Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0109
Information Commissioner's Ref: FS50154968

Heard at: Procession House
On: 16th April 2008

Decision Promulgated
19th May 2008

BEFORE

CHAIRWOMAN
Melanie Carter

and

LAY MEMBERS
Jacqueline Blake
John Randall

Between

GRAHAM BETTS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision

Determined on the Papers

Pursuant to paragraph 5 of Schedule 6 to the Data Protection Act 1998, the majority of the Tribunal upholds the decision notice dated 27 September 2008 and dismisses the appeal. This document sets out the majority decision followed by the dissenting views of the minority lay member.

Reasons for Majority Decision

Introduction

1. This appeal arises from a decision by East Riding of Yorkshire Council ("the Council") to treat a request by the Appellant under the Freedom of Information Act 2000 ("FOIA") as vexatious. The Appellant complained to the Information Commissioner ("IC") who issued a Decision Notice on 27 September 2007 agreeing with the Council.

2. The Appellant has appealed to this Tribunal on the basis that the Decision Notice was not in accordance with law.

Background

3. The Appellant was involved in a road accident in December 2004. He maintained that the damage to his car, in the sum £99.87, was the Council's liability for failing to maintain the particular road. The Council's insurers rejected the claim on the basis that it enjoyed a defence under section 58 of the Highways Act 1980 whereby a highway authority may prove that it has taken such care as in all the circumstances was reasonably required to secure that the part of the highway in question was not dangerous to traffic. To establish the defence, it is understood that the Council would need to be able to prove the existence of an adequate inspection regime.

4. The Appellant sought, via requests under the FOIA, to obtain information to show that the Council could not avail itself of the defence. The Tribunal noted at the outset that it was not its function to give a view as to the Council's liability in this matter.

The request for information

5. The Appellant made numerous requests under FOIA (see 24 January 2005 letter, 5 February 2005 email, 14 February 2005 letter, 24 February 2005 letter, 26 March 2005, 12 April 2005, 11 May 2005, 5 February 2006, an email in or around May 2006 and 4 November 2006 email). These requests all concerned the inspection of the road in question, work instructions and repairs to the road, information as to traffic flows, policies as to highway inspection, inspection period assessments and risk assessments. The Council provided the Appellant with various information including word processed job sheets and inspection reports on 15 March 2005 and manual diary entries on 28 February 2006. The Council maintains that it has provided all information that is it obliged to provide under FOIA.

6. The request which is the subject of this appeal was made by email on the 19 January 2007. The Appellant thereby asked for:

> "*a copy of your organisations health and safety policy and procedures where it described how risk is assessed and managed. In particular I require to see the guidance regarding the process of risk assessment?*
>
> *If as has been stated before by the Council that you have no procedure for undertaking risk assessments, can you please therefore inform me how the Council complies with the Health and Safety at Work Act and its associated regulations, and how your duty of care to the staff and public is exercised without such a procedure?*"

7. The Council rejected the request in a letter dated 7 March 2007 on the basis that it was vexatious under section 14 of FOIA.

The complaint to the Information Commissioner

8. The Appellant complained to the IC under section 50 of FOIA. The IC in turn concluded that the Council had been entitled to reject the request on the grounds that it was vexatious.

The questions for the Tribunal

9. The Tribunal's task is to consider for itself, taking into account all the information before it, whether the request was indeed vexatious. The appeal was determined on the papers.

10. The Tribunal noted that FOIA gives no definition of "vexatious". It took into account the legal principles helpfully set out in the case of *Hossack v Information Commissioner* EA/2007/24 (18 December 2007). In that case, the Tribunal stated that :

> *"13. We found the previous decision of the Information Tribunal in Ahilathirunayagam v Information Commissioner and London Metropolitan University, EA/2006/0070 helpful. They considered a number of factors in deciding that that request was vexatious:*
>
> *i. There is no statutory definition for the term vexatious and its normal use is to describe activity that is likely to cause distress or irritation, literally to vex a person to whom it is directed.*
>
> *ii. The fact that several of the questions purported to seek information which the Appellant clearly already possessed and the detailed content of which had previously been debated with the University.*
>
> *iii. The tendentious language adopted in several of the questions, demonstrating that the Appellant's purpose was to argue and even harangue the University and certain of its employees and not really to obtain information that he did not already possess.*

iv. The background history between the Appellant and the University … and the fact that the request, viewed as a whole, appeared to us to be intended simply to reopen issues which had been disputed several times before.

Several of these factors are present in the current appeal. We would add to the first factor that for the request to be vexatious there must be no proper or justified cause for it. A parking ticket may be likely to cause distress or irritation and may vex the motorist who receives it, but, if properly issued, should not be described as vexatious."

11. The Tribunal also had regard to the IC's Guidance on Vexatious and Repeated Requests, No. 22. Neither the Guidance nor the above mentioned cases were binding on the Tribunal but were found to be of considerable assistance.

Evidence

12. The Tribunal took into account a bundle of correspondence between the Council and the Appellant. As noted, the Appellant made a series of requests under FOIA commencing in early 2005. The Council made disclosure of certain information under cover of a letter of 15th March 2005 which also reported that there were no relevant risk assessments to disclose. The Appellant was dissatisfied with this and persisted with his requests, in particular seeking information as to how the Council determined the appropriate inspection period and risk assessments. The Council's letter of 10 May 2005, which was a review of compliance with the previous FOIA requests explained again that the relevant job sheets and inspection reports had been disclosed. The letter also made it clear that there were no further documents to be disclosed in relation to inspection period assessments and emails, notes etc.

13. The Appellant told the Council on 11 May 2005 that he did not believe the truth of the responses he had received and requested to see the diary entries for the relevant period. Over the next few months the Appellant persisted in his requests for information as to inspection period assessments.

14. It took the Council sometime to respond to the request for diary entries and the situation was considerably confused by the provision of incorrect information in a letter dated 7th July 2005. In that letter, an officer wrote to the Appellant, on the Chief Executive's behalf, making reference to the existence of an electronic diary system generating job sheets when an inspection was required. The Appellant made a further request asking for information as to this electronic diary system and the job sheets thereby generated.

15. Again, it took the Council some considerable time (ie: not until February 2006) to realise its mistake (insisting in previous correspondence that it had provided the jobsheets in question), to clarify the information and to apologise to the Appellant for the confusion.

16. Despite his own view that electronic as opposed to manual jobsheets did not in fact exist (see email of 23 August 2005), the Appellant persisted in requesting that these be produced. By this stage the Appellant was convinced that the actions of the Council were based on deception. The Appellant duly made complaints to the Council in relation to both the officer who wrote the 7 July letter and the Chief Executive.

17. The Appellant picked upon a turn of phrase used by an officer in a letter dated 21 June 2006 in which it was stated that "as part of its assessment of risk the Authority has determined" that the Council would adhere to a national code of practice. The Appellant insisted in correspondence that this showed that the Council did have a risk assessment which it was not producing to him and that various officers were involved in this deceit. Further complaints ensued.

18. On 3 July 2006, the Council emailed the Appellant to explain that it would in future only provide that which it was obliged to disclose under the Act. The Council had previously sought to provide answers to the Appellant's questions and requests for explanations despite not being obliged to do so under FOIA. This had included putting him in touch with different officers across the authority who might be able to answer his questions on the inspection regime.

19. In fact the Council continued to seek to explain the way in which it worked to the Appellant. It was confirmed to the Appellant again on 22 September 2006 that the Council did not hold any relevant risk assessments and explained that there was indeed an inspection regime for roads and how this worked in practice.

20. Again in a letter 21 November 2006 the Appellant asked for a copy of the assessment of risk undertaken by the Council or failing that an apology for having been told a lie. In a letter 11 January 2007, the Council wrote to the Appellant stating that the Council saw nothing to be gained by conducting further correspondence or agreeing to a meeting.

21. The Council wrote on 7 March 2007 to reject the 19 January 2007 request on the basis that it was vexatious. The letter explained that *"the reason that I have decided that the request is vexatious is that it is clearly related to your previous correspondence in relation to "risk assessments".…….I further consider that the correspondence with you has been frequent, lengthy and complicated".* This reflected the Council's criteria for reliance on section 14 contained in its "Vexatious Rights of Access Requests – Guide for Officers".

22. In a letter dated 28 August 2007 to the IC, the Council asserted that "*Mr Betts' aim appears to be to batter the Council into conceding his point through the sheer volume of his complaints.".*

Consideration

23. The Tribunal noted that on the face of it and if taken in isolation, there was nothing vexatious about the content or terminology of the request dated 19 January 2007. It was concerned moreover that responding to the request would most probably, at least in the first place, be a simple matter, not involving a significant burden in terms of cost or labour. For this reason, the Tribunal's starting point was one of caution and concern that section 14 should not be inappropriately applied. The Tribunal was concerned moreover that the Council could, as the IC put it in his letter of ……. "*have done better*". For all these reasons the Tribunal considered this to be a finely

balanced decision. However for the reasons set out below, it decided that the Decision Notice should be upheld and the appeal not allowed.

24. In order to determine whether section 14 should apply, it was necessary for the Tribunal to consider not just the request but also the background and history to the request. This indicated a long drawn out dispute between the Council and the Appellant. The Council and the IC have asserted that the request was simply a continuation of a pattern of requests and conduct by the Appellant which when put together substantiated a finding that the request was vexatious. The Appellant's essential argument in this appeal is that on account of the Council's failure to respond to his previous FOIA requests and deliberate deceptions, he had had to persist in his quest to obtain the particular information. He described his approach as "*determined and resolute".*

25. The Tribunal accepted that the Appellant felt genuinely aggrieved by the way in which he had been treated by the Council. It accepted moreover that the Council could indeed have responded to his requests over the two year period more accurately and in a more timely fashion.

26. The IC submitted that the Appellant had received all the information the Council held on the matter raised by the Appellant and implied that this latest request was simply seeking the same information over again. The Tribunal was of the view however that strictly speaking this was not the case. This latest FOIA request concerned health & safety policies – these had not previously either been asked for or provided.

27. The Tribunal found however that the request was linked to the previous FOIA requests. It referred to risk assessments and indeed built upon a comment he made in an earlier email dated 14 August 2006 in which he referred to the Health & Safety at Work Act. It was notable moreover that at no point in the submissions of the Appellant to this Tribunal had the Appellant asserted that the request was anything other than related to his previous FOIA requests and the issue of highway maintenance. It was the view of the Tribunal that the request was primarily concerned with risk assessment procedures and not the broader health & safety policies of the Council.

28. Thus this Tribunal accepted that this latest request was a continuation of the theme of all of the Appellant's previous requests, namely information as to risk assessment and information which would go to show that the Council did not have a satisfactory inspection regime in place in relation to the road where the accident took place.

29. The Tribunal was of the view that the Appellant had been entitled to seek to assist his claim for damages by requesting particular information under FOIA. The Tribunal reminded itself that the motive for a request is strictly speaking irrelevant. It was clear however to the Tribunal that the Appellant was not, at least from February 2006 onwards, truly seeking information but was rather seeking to obtain an admission that the Council did not have an inspection regime in place and therefore that the section 58 defence did not apply. In fact as early as 2 June 2005 the Appellant stated:

> *"Either the Council has done the required [inspection period assessments]… and will be able to provide proof by way of documentation or it has not, in which case I require an unambiguous statement to that effect.*"

This was the Appellant's approach throughout even though he had been told early on that were no further documents to be produced in response to the FOIA requests. This was particularly the case in relation to risk assessments. Despite being told in March 2005 that no relevant risk assessment existed, he persisted in requesting these all the way through to late 2006.

30. The Tribunal found it difficult to determine whether the Appellant simply did not believe the Council when it said it did not have further documents to disclose or whether the Appellant was so critical of his perception of the Council's failures with regard to risk assessments and inspection period assessments that he could not let the matter drop. Certainly, it appeared to both the IC and the Tribunal that part of the problem was that the Appellant was using different terminology to the Council and this led him to reject the Council's explanations of how it managed and assessed risk. A further difficulty seemed to be that the Appellant simply would not believe that the Council could carry out a risk assessment without producing a document entitled 'risk assessment'.

31. In fairness to the Appellant, the mistaken information given to him in the letter of 7th July 2005 might have caused him to think that there was further information held by the Council which ought to have been disclosed. The Tribunal noted however that in fact the Appellant did not think this, as he illustrated in his email of 23 August 2005 when he stated that he did not believe an electronic diary system and jobsheets generated as a result actually existed. Despite not believing that these documents existed he persisted in demanding their production. His consequent correspondence and requests for disclosure of the purported electronic material were, in the Tribunal's view, the Appellant's way of seeking to expose the Council's mistakes and thereby put pressure on the Council.

32. The Tribunal accepted that the Council's conduct would have fuelled the Appellant's sense of grievance. It did not excuse however his repeated requests and complaints after the Council had clarified its mistakes and apologised in February 2006.

33. The Tribunal noted that it was not the purpose of FOIA to assist requesters in placing undue pressure on a public authority either as part of a campaign to expose maladministration or in order to force it into an admission of liability. Moreover FOIA obliges public authorities to disclose information it holds, not to give explanations or to create information that does not otherwise exist.

34. Albeit it may have been a simple matter to send the information requested in January 2007, experience showed that this was extremely likely to lead to further correspondence, further requests and in all likelihood complaints against individual officers. It was a reasonable conclusion for the Council to reach that compliance with this request would most likely entail a significant burden in terms of resources.

35. The Tribunal considered that the Appellant was of course entitled to raise his concerns with other regulators (eg: Audit Commission, Local Government Ombudsman). The relevance of these other complaints was not that he had availed himself of his right to do so, but rather the way in which he made reference to these in correspondence to the Council. Read in context, they appeared as part of his concerted campaign to put pressure upon the Council.

36. The Appellant made a series of serious allegations of deception. These allegations were founded on minor factual inaccuracies without any evidence that they were deliberately misleading. His basic premise was that simply because misleading statements had been made, this was evidence enough to prove deliberate deception. These accusations, linked as they were to various FOIA requests were a factor in concluding that the January request was vexatious.

37. The Tribunal noted that the Appellant often wrote in intemperate terms. In addition to the unwarranted allegations of deception and corruption he would regularly make comments such as that officers were "arrogant". This manner of communication added to the vexatious nature of the request in that the Council could reasonably expect it to lead to further unpleasant communication.

38. The Appellant's refusal to let the matter drop and the dogged persistence with which he pursued his requests, despite disclosure by the Council and explanations as to its practices, indicated that the latest request was part of an obsession. The Tribunal accepted that in early 2005 the Appellant could not be criticised for seeking the information that he did. Two years on however and the public interest in openness in this matter had been outweighed by the drain on resources and diversion from necessary public functions that were a result of his repeated requests.

39. The majority concluded that the request was indeed vexatious within the meaning of section 14 of FOIA and that the Decision Notice should be upheld.

Reasons for Minority Dissenting View

40. The minority lay member, John Randall, disagrees with the majority decision, to the extent that the request concerns the health and safety policy and procedures of the public authority. The facts found and the applicable law are as set out above. His reasons for dissenting are as follows.

Finding a request "vexatious"

41. The Tribunal has considered the definition of "vexatious" in Hossack v Information Commissioner and the Department for Work and Pensions and in Ahilathirunayagam v Information Commissioner and London Metropolitan University. In Hossack the Tribunal noted that the consequences of a finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in litigation and therefore "the threshold for a request to be found vexatious need not be set too high".

42. The minority lay member noted that the observation is valid, but there are also good reasons why s.14(1) should be applied with care, and in a manner that has regard for the multiple responsibilities of some public authorities.

43. Critically, the application of s.14(1) sets aside the presumption in favour of disclosure that is the central purpose of the Freedom of Information Act. Further, in Hossack the Tribunal stated: "Clearly, context and history are important." Consideration of context and history are likely to be central to a decision to apply s.14(1), yet such consideration involves a departure from the principle that, in general, the public authority, the Commissioner and the Tribunal should be blind to both the motive and the identity of the person making the request for information.

44. The minority lay member stressed that it is right that there should be a safeguard against vexatious requests, as these serve to undermine the credibility of the disclosure regime. Nevertheless, because a finding that an application is vexatious has the effect of setting aside the important principles set out above, the use of s.14(1) should be a last resort. It is right that a public authority should be able to protect itself against genuinely vexatious requests. Yet, as the Information Commissioner says in his Awareness Guidance No.22 on vexatious and repeated requests: "public authorities must not be judgemental without good cause".

45. The minority lay member is of the view that there is an important distinction to be drawn between the cases of Hossack and Ahilathirunayagam and the present case. In the former cases, the appellants were likely to deal with the public authority on a single issue, or a narrow range of related issues. In Ahilathirunayagam the

appellant's actual and potential relationship with the public authority was as a student. It was unlikely that he would deal with the University in any other capacity. In Hossack, the appellant dealt with the DWP as a benefit claimant whose data had been disclosed, in breach of the Data Protection Act. Potentially, the wider functions of DWP meant that he might deal with the public authority also as a job-seeker or as a state pensioner; however, these are fairly closely related to the appellant's claimant status.

46. In Ahilathirunayaga, and, to a slightly lesser extent, in Hossack, it was not unreasonable for the public authorities to conclude, because of their relatively narrow range of functions, that it was likely that continued requests from the appellant would relate to the subject matter of earlier requests. It was reasonable to presume a close relationship between the requester and a particular type of request.

47. In the present case, the public authority is a local authority, having a wide range of functions, not all of which are related to each other. The Appellant was, at the time of the request, a resident within the area covered by the local authority, and the minority lay member was of the view that he could, potentially, have a legitimate interest in a number of functions of the authority. Particular care should therefore, he felt, be taken before it is concluded that any request from an applicant is a part of a series of earlier requests, especially when the public authority has a wide range of functions, several of which could touch on the interests of the applicant. A finding that a series of requests on a particular matter is vexatious or repeated, within the meanings of s.14(1) and (2), does not extinguish the entitlement of the individual to information on other matters. It is the request that may be vexatious, not the requester.

The conduct of the Appellant

48. The conduct of the Appellant is set out in the majority decision. In the minority lay member's view, two matters are of particular significance. First, the Council supplied the Appellant with incorrect information in a letter dated 7th July 2005. This appears to be the origin of a belief by the Appellant that he was being misled deliberately, particularly with respect to the use of risk assessment in relation to highway maintenance. Second, the Appellant regarded his professional judgement on the

issue of risk assessment as being superior to that of the Council. In a letter of 13th April 2008 to the Tribunal he said:

> *"My qualifications are indeed relevant. No other person thus far involved has demonstrated comparable expertise regarding maintenance systems or Risk Assessments. My experience concerns maintenance systems applied to complex Power Station equipment and I am perfectly entitled to use my expertise to determine whether the Council's claims were substantive. In my professional opinion the Council was not providing me with evidence that it had a valid maintenance system despite its contrary claims."*

49. The Appellant's initial request for information designed to assist his claim for compensation, by undermining the defence relied upon by the Council's insurers, was proper. However, his repeated exchanges with the Council on the question of risk assessment, fuelled by his belief that he had been misled deliberately, and by his belief that his professional judgement of risk assessment, albeit gained in different circumstances, was superior to that of the Council, would, in the minority lay member's view, be viewed by any reasonable observer as obsessive.

The question for the Tribunal

50. The question for the Tribunal is whether the application of 19th January 2007 was vexatious. A conclusion that the Appellant himself was behaving in a vexatious manner is evidence to be taken into account, but is not, by itself, conclusive that the application was vexatious.

51. The Information Commissioner publishes Awareness Guidance No. 22 on vexatious and repeated requests. The minority lay member pointed out that this guidance does not bind the Tribunal, but that it is helpful to consider the extent to which the present request falls within that guidance. To apply the Guidance to the request, it is necessary first to analyse the request, as it is a mixed request for information and explanation.

52. The first leg of the request is a straightforward request for information: “please send me a copy of your organisations health and safety policy and procedures”. The second leg “where it is described how risk is assessed and managed”, and “in particular I require to see the guidance regarding the process of risk management” makes assumptions about what might be in the document requested, and gives an indication of the motive for the request. The third leg, contained in the second paragraph of the request, is a pure request for commentary and explanation.

53. The request in the third leg lies outwith the scope of FOIA. It is for the Council to determine, as a matter of policy, how it responds to such requests, and whether it will decline to deal with certain requesters on the grounds that they are vexatious. The second leg indicates the aspect of the policy in which the requester is interested. The Council would satisfy its obligations by providing the health and safety policy and procedures as they stand. In fact, they contain information about risk assessment, as applied to the Council’s responsibilities for inspection and enforcement under the Health and Safety at Work Act.

54. In the view of the minority lay member, the issue for the Tribunal is whether the references to risk assessment, which go to the earlier vexatious conduct of the Appellant in relation to information about highway maintenance, are sufficient to warrant the application of s.14(1) to the request for the health and safety policy and procedures of the Council.

55. The Information Commissioner’s Guidance lists five criteria. In the Commissioner’s view, the first, and at least one of the following four, must be satisfied for s.14(1) to be engaged. The first criterion is that the request “would impose a significant burden on the public authority in terms of expense or distraction”. In this case, the minority lay member concluded that the Council feared that the purpose of the request was to open up a fresh line of enquiry on the issue of risk assessment, and that such a re-opening of correspondence on that issue would be a significant distraction. The minority lay member agreed that further exchanges on risk assessment would be a significant distraction, and that requests for information that related solely to this could engage s.14(1). However, he did not accept that the provision of an existing policy document on health and safety would, by itself, impose a significant burden.

56. The second criterion is that the request does not have any serious purpose or value. If the Council was satisfied that the information was sought solely for the purpose of extending the vexatious exchanges about risk assessment, this criterion could be applied. However, in the minority lay member's view the Council cannot know this with any certainty, given the wide range of functions in respect of which it deals with residents. Local authorities have extensive responsibilities for health and safety. These go considerably beyond the responsibilities that any employer has for its employees; local authorities have inspection and enforcement responsibilities relating to commercial premises within their area, in particular shops, offices, warehouses and service industries (including hotels and restaurants). There are many reasons why a resident might wish to have information about Council policies in this field.

57. The third criterion is that the request is designed to cause disruption or annoyance. If the request was limited to the issue of risk assessment, it would be reasonable to conclude, in the light of the earlier exchanges on the matter, that the request was designed to annoy. However, the minority lay member was of the view that a request for a health and safety policy cannot, by itself, be said to be designed to cause disruption or annoyance.

58. The fourth criterion is that the request has the effect of harassing the public authority. By itself, a request for the health and safety policy cannot be said to harass the Council. Some of the language of the earlier exchanges, on the part of the Appellant, was intemperate. However, as the Information Commissioner points out, in his Guidance, abusive or offensive language does not, by itself, make forfeit the requester's rights under FOIA. In this case, having been provided with incorrect information, the Appellant resorted to language such as "lies", "obstructive and deceitful" and "arrogant". Such language is regrettable, but it is language that is employed commonly, in similar circumstances, by some journalists and politicians. In the minority lay member's view if, in response to the provision of inaccurate information, public discourse uses such language, it is difficult to condemn a frustrated requester of information for similar employment of it.

59. The final criterion is that the request can otherwise fairly be characterised as obsessive or manifestly unreasonable. The minority lay member concluded that a request for information solely about risk assessment could be so characterised, in the light of the past exchanges; a request for a health and safety policy could not be so characterised.

60. The Guidance addresses the extent to which a public authority may take into account any knowledge it has of the applicant. The Commissioner says "a request cannot be judged vexatious purely on the basis that the person who submitted that request had previously submitted one or more vexatious, though unrelated, requests". He suggests that a useful test is "whether the information would be supplied if it were requested by another person, unknown to the authority". In the minority lay member's view, severed from the request for commentary and explanation, and setting aside for the moment the indication of motive, the pure FOIA request for the health and safety policy and procedures is not necessarily related to the earlier requests from the Appellant. It is improbable that another person, unknown to the authority, would be refused information about health and safety policy.

61. The minority lay member characterised the issue separating the majority and minority of the Tribunal as, in essence, whether the indication of motive contained in the second leg of the request is sufficient to bring the whole request within the scope of s.14(1), given the past history of vexatious behaviour by the requester. If the information requested was clearly related only to risk assessment in relation to highway maintenance, the minority lay member would agree with the majority. The request is, in his view, not so limited; health and safety enforcement is an unrelated area of responsibility of the local authority. However unlikely it may be given the requester's clear obsession, the minority lay member concluded that the request could be for an unrelated purpose, to which the reference to risk assessment was incidental.

62. The minority lay member gives the Appellant the benefit of the doubt on this matter with some reluctance. The case made by the Commissioner, for regarding the request as vexatious, is powerful, based as it is not only on the evidence that was before the Tribunal, but also on his independent knowledge of the Appellant through

other disputed requests. The minority lay member reaches his view because a local authority has a wide range of fairly unrelated functions. It would be wrong to conclude that because a requester made requests that were vexatious in relation to one local authority function, requests from the same person in relation to other functions of the same authority must also be vexatious. The presumption that the obsession that tainted requests relating to highways maintenance might also taint requests relating to health and safety functions is strong. Nevertheless, it is not, in the minority lay member's view, sufficiently strong to overturn the fundamental presumption of FOIA in favour of disclosure. By presuming that all requests from an individual will be similarly tainted, it treats the requester, rather than the request, as vexatious.

63. Being slow to make a judgemental presumption, and severing the part of the request that falls within FOIA from the requests for commentary and explanation, this in the minority lay member's view, leaves the pure FOIA request outwith the scope of s.14(1).

Alternative options available to the Council

64. The minority lay member having expressed the view that the use of s.14(1) should be a last resort, felt it appropriate to consider if the Council could have dealt with the request in any other way.

65. The pure FOIA request was for the health and safety policy and procedures of the Council. In the absence of any further definition of the policy sought, it is reasonable to assume that the request relates to the public functions of the Council in this area. Going to the website shown on the Council's notepaper (www.eastriding.gov.uk) and then entering the words "health and safety" into the search facility produces, within seconds, links to the following documents: "Health and Safety Plan 2006/07" and "Health and Safety at Work etc Act 1974: Enforcement Policy Statement". The documents include information about risk assessment.

66. It was the minority lay member's view that these documents would appear to be those that should be supplied in response to the pure FOIA element of the request of 19th

January 2007. The Appellant dealt with the Council via e-mail, thus he had the facility to access the Council website. In these circumstances, and if the Council's publication scheme provides for publication on its website, it would have been open to the Council to rely upon the exemption in s.21 FOIA concerning information accessible to the applicant by other means. s.21 is an absolute exemption, thus once such an exemption is engaged (as the Tribunal pointed out in Ahilathirunayagam) it is not necessary to consider whether the request is vexatious.

Minority Conclusion

67. The Appellant behaved in an obsessive manner in relation to his exchanges with the Council on the matter of risk assessment. The Council would be justified in treating any further request for information relating solely to risk assessment as vexatious, within the meaning of s.14(1).

68. The request of 19th January 2007 was a mixed request. The element relating to the health and safety policies and procedures of the Council was a proper request under FOIA. The elements relating to risk assessment were requests for commentary and explanation, which fall outside FOIA.

69. The minority lay member concluded that the request did not satisfy the tests suggested in the Information Commissioner's Awareness Guidance No. 22. Specifically, the request for the health and safety policy and procedures did not impose a significant burden. Correspondence that might occur subsequent to the provision of that information had the potential to impose such a burden, but the provision of the information itself (which was already in the public domain) did not. Any subsequent correspondence should be dealt with on its own merits and, to the extent to which it sought further information about risk assessment, could well be caught by s.14(1).

70. The minority lay member commented that the tests derived from Hossack and Ahilathirunayagam should be applied with care, given the very wide range of functions discharged by a local authority. Particular care should be taken before imputing a motive demonstrated in relation to one function, to a request in respect of

a different function. In this case, a person whose behaviour was vexatious in relation to one matter (highways maintenance) should not be denied information in relation to another (health and safety policy) solely because both could be touched by an obsession with risk assessment. Such denial treats the requester as vexatious, not the request.

71. The minority lay member disagrees with the majority decision, to the extent that the request relates to the provision of the health and safety policy and procedures.

Majority Decision Conclusion

72. For the reasons set out in paragraphs 1 to 39 above, the majority of the Tribunal concluded that the request was vexatious within the meaning of section 14 of FOIA such that the Council had not been obliged to comply with the request. The majority of the Tribunal uphold the Decision Notice and dismiss the appeal.

Signed

Deputy Chairwoman
Date 19th May 2008