

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 25 July 2017 (issued under the slip rule, correcting the earlier decision dated 17 July 2017, following the hearing on 19 June 2017), under file reference EA/2016/0272 does not involve any error on a point of law. The First-tier Tribunal's decision stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

Representation

The Appellant: Mr Colin Thomann of Counsel, instructed by the Government Legal Department

The First Respondent: Mr Michael Armitage of Counsel, Instructed by the Information Commissioner

The Second Respondent: Ms Aileen McColgan of Counsel

REASONS FOR DECISION

What this appeal is about: the legal question

1. The legal question at the heart of this appeal relates to the proper assessment of an allegedly "vexatious" request (within the meaning of section 14(1) of the Freedom of Information Act 2000 [FOIA]). In particular, does a compelling public interest in the disclosure of information held by a public authority necessarily trump any consideration of the resource burden involved in complying with that request, such that the request cannot under any circumstances be regarded as vexatious?

2. The short answer to that question, as a matter of principle, is no.

3. However, in the present case I conclude that the First-tier Tribunal did not err in law. Despite some infelicitous language, it did not start from (or indeed end at) the position that the answer to the question posed in paragraph 1 above was necessarily in the affirmative. Rather, I find that the First-tier Tribunal concluded, *in the particular circumstances of this case* and looking at matters in the round, that the significant public interest in the disclosure of the requested information had the effect *in this instance* of outweighing the undoubtedly burdensome resource considerations. It followed the First-tier Tribunal was entitled to come to the decision it did. It follows equally that the public authority's appeal to the Upper Tribunal is dismissed.

4. I held an oral hearing of this appeal on 16 May 2018 at Field House in London. The Appellant, the Cabinet Office, was represented by Mr Colin Thomann of Counsel. The First Respondent, the Information Commissioner, was represented by Mr Michael Armitage of Counsel. The Second Respondent, Professor Nigel Ashton, was represented by Ms Aileen McColgan of Counsel. I am indebted to them all for their helpful submissions. In this decision I refer to the parties by their names, rather than by party status, as it is easy to fall into the trap of assuming that “the appellant” in an information rights case is the individual requester.

What this appeal is about: the factual background

5. So far as the background to the case is concerned, for present purposes it is sufficient to rely on the helpful summary provided by the First-tier Tribunal in paragraph 1 of its decision:

“1. Professor Ashton holds a chair in International History at the London School of Economics. He has been in correspondence with the Cabinet Office with a view to obtaining access to the Prime Minister’s Office files relating to relations between Libya and the UK and sought the assistance of the Information Commissioner. On 10 November 2014 he made a request which set out his interests when he asked for the release of all the Prime Minister’s Office files on relations with Libya from 1988-2011. In this request he indicated his interests ‘... *the Lockerbie bombing and the subsequent investigations ... Libyan terrorist activities ... the Libyan nuclear programme relations with the former Libyan leader Muammar Qaddafi*’ (bundle page 44). The final form of the request (9 February 2015) which was the subject of a decision by the Information Commissioner (‘ICO’) was for files covering 12 years:-

‘I would like to request the release under the FOIA of the following files:

John Major

Libya internal situation/relations - part 9 01/09/90 - 01/02/94

Libya internal situation/relations - part 10 24/12/94 - 01/05/97

Tony Blair

Libya internal situation/relations 1 02/05/97 - 25/02/99

Libya internal situation/relations 2 26/02/00 - 03/07/00

Libya internal situation/relations 3 04/07/00 - 07/06/01

Libya internal situation/relations 1 08/06/01 - 30/09/02’.

6. After a lengthy exchange of correspondence, the Cabinet Office on 27 November 2015 formally refused Professor Ashton’s request for these ‘PREM’ (Prime Minister’s Office) files on the ground it was a “vexatious” request within section 14(1) of FOIA. Professor Ashton lodged a complaint with the Information Commissioner.

7. On 13 October 2016 the Information Commissioner issued Decision Notice FS50584503. The Senior Case Officer (SCO) reviewed the request in the light of the Commissioner’s guidance on the types of case where a request might be refused because of the burden of undertaking activities which did not ‘count’ for the purposes of the cost limit under section 12 of FOIA. Section 12, of course, covers the location and retrieval of relevant information but not the process of making redactions to documents. The SCO accepted that the six files requested by Professor Ashton contained a total of 1,053 pages. She also acknowledged that compliance with the request would impose, in her words, “a grossly oppressive burden in terms of activities that are not covered by the section 12 costs limit” (Decision Notice at §33),

even if the Cabinet Office's own estimates were not accepted in full. Moreover, it is noteworthy that the SCO did not accept the Cabinet Office's arguments about the burden on other departments and agencies had been established (Decision Notice at §36-§38).

8. The SCO recognised that the motive for Professor Ashton's request was "one very much in the public interest" (Decision Notice at §30). However, citing the Upper Tribunal's decision in *CP v Information Commissioner* [2016] UKUT 427 (AAC), in the same passage the SCO remarked as follows (footnote omitted):

"However, this does not mean that the request is not vexatious. No matter how serious a request's purpose, there comes a point when the burden it places on a public authority is such that it outweighs the value in compliance. The Upper Tribunal recently confirmed that the public value in a request is '*important but not the only factor*' in determining whether a request is vexatious."

9. The SCO concluded as follows:

"39. The Commissioner's decision is that the Cabinet Office has met the criteria for proving that a request is vexatious based purely on the burden it would impose upon its own resources. Whilst the Commissioner notes the complainant's points regarding the public interest in the information, and the efforts to reduce the scope of the request, the amount of relevant information and detailed considerations that would be required means that compliance with the request in this case would represent an unjustified burden upon the Cabinet Office's resources."

The First-tier Tribunal's decision

10. With the consent of the parties, the First-tier Tribunal (from now on, 'the Tribunal') dealt with the appeal 'on the papers'. The Tribunal allowed Professor Ashton's appeal against the Information Commissioner's Decision Notice. The Tribunal directed the Cabinet Office, within 35 calendar days, either to disclose the requested information or to issue a fresh response under FOIA which did not rely on section 14.

11. The Tribunal's decision falls conveniently into three parts. The 'Introduction', covering paragraphs [1]-[15] actually comprises two halves. The first section (paragraphs [1]-[10]) summarises the factual background to the appeal. In doing so, the Tribunal explained why section 12 did not assist the Cabinet Office:

"9. The time and effort required to do this will be considerable. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 prescribe the cost of complying with a request above which s12 FOIA allows a public authority to refuse to comply with a request for information. However the method of estimating cost for these purposes only allows certain activities to count and limits the cost of time to £25 per hour. The cost of, for example, identifying redactions which need to be made in the interests of national security, do not fall within the list of activities which count towards the cost limit. If such activities did, the cost of this would on the evidence before the tribunal far exceed the cost limit and the Cabinet Office could properly rely on s12. A Deputy Director of the Cabinet Office estimates the total time for the Cabinet Office at 80 hours, in addition to the time of other departments. The time allowed for activities falling within the Regulations is 18 hours and so within the cost limit. The Cabinet Office therefore cannot in this case rely on s12 FOIA to say that the

burden imposed by the request is too high and it should not be required to comply.”

12. The second half (paragraphs [11]-[15]) of this opening part seeks to summarise the relevant case law, with extensive citations from *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 and also from both the Upper Tribunal’s decision in *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC) and, on further appeal, the decision of the Court of Appeal in the same case ([2015] EWCA Civ 454; [2015] 1 WLR 5316; [2015] AACR 34).

13. The ‘Consideration’ (paragraphs [16]-[18]) comprises the Tribunal’s discussion and analysis of the issues (see further below).

14. Finally, the Tribunal’s ‘Conclusion and remedy’ is set out in paragraph [19] (on which see paragraph 15 below).

15. The key part of the Tribunal’s reasoning is to be found at paragraphs 17 and 18 (italics are as in the original). Given the nature of the challenge made in this appeal, it is important to refer to this passage in full:

“17. The records he seeks concern the reaction of the UK Government to the murder of hundreds of people over Lockerbie by a Libyan agent, the involvement of the Government of Libya in facilitating the murders committed by the PIRA, the rapprochement with that Government in the light of concern about Islamist terrorism and the decision to use force to protect an insurgency against that Government during the Arab Spring. These are all substantial questions of public policy where there is a profound public interest in understanding the Government’s approach. The information sought is of great value to the public and to a historian. Clearly much information is in the public domain, in the form, for example, of Ministerial Statements in Parliament. However more information is held and some at least of the information sought could be released.

18. From the information before us there is no suggestion that there is any basis for the claim that the request is vexatious other than the burden which complying with the request would impose on the Cabinet Office and other departments. The guidance of the Court of Appeal must be read as a whole and is clear. The starting point is that this is a request for information which is of great public value and significance. Vexatiousness, in Lady Arden’s words, ‘*primarily involves making a request which has no reasonable foundation*’. That primary definition of vexatiousness alone in the view of this Tribunal takes this request outside the scope of the ICO’s guidance referred to above. There is substantial public interest in the request, there is no suggestion of any improper motive, the request is aimed at ‘*the disclosure of important information which ought to be made publicly available*’; and it will be subject to redaction. Given the public significance of what is sought it is not (as the ICO suggested) ‘grossly oppressive’. The Cabinet Office witness statement sees Professor Ashton’s potential series of requests for papers relating to relations with Libya between 1969 and 2011 as, in effect, having the consequence of moving forward the review and release to the National Archive of a whole series of files, with potentially disruptive effects for the programme of preparing other files for release and even resulting in a failure of their duties under the Public Record Act (see Witness Statement para 37, p103 bundle). We do not accept that this concern about the disturbance of other activities can override our decision on the application of s14 in the case before us. Redaction of the requested files will no doubt take time, but cannot in the present case and context be seen as a

disproportionate squandering of public resources. As the Court of Appeal made clear the role of s14 in protecting public resources requires a finding the request is vexatious and (with respect to the aim of protecting public resources) – ‘*that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy (para. 2 above), been carefully calibrated.*’ Where a clear and substantial public interest in the request has been established, s14 cannot be invoked simply on the grounds of resources. Paragraph 86 of Lady Arden’s judgement must be read in the context of the constitutional significance of the rights conferred by FOIA and as she indicated, reliance on s12 is more straightforward than s14 which requires the circumstances to justify a finding of vexatiousness which is a high standard.”

16. I have underlined the penultimate sentence of paragraph 18 (in this decision referred to simply as ‘the underlined sentence’) as counsel for the Cabinet Office and the Information Commissioner both trained their forensic fire on that particular passage. In addition, the operative part of the final paragraph [19] of the Tribunal’s decision should be noted:

“Conclusion and remedy

19. It is clear that the Cabinet Office has substantial arguments as to the burden which is imposed by this request and has taken significant steps to try and come to some accommodation with Professor Ashton. ... The request as it stands and the circumstances surrounding it do not reach the high standard required for it to be considered vexatious. S14(1) is not engaged in this case. The tribunal is therefore satisfied that the decision notice is not in accordance with the law and the appeal is upheld. S14 is not an appropriate way for the Cabinet Office to approach Professor Ashton’s request and the request and the significant exemptions which will be engaged should now be considered on their merits.

The Cabinet Office’s grounds of appeal

17. The Cabinet Office advances two grounds of appeal. The first ground of appeal is that the Tribunal misinterpreted the scope of the “vexatiousness” provision in section 14 of FOIA. It is argued that the Tribunal erred in law by reasoning that, once a “substantial public interest” had been established in the information sought, section 14 could not be invoked, regardless of the resource implications of the request. This reasoning, it is said, is inconsistent with previous higher authority.

18. The second ground of appeal is that the Tribunal failed, when applying the vexatiousness test, to take into account at all material factors, and/or to give adequate regard to (a) Professor Ashton’s failure to agree or engage with efforts to narrow his request thematically, by subject or topic, and agreeing only to sequence his request to consecutive chronological tranches (thereby, in fact, increasing the resource burden); and (b) the impact of his request upon a limited pool of employees with the requisite expertise to undertake this work and/or the ability of the Cabinet Office to fulfil its other functions.

19. The Tribunal itself gave permission to appeal to the Upper Tribunal on ground 1, while I later gave permission, albeit with some hesitation, on ground 2.

20. In summary, the Information Commissioner supported the Cabinet Office on its primary ground of appeal, but not on the second ground. Professor Ashton, understandably, resisted the appeal on both counts.

The parties' submissions in outline on ground 1

21. Mr Thomann, for the Cabinet Office, submitted that the Tribunal had erroneously proceeded on the basis that, in applying the section 14 assessment, resource implications cannot be relied upon without more, once a clear and substantial public interest in the request has been established. This approach, he contended, both put an impermissible gloss upon the statutory test of vexatiousness and was inconsistent with previous authority. The central premise of Mr Thomann's argument was set out as follows in his skeleton argument:

"28. The First-tier Tribunal therefore erred in drawing a 'bright line' exemption for cases where, in the Tribunal's opinion, there is a clear and substantial public interest underlying the request. The reasoning in the appealed decision is that section 14 then cannot be invoked on the grounds of resources: para 18 of the judgment under appeal.

29. This is not merely the ordinary reading of the language of the First-tier Tribunal; see for example the following passages (paragraph numbers in square brackets):

'Where a clear and substantial public interest has been identified, s.14 cannot be invoked simply on the grounds of resources' [18];

'S14(1) is not engaged in this case' [19],

'S14 is not an appropriate way for the Cabinet Office to approach Professor Ashton's request' [19]."

22. Mr Armitage, for the Information Commissioner, agreed with Mr Thomann that the Tribunal had misdirected itself in law by drawing a 'bright line' according to which section 14(1) may not be invoked, irrespective of the effect of complying with a request on a public authority's resources, in cases where there is a substantial public interest underlying the request for information. Looking at the wider context, in the Commissioner's role as public guardian of FOIA, Mr Armitage argued as follows in his skeleton argument:

"4. Ground 1 raises an issue of law that is of considerable importance for the operation and integrity of the freedom of information regime. The ability to refuse a request on resources grounds under section 14(1) operates as a key safeguard for public authorities who receive oppressively burdensome requests, particularly in circumstances in which the 'cost of compliance' exemption provided for in section 12 FOIA cannot be invoked. The Commissioner's position is that, as a matter of law, section 14(1) may be invoked on grounds of resources alone, a point that is clear in particular from the Court of Appeal's judgment in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (*'Dransfield'*)."

23. Ms McColgan, for Professor Ashton, confronted the principal argument by the Cabinet Office and the Information Commissioner head on. Her primary submission was that the Tribunal had not reached its decision on the basis suggested by Mr Thomann, namely that "once a 'substantial public interest' had been established in the information sought, section 14 could not be invoked, regardless of the resource implications of the request". In her submission the Tribunal had engaged in a careful analysis of the decision of the Court of Appeal in *Dransfield*. Its starting position was that of Arden LJ in that case: namely vexatiousness "primarily involves making a request which has no reasonable foundation". The Tribunal had reached a clear

finding of fact that Professor Ashton's request was not "grossly oppressive", the implication being that, had it been, section 14 might have applied. It then went on to rule in terms that the request "cannot in the present case and context be seen as [involving] a disproportionate squandering of public resources". The underlined sentence in paragraph [18] of the decision on which Mr Thomann and Mr Armitage had concentrated their attack was (a) not the basis for the Tribunal's decision and in any event (b) not inconsistent with the Court of Appeal's decision in *Dransfield*.

The Upper Tribunal's analysis: ground 1

What does the law say about the proper legal test under section 14 of FOIA?

24. The leading case on section 14 is plainly the decision of the Court of Appeal in *Dransfield*. That decision in turn can only properly be understood in the context of my own Upper Tribunal decision at an earlier stage in the same appeal. In *CP v Information Commissioner* [2016] UKUT 427 (AAC) Upper Tribunal Judge (now Mrs Justice) Knowles helpfully set out the main themes as follows:

"FOIA: Section 14(1)

21. The right to request information under section 1 of FOIA is subject to section 14. Section 14(1) provides that '*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious*'. There is no statutory definition of what constitutes a vexatious request within FOIA.

(i) The Upper Tribunal in Dransfield

22. In the Upper Tribunal decision of *Dransfield* [see reference in paragraph 14 above], 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 [paragraph 10]. 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*' [see paragraph 72 of the *Dransfield* judgment in the Court of Appeal; reference in paragraph 18 above].

23. The test under section 14 is whether the request is vexatious not whether the requester is vexatious [paragraph 19]. The term '*vexatious*' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA [paragraph 24]. 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 [paragraph 25]. 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 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 [paragraph 26].

24. 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 [paragraph

28]. 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.

25. As to burden which is of relevance in this appeal, 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 [paragraph 29]. 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 [paragraph 30]. 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 [paragraph 31].

26. 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 [paragraph 32]. The Upper Tribunal considered the extensive course of dealings between Mr Dransfield and Devon County Council which, in the relevant period, comprised some 40 letters and several FOIA requests when coming to the conclusion that his request was vexatious [see paragraphs 67-70].

27. 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 [paragraphs 43 and 45].

(ii) The Court of Appeal in Dransfield

28. 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 [paragraph 69, judgment].

29. Arden LJ gave some additional guidance in paragraph 68:

'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...'

30. 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."

25. Judge Knowles also observed in *CP v Information Commissioner* that the Court of Appeal had stressed that "an objective approach must be used when assessing if a request is vexatious. The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. It is clear from the Court of Appeal's decision that the public interest in the information which is the subject of the request cannot act as a trump card so as to tip the balance against a finding of vexatiousness" (at paragraph 45).

26. This echoed the following observation of Arden LJ, when dealing with the appeal in *Craven v Information Commissioner and DECC*, which had been heard alongside *Dransfield* in the Upper Tribunal ([2012] UKUT 442 (AAC)) and also with that appeal in the Court of Appeal ([2015] EWCA Civ 454; [2015] AACR 34):

"85. As the UT held, there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request.

86. In addition I would agree with the UT's observation that, if the authority can easily show that the limits in section 12 would be exceeded, it would be less complicated for it to rely on that section, rather than section 14."

27. The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a

resources argument. As Mr Armitage put it in the Commissioner's written response to the appeal (at §18):

- a. *In deciding whether a request is vexatious within the meaning of section 14(1), the public authority must consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.*
- b. *The burden which compliance with the request will impose on the resources of a public authority is a relevant consideration in such an assessment.*
- c. *In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.*

What did this Tribunal say as to the proper legal test under section 14 of FOIA?

28. In his oral submissions Mr Thomann rightly acknowledged that the Tribunal's decision should not be read as though it were a statute.¹ There is certainly ample judicial authority for the proposition that tribunals' decisions should be read with a suitable degree of appellate judicial restraint – see the case law cited by Upper Tribunal Judge Markus QC in her recent decision in *Oxford Phoenix v Information Commissioner and MRHA* [2018] UKUT 192 (AAC) at paragraphs 50-55. See also Lord Hope's comment to the same effect in *Shamoon v Chief Constable for the Royal Ulster Constabulary* [2003] UKHL 11; [2003] ICR 337:

"59. ... It has also been recognised that a generous interpretation ought to be given to a tribunal's reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis."

29. So, reading this Tribunal's decision, what do we find? The structure of the Tribunal's decision and the central passages in its reasoning have been set out above (at paragraphs 10-15). As noted, there is copious citation of case law authority at paragraphs [11] through to [15] of the Tribunal's decision. Those citations include my statement in *Dransfield* (at paragraph 43 of the Upper Tribunal's decision) that "one particular factor alone, present to a marked degree, may make a request vexatious even if no other factors are present. The question ultimately is this – is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?". They also include Arden LJ's reminder in *Dransfield* that "the decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious" (at paragraph 68 of the Court of Appeal judgment). They additionally include Arden LJ's confirmation (at paragraph 85) that "there is no warrant for reading section 14 FOIA as subject to

¹ This type of comparison by reference to the gold standard of statutory drafting may need revisiting in the light of more recent experience: see the excoriating editorial by D Greenberg, "Standards of Drafting of Primary Legislation in the United Kingdom" (2018) 39 *Statute Law Review* v, citing several "staggeringly elementary errors in drafting" in the Prisons and Courts Bill (a measure lost with the calling of the 2017 General Election).

some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request”.

30. There was no real criticism by either Mr Thomann or Mr Armitage of the Tribunal’s citation of authority and nor could there be, as the passages from the case law stand and speak for themselves. True, the Tribunal mis-numbered paragraphs 85 and 86 of Arden LJ’s judgment in *Dransfield* as paragraphs 86 and 87, but this was presumably no more than a typographical or formatting error. The recitation of the substance of the legal principles involved is quite properly unchallenged.

31. It follows that Mr Thomann and Mr Armitage have to persuade me that the Tribunal, having correctly set out the relevant law in paragraphs [11] to [15], then went ahead and either misapplied and/or forgot those principles in its analysis at paragraphs [16] to [19]. On the contrary, I find Ms McColgan’s reading the more compelling one. Thus the Tribunal recognised at the outset of paragraph [18] that the burden on the public authority was the only factor pointing towards a finding that the request was vexatious. Against that, the Tribunal recognised that “the starting point is that this is a request for information which is of great public value and significance” and there was a “significant public interest in the request”. Moreover, there was “no suggestion of any improper motive” and (echoing Arden LJ) “the request is aimed at ‘the disclosure of important information which ought to be made publicly available’”. The material requested would also be “subject to redaction”, which could not properly be described as a “disproportionate squandering of public resources”. The Tribunal further found, as regards the burden involved, that “Given the public significance of what is sought it is not (as the ICO suggested) ‘grossly oppressive’”. To my mind that last finding does not suggest that public interest automatically trumps the resource burden on the public authority. Rather, the Tribunal was making a relative assessment. In other circumstances the resource burden might well have led to a conclusion that the request was vexatious. But, in the particular circumstances of this case, the Tribunal found that the considerable public significance of the requested material outweighed that consideration.

32. So, even if the reasoning is in places a little compressed, it is clear to me that the Tribunal was engaged, as it had to be, on a holistic assessment of vexatiousness in the round, talking into account the appropriate constellation of relevant considerations. It did not simply (and simplistically) conclude that “this is a request for information which is of great public value and significance” and *therefore* it necessarily overrode any consideration of the burden on the public authority. Rather, the scales of the various factors were weighed in the balance and an all-round assessment arrived at on the facts, namely that the request was not vexatious. In doing so the Tribunal acknowledged entirely properly that the threshold for a finding of vexatiousness is a high one and the strength of the public interest in the requested material is necessarily highly material (but not determinative) of that assessment.

33. So what then of the underlined sentence in paragraph [18] of the Tribunal’s decision? Taken in isolation and at face value, I accept that the natural reading of that passage is that section 14 cannot be invoked on the ground of resources where there is a clear and substantial public interest in the request. But does this natural reading mean that the Tribunal applied the wrong test and so erred in law? I conclude that it does not, as the underlined sentence must be read against the backdrop of the decision as a whole. In my view the underlined sentence is neither “the core of its reasoning” (Mr Thomann’s skeleton argument at §17) nor “the heart of the FTT’s reasoning” (Mr Armitage’s written response at §2). Rather, and for the reasons set out above, I am satisfied that the Tribunal was properly engaged in making a holistic assessment of all relevant considerations. If the Tribunal had truly

erred in the way being suggested, then its previous analysis of the various considerations would have been redundant. Indeed, the very next sentence in paragraph [18] supports Ms McColgan's analysis. In that sentence the Tribunal explicitly referred to paragraph 86 (a typo for paragraph 85) of Arden LJ's judgment in *Dransfield*, namely her observation that "there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request". So, this demonstrates that the Tribunal had that proposition of law firmly to the fore of its collective mind. All the Tribunal was saying was that this principle "must be read in the context of the constitutional significance of the rights conferred by FOIA". In the final analysis I regard the underlined sentence, as Ms McColgan put it during oral argument, as being "at worst an unfortunate throwaway line".

34. In the course of both his oral and written submissions, Mr Thomann also relied on four other passages in the Tribunal's decision as supporting his central argument that the Tribunal had applied the wrong test and so had erred in law. I will take each in turn.

35. The first was the Tribunal's statement, also in paragraph [18] of its decision, that the "primary definition of vexatiousness alone in the view of this Tribunal takes this request outside the scope of the ICO's guidance referred to above". The "primary definition" was a reference back to Arden LJ's holding that vexatiousness "primarily involves making a request which has no reasonable foundation" (*Dransfield* at paragraph [68]). The reference to the guidance was to the ICO's publication *Dealing with vexatious requests (section 14)* and especially the guidance on *Requests which would impose a grossly oppressive burden but are not covered by the section 12 cost limits* (paragraphs 69-74). This guidance was summarised by the Tribunal at paragraph [5] of its reasons. In the passage under challenge the Tribunal was doing no more than saying that, given the high threshold for a finding of vexatiousness, it was not satisfied that the instant case was properly characterised as one where there was a "grossly oppressive burden" on the public authority.

36. The second was the statement, again in paragraph [18] of the Tribunal's decision, that (in the context of the National Archives point) "We do not accept that this concern about the disturbance of other activities can override our decision on the application of s14 in the case before us." It is an unduly literal reading of that sentence to read "can" in that context as meaning "can as a matter of principle". The Tribunal was simply making the point that on its factual findings it did not consider the National Archives point to be determinative. That was ultimately an issue of fact for the Tribunal to assess.

37. The third was the assertion in paragraph [19] of its decision that "S14(1) is not engaged in this case". I do not read that sentence, as Mr Thomann suggests, as using "not engaged" in the rather narrow meaning of that word, i.e. as being precluded on principle. This paragraph is simply the Tribunal's concise summing up of its decision as a whole. The sentence to which objection is taken must be read in context, as Ms McColgan submits. For example, the preceding sentence is illustrative of the balancing exercise undertaken: "The request as it stands and the circumstances surrounding it do not reach the high standard required for it to be considered vexatious". All that "S14(1) is not engaged in this case" is saying is that on the facts the Tribunal decided that the section 14 test was not satisfied. No more and no less than that.

38. The fourth was the further statement in the same paragraph to the effect that “S14 is not an appropriate way for the Cabinet Office to approach Professor Ashton’s request”. This challenge is equally unpersuasive. Again, all the Tribunal was doing was simply reiterating its conclusion that, on the facts as found, section 14 did not apply.

39. For the avoidance of doubt, I was also not persuaded that the terms in which the Tribunal gave permission to appeal on ground 1 necessarily showed that it had fallen into error in its approach to the section 14 balancing exercise. The grant of permission does not in terms say that the burden on the public authority can never outweigh a compelling public interest.

40. For the most part Mr Armitage relied on the same passages as Mr Thomann in support of his submission that the Tribunal had erred in law on ground 1. I do not find those challenges persuasive for the reasons set out above. Mr Armitage also referred to the terms of the Tribunal’s substituted Decision Notice. However, it seems to me that wording is equally consistent with the view that section 14 was simply not satisfied in the circumstances of this case.

41. Mr Armitage also relied upon *Craven v Information Commissioner and DECC* (see paragraph 26 above). That case confirms that a request may be vexatious (or, in the context of the Environmental Information Regulations (EIR), “manifestly unreasonable”) purely on the basis of the burden of compliance on the public authority. As Mr Armitage pointed out, *Craven* was not referred to by the Tribunal in its decision. I am not sure that takes him very far, given (i) *Craven* does not seem to have been cited to the Tribunal, (ii) the case turned on the EIR and not FOIA, and (iii) in any event it added little on this point to the principles expounded in *Dransfield*. Mr Armitage noted that the cost of compliance in *Craven* involved 68 hours of work (on a reverse calculation from the information provided in paragraph 86(iii) of the Upper Tribunal’s decision), well over the section 12 limit. This was, he pointed out, in the same sort of region as the present case. The short answer to this is that these cases are necessarily fact-specific. Furthermore, as Ms McColgan observed, *Craven* was a case in which although there was some general public interest in the nature of the information requested, it was not of such a strong and compelling nature as in the present case. There were, moreover, a number of further factors which weighed in the balance and led to the conclusion that the request in that case was “manifestly unreasonable” (see paragraphs 86(i), (ii) and (iv) of *Craven*).

42. It follows that I agree with Ms McColgan’s primary submission that the underlined sentence in paragraph [18] of the decision was not the basis for the Tribunal’s decision.

43. For all those reasons I conclude that ground 1 is not made out.

The parties’ submissions in outline on ground 2

44. The Cabinet Office pursued ground 2 in the event I was not with it on ground 1. It was argued by Mr Thomann that there were additional factors, capable of supporting a finding that the request was vexatious within section 14(1), which had not properly been taken into account by the Tribunal. The first of these was said to be a failure by Professor Ashton, despite concerted efforts by the Cabinet Office, to engage with efforts to render manageable the scope of his request by reference to specific topics or events. The second was that the nature of Professor Ashton’s FOIA request was such that staff resources stood to be diverted from a limited pool of the Cabinet Office’s staff with the requisite experience and knowledge to conduct the redaction of PREM files. Mr Thomann argued that such a diversion of a limited pool

of resources, and the impact of the further proposed request(s) on the Cabinet Office's ability to complete its other activities, could and should have been brought to bear as a material part of the overall section 14 balancing exercise.

45. Mr Armitage, for the Information Commissioner, did not support ground 2. Aside from ground 1, in his submission there had been no failure on the part of the Tribunal to have regard to any material considerations in making the required rounded section 14 assessment as to whether the request by Professor Ashton was vexatious in the proper sense of that term.

46. Ms McColgan, for Professor Ashton, had both a shorter and a longer answer to this second ground of appeal. The shorter answer was that this ground was an attempt by the Cabinet Office to dress up its disagreement with the Tribunal's findings of fact as a challenge for error of law. The longer answer, notably by detailed reference to specific communications and exchanges during the progress of the request, was that there was in any event no factual basis for the points that the Tribunal had allegedly failed to take on board.

The Upper Tribunal's analysis: ground 2

47. I can deal with this ground of appeal more succinctly. The hesitation which I had in giving permission to appeal on this second ground has been amply justified by hearing fuller argument on the point. As already noted, this ground of appeal subdivided into two distinct points.

48. The first (ground 2a) was the Cabinet Office's submission that Professor Ashton had failed to narrow the terms of his FOIA request (e.g. by specifying particular events or topics of interest) so as to make it more manageable. Furthermore, this alleged failure was a matter that should properly have been considered in the overall assessment of whether the request was vexatious. For the reasons that Ms McColgan sets out in her skeleton argument, and which I need not repeat in detail here (as they are issues of pure fact), the evidential material before the Tribunal amply demonstrated that Professor Ashton had engaged with the Cabinet Office to reach some form of accommodation. Indeed, that had been the Information Commissioner's own finding (see paragraph 8 above). There was, very simply, no evidential basis on which the Tribunal could properly have found that Professor Ashton had failed to co-operate with the public authority. The most that could be said, as the Tribunal duly found, was that following these exchanges "no resolution was reached" (Tribunal's reasons at paragraph [2]). The Tribunal, like the Information Commissioner, found no basis on which to criticise the way in which Professor Ashton had pursued his request during that process.

49. The second discrete point (ground 2b) was the argument that the Cabinet Office had a limited pool of staff in its National Archives team with the relevant expertise to carry out the necessary review of the PREM files in question and that the Tribunal had also failed to have regard to this factor. However, this was again a classic question of fact. The Information Commissioner's Decision Notice had made reference to the nature of the burden on both the public authority and allied agencies (see e.g. Decision Notice at §24-§27 and §33-§36). The Tribunal in turn also made findings on these issues, including reference to the National Archives aspect of the case (see e.g. at paragraphs [9] and [16]). I am driven to the conclusion that this sub-ground, as with the first point, is simply an attempt to re-argue a question of fact that was properly the subject of determination by the Tribunal below.

50. However, underpinning this pragmatic question is an important issue of principle. Mr Armitage explained that the Information Commissioner opposed ground 2b "to the

extent that the Cabinet Office seeks to contend that section 14(1) entitled a public authority to refuse to comply with a request for information on the general basis that it is struggling to meet a large number of obligations with limited resources” (written response at §39). As Mr Armitage observed, “the same is true for the majority of public authorities, and recognition of any such entitlement would deprive the right to information under section 1 FOIA of much of its effectiveness.”

51. For all those reasons I dismiss ground 2 too.

Conclusion

52. I therefore conclude that the decision of the First-tier Tribunal does not involve any error of law. I accordingly dismiss the appeal by the Cabinet Office (Tribunals, Courts and Enforcement Act 2007, section 11).

Postscript

53. For completeness I should mention that at the Upper Tribunal hearing there were applications by both Professor Ashton and the Cabinet Office to admit further evidence, Professor Ashton wished to adduce a section 14 refusal letter from the Cabinet Office that had been sent to another academic researcher who had also made a FOIA request in relation to PREM files on Libya. The Cabinet Office objected to this application, but in turn wanted to adduce in evidence a further statement from Mr Roger Smethurst, the senior civil servant at the Cabinet Office responsible for departmental records and information management. I took the provisional view that neither piece of evidence was going to assist in the main task at hand, namely identifying whether the Tribunal had erred in law. I accepted that if there was any question of the Upper Tribunal re-making the decision under appeal, then the further evidence may have been helpful. In those circumstances, and given the substantive outcome of the appeal, I did not consider it necessary to make any formal ruling on the applications to adduce extra evidence.

**Signed on the original
on 21 June 2018**

**Nicholas Wikeley
Judge of the Upper Tribunal**