not require the Board to take any steps.

7. We consider that it is important to stress what was outside of the scope of the Appeals. The Appeals were not about the merits or otherwise of the Board's activities, nor any other legal proceedings or complaints which the Board and/or the Appellant have been involved with, nor the conduct of any individuals in respect of any such proceedings or complaints, nor issues regarding any alleged defamation. It is also not the role of the Tribunal to ascertain who sent the Cards or to investigate any allegations relating to the Cards. The Tribunal has no power to determine those issues and nothing we say should be interpreted as an expression of opinion on any of those issues. The appeal can only be determined with regard to the remit and powers of the Tribunal, to which we refer below.

8. We set out below relevant information regarding the background to the Appeals, including the position regarding certain predecessors to the Board. For convenience, in this decision we refer to the Requests being made to the Board and to information being held by the Board, rather than its applicable predecessors.

Mode of Hearing

9. The parties consented to the Appeals being determined by the Tribunal without a hearing.

10. The Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the Appeals

11. The background to the Appeals is as follows. It is first helpful to adopt the Commissioner's explanation of the historical position, as explained in the First Decision Notice[1]:

"The request under consideration here traces its roots back to enquiries the Appellant made to the body that commissioned health services in her area. Whilst many of the people involved have remained the same throughout the process, the body responsible for commissioning is now on its third different name in the space of just over two years.

Originally the Appellant made requests to NHS Norwich Clinical Commissioning Group (NCCG). However, that body merged with several other clinical commissioning groups in April 2020 to form Norfolk and Waveney Clinical Commissioning Group ("NWCCG"). NWCCG was the public authority to whom the request was made and which responded to the request.

[1] Paragraphs 4, 5 and 6 of the Decision Notice.

Whilst the Commissioner commenced his investigation with a letter to NWCCG, during the course of the investigation, on 30 June 2022, that body ceased to exist, with its functions being transferred to the Board – which had been set up to meet the requirements of the Health and Care Act 2022. The Board has, in responding to the Commissioner, taken on responsibility for responding to the request that is the subject of this notice.".

12. The previous request for information made by the Appellant to the NCCG was the subject of appeal proceedings to the First-tier Tribunal, which upheld her appeal. However, the Appellant was unhappy with the NCCG's subsequent response and argued that NCCG had failed to comply with the First-tier Tribunal's decision. Ultimately, an application made by the Appellant for the First Tier Tribunal to certify, to the Upper Tribunal, that NCCG had failed to comply with the First-tier Tribunal's decision and was thus in contempt of court was refused, as the NCCG no longer existed at that time. This was so even though the First Tier Tribunal concluded that NCCG had wilfully failed to comply with its previous decision. NWCCG could not be held in contempt as it had not been ordered to do anything.

13. The subsequent background then leading to the First Request was explained by the Commissioner in the Decision Notice[2] as follows:

"*During 2018, the Appellant had a complaint ongoing with the Parliamentary Health and Social Care Ombudsman*[3] *(PHSO). In March of that year, three staff members of NCCG received cards via the online retailer Moonpig. A further card was sent in January 2020. These cards contained quotations from various items of correspondence or judgements relating to the Appellant. In some cases, they also contained images of the staff members involved that had been "scraped" from NCCG's website. Given the nature of the information the cards contained, NCCG concluded that they had been sent either by, or at the direction of, the Appellant – a claim she denies – and wrote to her warning that it would not tolerate such behaviour and that it had taken legal advice on the matter.*".

14. We understand that, in connection with the contempt proceedings referred to in paragraph 12, the NWCCG referred to the Cards. The Appellant alleged, in the Second Request, that the NWCCG had stated that the Cards were sent by the Appellant "in defence of its misconduct".

The First Request

15. On 16 May 2021, following receipt of the letter from the Board referred to in paragraph 13, the Appellant sent an email to the Board, requesting information in the following terms:

"*1) Please confirm that public money was used to pay for the aforementioned legal advice.*

2) If the legal advice was funded with public money, please confirm how much it cost the public purse.

3) Please provide a copy of the legal advice that was received, together with all correspondence that took place between NCCG/NWCCG and its legal advisors with regard to this matter.

4) In a letter dated 04/03/19 (attached), Tracy Williams (Chair) stated: 'It is my view that

[2] Paragraph 14 of the Decision Notice.
[3] The reference to the Parliamentary Health and Social Care Ombudsman was erroneous and should have referred to the Parliamentary and Health Service Ombudsman.

sending such a card could be construed as an intimidating act and one which NCCG would not tolerate in the future. NCCG would need to consider any appropriate course of action to take if this were the case, to protect the wellbeing of our staff'. Please confirm what courses of action NCCG/NWCCG considered when Ms Williams received the fourth greetings card.

5) In the letter referenced by the Chief Nurse, above, Jo Smithson explained that 'Any future communication of this nature will not be tolerated by the CCG'. Please confirm what course of action NCCG/NWCCG actually took following the subsequent receipt of the fourth card.

6) If no action was taken, please explain why NCCG/NWCCG tolerated further such communication, contrary to Jo Smithson's previous statement.

7) Please confirm that the photographs submitted into evidence (attached) were published on NCCG's website with the full permission of the individuals concerned.

8) Please explain why NWCCG continues to publish photographs of its staff on its website, rather than protect them from potentially being 'naturally upset and disturbed' again (Chief Nurse, above) by the possible receipt of further 'intimidating' (Tracy Williams, attached), 'derogatory and irrelevant' (Jo Smithson, attached) personalised greetings cards which could reflect back to them yet more photos of themselves that they have published, together with yet more statements that they have made.

9) Please confirm how many other patients with complex healthcare needs, who had been subjected to its maladministered PHB service, NCCG/NWCCG's senior management team directly contacted by post to their home address for the purpose of accusing them of sending the aforementioned greetings cards.

10) I refer the CCG to an email that was received by the former manager of the maladministered PHB service (and alleged recipient of one of the 'critical' (Chief Nurse, above) greetings cards), [redacted], on 15/03/17 (attached): 'I appreciate that you are not able to discuss other patients. Notwithstanding, in the interest of transparency, it is important you know that MW and I are apprised of each other's situations. Comparison in the public arena not only highlights the discrepancies and inconsistencies within CHC, but also contextualises my budgetary fears'. Notwithstanding, in a letter from the CCG dated 04/03/18, Tracey Williams explained (attached): 'Within the Moonpig card Jo Smithson received, it contained the sentence '[the Appellant] has submitted queries and questions to many different members of staff within a short space of time. This has made communication with [the Appellant] challenging at times.' The sentence in question was articulated in a letter from Jo Smithson to Clive Lewis MP's office. NCCG have confirmed with Mr Lewis' office that this letter was only shared with you directly, and have therefore come to the conclusion this line could only have been duplicated in the card by yourself'. Please confirm whether or not NCCG/NWCCG was/is familiar with the concept of information sharing.

11) The greetings cards contain statements from the CCG and other various organisations that were made in response to the complaints of multiple different patients. I refer the CCG to an email that was received by Jo Smithson from a fellow PHB holder on 30/05/18…If NCCG/NWCCG was/is familiar with the concept of information sharing, please explain why the Chief Officer did not also directly accuse this individual, who was under the auspices of the PHSO.

12) If NCCG/NWCCG was/is familiar with the concept of information sharing, and if no other individuals have been accused of sending the greetings cards, please explain how the aforementioned Chief Officer, Chair, and Chief Nurse can be 'confident' that the only individual that could possibly be responsible for sending the greetings cards, and therefore the

only individual that has been accused and threatened, is the same individual that was/is pursuing legal action against NCCG in both the high court and the FtT.".

The Board's reply and subsequent review in respect of the First Request

16. The Board responded to the First Request on 14 June 2021. It provided information within the scope of element (1) of the First Request, denied holding information within the scope of the element (2) of the First Request and relied on section 42 of FOIA (legal professional privilege) to withhold the information within the scope of element (3) of the First Request. The Board refused the remainder of the First Request as vexatious pursuant to section 14 of FOIA (vexatious or repeated requests).

17. The Board wrote to the Appellant again on 25 August 2021 following an internal review. It upheld its position in relation in respect of elements (1), (2) and (3) of the First Request. In respect of elements (4), (5) and (6) of the First Request, the Board now accepted that it did hold some information falling within the scope of those elements, but determined that such information was also covered by section 42 of FOIA (legal professional privilege). The Board denied holding any information within the scope of element (7) of the First Request and provided some information within the scope of element (8). The Board upheld its position that elements (9) to (12) of the First Request were vexatious pursuant to section 14 of FOIA (vexatious or repeated requests).

18. On 25 August 2021, the Appellant contacted the Commissioner complaining about the Board's response to the First Request.

The Second Request

19. On 13 September 2021, the Appellant sent an email to the Board, referring to the Cards and providing further comments on those and related issues. The email concluded by requesting information in the following terms:

    "*Please provide a copy of all information for the period 1st March 2018 to 1st April 2020 inclusive which is held by the CCG in relation to the greetings cards referenced above. This includes (but is not limited to) all emails / correspondence received by or sent from NEL CSU's PHB and CHC teams and NCCG's senior management team, and copies of the minutes of all meetings in which the cards were discussed.*".

The Board's reply and subsequent review in respect of the Second Request

20. The Board responded to the Second Request on 11 October 2021. It refused the Second Request on the grounds it was vexatious pursuant to section 14 of FOIA.

21. Following an internal review, the Board wrote to the Appellant on 1 November 2021. It upheld its original position.

22. On 2 November 2021, the Appellant contacted the Commissioner complaining about the Board's response to the Second Request.

The Decision Notices

23. The Commissioner had (with the agreement of the Appellant and the Board) dealt concurrently with three separate requests for information which had been made by the Appellant at around the same time and which the Board had refused, either in full or in part, as vexatious. The Commissioner issued three separate decision notices relating

to those, but only the First Decision Notice and the Second Decision Notice are the subject of the Appeals. The reasoning given by the Commissioner in the Decision Notices was largely the same, except for certain differences relating to the specific nature of the Requested Information (where applicable).

24. The material points in respect of both Decision Notices were, in summary, as follows.

25. The Commissioner noted the Appellant's submissions that:

   a. although the Requests were similar to one another, there was still value in processing each one, explaining that she needed to ensure that successful disclosure of sufficient information was made before the PHSO investigated "the ongoing discrimination and/or mistreatment of patient(s) by the senior management teams of both NCCG and NWCCG" and that, in respect of the Second Request, it could not be subject to the legal professional privilege exemption;

   b. the Board had not estimated how much time it would take to fulfil each of the Requests but public interest would increase in direct proportion to wasted time and money which had been spent in its continued preoccupation with greetings cards and associated unnecessary and unjustified time and expense involved for the executive team and lawyers;

   c. public scrutiny was required in order to make the Board desist from continuing in the same manner, given that no amount of complaints from the Appellant have had any impact;

   d. the Board was continuously repeating the allegations regarding the Cards in an attempt to discredit her and, by extension, her complaints to various other bodies;

   e. the Requests would provide evidence that the Board was "knowingly harassing a vulnerable patient for deterrent and defamation purposes, and furthermore that its complaints processes are not fit for purpose";

   f. the Requests were also intended to obtain information about the Board's systemic mistreatment of complainants and to establish how many more people had been sent unsolicited, accusatory letters by the Board, adding that "such mistreatment of complainants rarely happens in isolation"; and

   g. such people would have complex healthcare needs and were among the most vulnerable members of society, therefore there was a wider public interest to expose "the internal machinations of an NHS organisation that uses public money to act on the erroneous suspicions and personal grudges of individual employees", stating that the Requested Information sought to "identify these failings, thwart the evident victim-blaming culture, and improve complaints processes.".

26. The Commissioner noted the Board's submissions that:

   a. the Appellant was using the Requests as "nothing more than an attempt to continue to argue matters and further litigate";

b. it considered that it had made reasonable efforts to try to resolve the underlying grievance, but that these efforts had been unsuccessful and therefore it could no longer justify continuing to devote resources to the matter;

c. the Appellant had submitted twenty information requests since 2017 and that she "routinely" challenged these requests, stating that of those twenty requests there had been eleven requests for internal reviews, ten complaints to the Commissioner and two appeals to the First-tier Tribunal;

d. based on previous experience, it considered that responding to the Requests would be likely to spawn future requests for information;

e. it considered that the tone the Appellant had used in the Requests (in particular her allegations of maladministration and criminal behaviour) was "unreasonable", "without foundation" and "targeted to cause upset or distress";

f. the Requests only served the private interests of the Appellant, being based on her previous interactions with the NCCG and the previous First-tier Tribunal decision referred to in paragraph 12, which served no wider public interest; and

g. it was concerned that disclosure of the Requested Information would only serve "to set a precedent that FOIA can be misused".

27. The Commissioner's view was that:

a. this was "a classic case of vexatiousness by drift", on the basis that the Appellant has historically raised a matter of substantial public interest with one of the Board's predecessor organisations but that, over a course of several years, that focus had now drifted, from holding the Board accountable, to "attempting to right what the Appellant considers to be the wrongs committed against her by the Board, NCCG and NWCCG";

b. NCCG and NWCCG may not have dealt with the Appellant's initial concerns as well as they might have done and that, together with the involvement of different bodies, had understandably caused the Appellant to be frustrated and to mistrust the responses she had been given;

c. five years had passed from the date of from the original request and the original underlying matter had spawned some 'satellite processes' (including complaints, litigation and requests for information) which had lost sight of the original issue and were now "taking up a disproportionate amount of everybody's resources";

d. the issue regarding the Cards was an issue solely of interest to the Appellant (whether or not she was the person that caused them to be sent) and whatever limited public value there may have been even had the Requests been made in 2018, the passage of time had diminished that public value even further;

e. the making of two requests regarding the Cards suggested an obsession with the issue on the Appellant's part, rather than on the Board's part;

f. even if the Appellant had been unjustly accused as the sender of the Cards, the Requested Information would remain of dubious merit. Whilst the allegations regarding the Cards was referenced by NWCCG in its submissions regarding the

contempt certificate proceedings referred to in paragraph 12, the First-tier Tribunal did not consider that relevant to the matters it had to decide. Accordingly, the Commissioner considered that independent bodies were capable of giving appropriate weight to the accusations that the Board had made about the creator of the Cards;

g. with regard to the number of previous requests for information made by the Appellant, the Commissioner did not consider that nineteen requests over the course of four years represented an excessive amount but he recognised that the Appellant is likely to submit further requests in future;

h. the Commissioner was not persuaded that the Appellant "routinely" refused to accept the Board's initial responses to the requests she made and instead, having regard to the history of the requests and which were challenged by the Appellant, the Commissioner considered that the evidence was not indicative of a person pursuing information requests unreasonably or making futile complaints;

i. the Commissioner did not consider that the Appellant's language in the Requests would render them vexatious and did not consider that the accusations she made were without merit. This was so because the references to "maladministration" appeared to refer to a previous third-party complaint to the PHSO, in which the PHSO concluded that NCCG was guilty of maladministration and the references to "criminal behaviour" appeared to relate to the contempt certification proceedings in which the First-tier Tribunal found that there was a wilful defiance of its decision by the NCCG; and

j. ultimately, having viewed all the circumstances of the case holistically, the Commissioner was satisfied that each of the Requests were vexatious as they would require a disproportionate diversion of resources and was a manifestly unjustified use of a formal process and accordingly that the Board was entitled to rely on section 14(1) of FOIA in order to refuse the Requests.

28. The Commissioner stated in both Decision Notices that he expressed no definitive opinion on whether the Cards were sent by the Appellant or not. In the Second Decision Notice, he went on to note that that the Cards could only have been created by someone with not only a very detailed knowledge of the Appellant's interactions with the Board and its predecessor organisations, but also a peculiar motivation to highlight the Appellant's case. The Commissioner further commented that, if numerous individuals had similar concerns to the Appellant (as alleged by the Appellant), it was curious that an apparently unconnected person wishing to draw attention to the wider issues would focus solely on the Appellant's own case.

29. The Commissioner stated in both Decision Notices that his conclusion on vexatiousness would have been the same regardless of whether the Appellant could have been proved to have sent (or not sent) the Cards.

30. The Commissioner also stated that his decision regarding the Requests being vexatious did not mean that future requests that the Appellant may make would automatically be vexatious and that the Board should consider any future requests on their own merits, taking into account the value of the request and the resource required to deal with it.

The First Decision Notice

31. In respect of the First Decision Notice, the Commissioner did not assess the Board's response to elements (1), (2) and (8) of the First Request, on the basis that the Appellant had not disputed the Board's response to those elements.

32. The Commissioner considered that the scope of his investigation was to:

    a. determine whether elements (9) to (12) of the First Request were vexatious; and

    b. explain why he decided to apply section 40(1) of FOIA himself proactively in the circumstance of this case.

33. The Commissioner concluded, for the reasons given above, that element (7) of the First Request and elements (9) to (12) inclusive of the First Request were vexatious.

34. We should note that, whilst the Commissioner's reasoning in the First Decision referred only to elements (9) to (12) of the First Request[4], the First Decision Notice clearly concluded that element (7) of the First Request was also vexatious[5].

35. The Commissioner also noted in the First Decision Notice that he saw no reason why the arguments outlined by him (as referred to in paragraph 27) would not have applied equally to elements (1) to (8) of the First Request. However, he stated that it was the responsibility of the Board to decide what stance it wished to take in respect of each part of a multi-part request. As the Board chose to comply with the remaining elements of the First Request, the Commissioner then addressed the other elements in dispute – which he stated were elements (3) to (6) inclusive of the First Request.

36. The Commissioner explained that:

    a. section 40(1) of FOIA provides an exemption from disclosure for any information which is the personal data of the person who has requested it;

    b. this was because a right of access to this information already exists under the Data Protection Act 2018[6] and the UK GDPR; and

    c. disclosure under that legislation is disclosure of a person's data to them alone, rather than disclosure to the 'world at large' under FOIA.

37. Whilst the Board had been proposing to rely on section 42 of FOIA (legal professional privilege) to withhold certain information, the Commissioner's assessment of that information was that it was the personal data of the Appellant.

38. The Commissioner explained what constitutes personal data and set out his views on why the information in question comprised the personal data of the Appellant, as follows:

    "*Whilst the complainant is only referred to by her initials, the Commissioner considers that anyone familiar with the background of the complainant's interactions with the Board over the last five years would be able to identify her – even if the initials were redacted. Even without*

[4] Paragraph 24 (and below) of the First Decision Notice

[5] Paragraph 2 of the First Decision Notice

[6] The Commissioner actually stated the Data Protection Act 2011, in error.

inside knowledge, the Commissioner considers that there are sufficient references within the information to particular events, which could be cross-referenced to information in the public domain in order to identify the complainant. She would therefore be identifiable from this information unless it were so heavily redacted as to render it meaningless.

…the Commissioner also considers that this information clearly relates to the complainant because it relates to decisions that the Board is intending to take about how it will deal with her in future. The matter of the Moonpig cards is discussed, but the information also covers the complainant's broader interactions with the Board and sets out possible responses.".

39. The Commissioner therefore concluded that relevant withheld information was the Appellant's own personal data.

40. The Commissioner stated that, given his dual role as the regulator of data protection legislation, he had a responsibility to prevent personal data being inadvertently disclosed under FOIA. Consequently, he proactively applied section 40(1) of FOIA to the relevant withheld information, to prevent any possibility that the information might be disclosed under FOIA.

41. The Commissioner determined that, as the relevant information comprised the personal data of the Appellant, section 40(1) of FOIA applied, which was an absolute exemption (therefore the 'public interest test' did not apply).

The Second Decision Notice

42. The Commissioner considered that the scope of his investigation in respect of the Second Decision Notice was to determine whether the Second Request was vexatious. The Commissioner concluded that it was, for the reasons given above.

The Appeals

The grounds of appeal

43. The Appellant's grounds of appeal were the same for both Appeals. Fundamentally, the Appellant's appeal was based on the ground that the Commissioner had not been objective. The material points in the grounds of appeal were (in summary) as follows:

    a. The Appellant's complaint to the Commissioner was not considered by an impartial case officer and the Appellant believed that it did not receive a fair or unbiased consideration.

    b. The Commissioner had drawn certain conclusions without, and sometimes in spite of, the evidence.

    c. It was not reasonable for the Commissioner to conclude that this was 'a classic case of vexatiousness by drift' when there was no evidence to support that claim.

    d. The background events leading up to the Requests supported the Appellant's version of events and showed that evidence of certain individuals at the Board could not be relied on.

    e. The Commissioner was wrong to infer (in the context of the contents of the Cards) that an apparently unconnected person wishing to draw attention to the wider issues would focus solely on the Appellant's own case, particular when one of

the quotes inside one of the Cards identified another complainant by name. Evidence of this was provided to the Commissioner and he failed to consider this, or identify this fact. This was therefore an unreasonable conclusion to draw and demonstrated the Commissioner's confirmation bias.

f. The Commissioner had not identified that it would take a substantial amount of time to fulfil the Requests, or that fulfilling them would cause any disruption, irritation or distress. Given that, the Commissioner should have concluded that the Board's reluctance to disclose the Requested Information suggests that the Board understands that it could be damaging to it and therefore the Commissioner should have concluded that there was value for scrutiny by the public.

g. Had the Commissioner concluded that NWCCG's repeated accusations were unreasonable, then he would have considered there to be a greater public interest in disclosure of the Requested Information. On the other hand, he has been disproportionate and irrational in expressing his opinion that the Requests, following NWCCG's unsolicited and direct accusations, rendered the Appellant's actions unreasonable.

h. The Commissioner did not admonish the Board for failing to assist the Appellant by identifying the Requested Information as being the Appellant's personal data and providing disclosure of that under a subject access request.

i. The Commissioner had not supported his Decision with any evidence that the motivation behind the App's complaint was anything but genuine, and in the public interest.

44. The Appellant's notice of appeal stated that the remedies being sought were disclosure of the Requested Information (other than personal data available via a subject access request) and "to hold the Commissioner to account for his lack of impartiality".

The Commissioner's responses to the Appeals

45. There was no formal response by the Commissioner to the Appeals and accordingly we considered the contents of the Decision Notices as setting out the Commissioner's position in respect of the respective Appeals.

The Tribunal's powers and role

46. The powers of the Tribunal in determining the Appeals are set out in section 58 of FOIA, as follows:

"(1) 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.

(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in

question was based.”.

47. In summary, therefore, the Tribunal’s remit for the purposes of the Appeals is to consider whether the Decision Notices were in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notices should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notices were based and the Tribunal may come to a different decision regarding those facts.

48. As we have noted, the Appellant, in her notice of appeal, sought that the Commissioner be ‘held to account for his lack of impartiality’. The Tribunal has no jurisdiction to determine matters relating to the conduct of the Commissioner or how he handled any investigation in respect of a complaint made to him. The Tribunal’s role and powers are limited to the matters outlined in the preceding two paragraphs.

The law

The relevant statutory framework

General principles - FOIA

49. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

“*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.”.

50. In essence, under section 1(1) of FOIA, a person who has requested information from a public authority (such as the Board) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

“*Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”*.

51. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold. The right of access to information contained in that section is subject to certain other provisions of FOIA, including (as applicable for the purposes of the Appeals) sections 2 and 14.

52. We deal with section 14 of FOIA first, before turning to section 2 of FOIA.

Section 14 of FOIA – vexatious or repeated requests

53. Section 14 of FOIA provides:

"(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.".

54. The term 'vexatious', used in section 14(1), is not defined in FOIA, but it is evident from that section that it applies to the request itself (and not to the person making the request). This point was also confirmed in the case of *Dransfield*, which we refer to below.

Section 2 of FOIA - effect of the exemptions in Part II

55. Section 2(2) of FOIA provides:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.".

56. Accordingly, certain exemptions to the right of access to information are set out in Part II of FOIA. Sections 40 and 42 are included within Part II of FOIA and are applicable for the purposes of the Appeals.

57. The effect of section 2(2) of FOIA is that some exemptions set out in Part II of FOIA are absolute and some are subject to the application of section 2(2)(b) of FOIA, which is often known as the 'public interest test'. Where an applicable exemption is not absolute and the 'public interest test' applies, this means that a public authority may only withhold requested information under that exemption if the public interest in doing so outweighs the public interest in disclosure.

58. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. So far as is relevant for the purposes of the Appeals, only section 40(1) is included in that list.

59. Accordingly, in summary, the relevant exemptions to the duty to disclose information are as follows:

    a. section 40(1) of FOIA is an absolute exemption; and

    b. section 42 of FOIA (which is not specified in the list in section 2(3) of FOIA) is a qualified exemption which is therefore subject to the 'public interest test'.

Section 40(1) of FOIA – personal data

60. Section 40(1) of FOIA provides:

"Any information to which a request for information relates is exempt information if it

constitutes personal data of which the applicant is the data subject.".

61. Section 40(7) of FOIA sets out applicable definitions for the purposes of section 40(1), by reference to other legislation, the applicable parts of which are as follows:

    a. section 3(2) of the Data Protection Act 2018 defines "*personal data*" as "*any information relating to an identified or identifiable living individual*"; and

    b. a "*data subject*" is defined in section 3 of the Data Protection Act 2018 and means "*the identified or identifiable living individual to whom personal data relates*".

Section 42 of FOIA – legal professional privilege

62. So far as is relevant for the purposes of the First Appeal, section 42 of FOIA provides:

    "*(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*".

Relevant Case law

Section 14

63. As we have noted, the term 'vexatious' is not defined for the purposes of section 14(1) of FOIA. However, guidance on applying that section is given in the decisions of the Upper Tribunal and the Court of Appeal in the case of *Information Commissioner vs Devon County Council & Dransfield*[7].

64. The judgment of the Upper Tribunal in the case of *CP v Information Commissioner*[8], helpfully summarises the main principles in the *Dransfield* case and relevant extracts from that summary are as follows (omitting, for ease of reference, the paragraph numbers in that summary and the cross-references to the paragraphs in the *Dransfield* case):

    "*(i) The Upper Tribunal in Dransfield*

    In the Upper Tribunal decision of Dransfield…, the Upper Tribunal gave some general guidance on the issue of vexatious requests. It held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied'…

    The test under section 14 is whether the request is vexatious not whether the requester is vexatious. The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA. As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account. The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause

[7] [2012] UKUT 440 (AAC) and 2015 EWCA Civ 454, respectively
[8] [2016] UKUT 427 (AAC)

was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request.

Four broad issues or themes were identified by Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations were not exhaustive and were not intended to create a formulaic check-list. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.

As to burden…, 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 the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor. Thus, 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. However if the public authority has failed to deal with those earlier requests appropriately, that may well militate against holding the most recent request to be vexatious. Equally a single well-focussed request for information is, all things being equal, less likely to run the risk of being found to be vexatious. Wide-ranging requests may be better dealt with by the public authority providing guidance and advice on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked.

A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request.

Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests.

(ii) The Court of Appeal in Dransfield

There was no challenge to the guidance given by the Upper Tribunal in the Court of Appeal. In the Court of Appeal, the only issue relevant to this appeal was the relevance of past requests. Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the Dransfield case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority.

Arden LJ gave some additional guidance…:

> *'In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context*

of FOIA, I consider 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. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available…'

Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor.".

65. It should also be noted that the Upper Tribunal in the *Dransfield* case concluded that the purpose of section 14 of FOIA was "*to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*"[9].

66. The Upper Tribunal also took the view in the *Dransfield* case 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. As the Upper Tribunal observed[10]:

"*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."*.

<u>*Section 42*</u>

67. In respect of legal professional privilege, the House of Lords established, in the case of *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)*[11], the relevant principles which must apply if legal professional privilege attaches to any particular material:

    a. the material must be between a qualified lawyer acting in their professional capacity and a client;

    b. it must be created with the sole or dominant purpose of obtaining or providing legal advice; and

    c. it must be confidential.

Evidence

68. The Tribunal read and took account of a combined (covering both Appeals) open

[9] Paragraph 10 of that case
[10] Paragraph 82 of that case
[11] [2004] UKHL 48

bundle of evidence and pleadings. The Tribunal also read and took account of a closed bundle. The closed bundle contained certain material which was not included in the open bundle and contained some unredacted material which had been redacted in the open bundle. We were provided separately with two pages of documents which had been omitted by error in the open bundle (where some documents had been duplicated rather than containing those two pages). The open version of those two pages contained some redactions but we were provided with a closed (unredacted) version of them.

69. We were also provided with a separate open bundle which comprised certain information which had been received by the Appellant in response to a subject access request made by her on 3 September 2022 and some material relating to a separate FOIA request made by the Appellant and a decision notice of the Commissioner dated 30 August 2022 (reference IC-138310-W9M8). That decision notice was not the subject of the Appeals and, whilst we reviewed the contents of this bundle, it was not directly relevant to the Appeals (albeit it also contained some information duplicating that in the bundles specifically relating to the Appeals). The contents of that separate bundle had no bearing on the outcome of our decision either way.

Discussion and conclusions

Outline of relevant issues

70. The fundamental issues which we needed to determine in the Appeals were whether the Commissioner was correct to conclude, in the Decision Notices:

    a. that the Requests were vexatious under section 14 of FOIA; and

    b. that certain information was exempt under section 40(1) of FOIA on that basis that it comprised the personal data of the Appellant.

Preliminary observations

71. We felt that some of the Board's response to the First Request could (and perhaps should) have been dealt with differently. For example, it may have been appropriate to provide a 'neither confirm nor deny' response to element (9) of the First Request given the potential implications for third parties which were integral to that element.

72. We also consider that, whilst the Commissioner considered that element (7) of the First Request may have been treated by the Board as vexatious[12], the Board initially stated that information falling within that element was not held. If the Board was relying on grounds other than consent in publishing any applicable photographs on its website (such as the ground of 'legitimate interests'), then that would explain why the relevant information (regarding matters of 'consent') was said to not be held.

73. However, those observations are not material to the outcome of our decision, for reasons we will explain.

74. We also consider that elements of the First Request did not constitute genuine requests for information under FOIA. In our view, elements (7) and (8) of the First Request and elements (10) to (12) inclusive of the First Request are not primarily requests for

[12] Paragraph 22 of the First Decision Notice

recorded information likely to be held by the Board (or its predecessors) but rather seeking the Board's views in respect of matters put to it by the Appellant in the First Request.

Analysis and discussion; application of the law

<u>The First Request</u>

Section 40(1) of FOIA – personal information

75. We start by addressing briefly the issue of the personal information contained in the First Request. We agree with the Commissioner, for the reasons given by him in the First Decision Notice, that the information falling within the relevant elements of the First Request constitute the personal data of the Appellant and therefore section 40(1) of FOIA would be engaged in respect of that information. As we have noted, that section is an absolute exemption and therefore the 'public interest test' does not apply.

76. Accordingly, we now turn to the remaining parts of the First Request which were in dispute. As we have noted, the Commissioner stated that these were elements (9) to (12) of the First Request but included element (7) of the First Request as being vexatious in the First Decision Notice. We consider element (7) of the First Request to also be a relevant part of the First Request which is in dispute and so we include that in our considerations below. Consequently, we refer to below to the "Disputed Elements" as being element (7) of the First Request and elements (9) to (12) inclusive of the First Request.

Section 14 of FOIA – vexatious requests

77. Given the legal framework which we have outlined above, we consider that the consideration of the four broad issues or themes outlined in the *Dransfield* case are a useful starting point for our consideration of the primary issue of whether or not the Requests were vexatious.

78. We acknowledge that those issues or themes are not exhaustive and are not intended to create a formulaic checklist for the Tribunal to address when considering whether or not the Requests were vexatious for the purposes of section 14 of FOIA.

79. However, we recognise that those issues or themes are a helpful tool for the Tribunal in considering potentially relevant issues as part of its broad assessment of all the circumstances. In that regard, we considered those issues or themes in our deliberations, but we should stress that we have not been constrained or confined in any way by considering them. On the contrary, we have adopted a holistic approach and we have been mindful that fundamentally we were considering whether or not the Requests were vexatious as a manifestly unjustified, inappropriate or improper use of FOIA.

80. The first issue or theme we considered was that of the burden placed on the Council and its staff by the Requests, as the question of burden was a point made by the Commissioner in the Decision Notices. However, there was little evidence relating to the question of the potential burden on the Board in complying with the Requests, although it is evident from the Requests that there would be some burden paced on the Board (particularly given the nature and extent of the issues covered in the First Request).

81. We are also mindful that the Appellant had made several previous requests for information and that this could be relevant in assessing the overall burden on the Board. However, as the Commissioner pointed out, the number of requests over the period in question was not excessive and we do not consider that they would be a material factor in assessing the level of burden on the Board in respect of the Requests.

82. We consider that the issue regarding the value or serious purpose of the First Request is more relevant in the current case. As we have noted, the Disputed Elements were not related to information which the Board may hold. We find that, with regard to the Disputed Elements, the Appellant was not genuinely seeking recorded information from the Board for the purposes envisaged by FOIA. It seemed to us that, with regard to the Disputed Elements (and some other elements of the First Request) the Appellant was simply seeking admissions of guilt in respect of the issues raised. In any event, the Appellant was evidently seeking the Board's opinion on the relevant issues rather than seeking specific records of information which may be held by the Board, For those reasons, the Disputed Elements were, effectively, 'fishing for information' rather than being a genuine request for information under FOIA.

83. We recognise the Appellant's statements regarding her motives behind the Requests and we appreciate that consideration of the motive of the requester could be a significant factor in assessing whether a request is vexatious in all of the circumstances. Likewise we have taken into account the public interest arguments put forward by the Appellant. However, given our finding that the Disputed Elements were not genuine requests for recorded information, we consider that those parts of the First Request were not a proper use of FOIA. As stated by Upper Tribunal Judge Wikeley in the *Dransfield* case, section 14 of FOIA "*serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA*"[13].

84. In considering the question of vexatiousness, we have adopted a broad approach and considered all of the circumstances in respect of the First Request. Ultimately, using the words of the Upper Tribunal view in the *Dransfield* case[14], we have concluded that the relevant parts of the First Request were an "inappropriate or improper use of FOIA".

85. For all of the reasons we have given, in our view the Disputed Elements were vexatious. As we have noted, section 14 of FOIA relates to a request being vexatious, not the requester, and so this is no reflection on the Appellant.

Section 42 of FOIA – legal professional privilege

86. It is not necessary to go into detail on the potential application of section 42 of FOIA for the purposes of the First Request, given our above conclusions about the Disputed Elements being vexatious. However, we address it briefly given that this was an issue raised in respect of the First Request (albeit not being a relevant decision of the Commissioner for the purposes of the First Decision Notice).

87. We considered that this would be applicable as an exemption to disclosing element (3) of the First Request on the basis that the relevant information met the necessary requirements set out in the *Three Rivers* case - namely that it was confidential legal advice provided by a qualified lawyer acting in their professional capacity and their

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[13] Paragraph 35 of the Upper Tribunal's decision in that case

[14] See paragraph 82 of the Upper Tribunal's decision in that case

client; further, there was no evidence that there was any loss of the confidential nature of that advice. We considered that the 'public interest test' would favour maintaining the exemption, including for reasons similar to those for which we determined the Disputed Elements to be vexatious. Therefore the Board would be entitled to withhold that element of the First Request in any event.

88. We should also note that our views in the preceding paragraph do not preclude the relevant information also constituting the personal data of the Appellant, as determined by the Commissioner.

The Second Request

Section 14 of FOIA – vexatious requests

89. We consider that our analysis and reasons set out above regarding the Disputed Elements being vexatious apply equally to the Second Request. This is because the Second Request, whilst phrased differently, essentially is targeting information already requested by way of the First Request. Accordingly, we find that the Second Request was also vexatious for the same reasons we have given in respect of the First Request. Another relevant factor is that the Second Request was sent within approximately three weeks after the Appellant had received the final response from the Board refusing the First Request (but this was secondary to our preceding conclusions in any event).

90. We note that the Appellant had told the Commissioner that the Second Request "*may seem repetitive in that it seeks to obtain similar information with regards correspondence about the Moonpig cards, it cannot be subject to the same LPP exemption that was engaged in [the Board's response to the First Request]*". In essence, the Appellant was seeking to distinguish the Requests on the basis that the legal professional privilege exemption would not apply to the Second Request. However, we think that this serves to demonstrate that the Second Request was effectively a reframing of the First Request following the Board's final response regarding the First Request.

91. Section 14(2) of FOIA was not relied on in the Second Decision Notice. We consider that it could have been relevant to the Second Appeal on the basis that the Second Request was essentially a repetition of the First Request (but this was not an analysis which we needed to undertake, given our other findings).

Final conclusions

92. For all of the reasons we have given, we conclude as follows

93. Whilst some of our analysis of the Requests and the issues raised differs from that of the Commissioner, ultimately we agree with the conclusions reached by the Commissioner in the Decision Notices.

94. We therefore dismiss both of the Appeals.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 29 September 2023