IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0121 and 127**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50351891 and FS50346909

Both dated: 28th March 2011

Appellant: **Mr Anthony Swain**

Respondent: **Information Commissioner**

Heard on by way of telephone conference on 20th October 2011

Date of decision: **15th December 2011**

BEFORE:

Fiona Henderson (Judge)

Michael Hake

And

Jean Nelson

Subject matter:
FOIA - S 14 – whether request was vexatious request

Cases:

Rigby v Information Commissioner and Blackpool, Flyde and Wyre Hospitals NHS Trust EA/2009/0103

Hossack v Information Commissioner and DWP EA/2007/0024

Welsh v Information Commissioner EA/2007/0088

IN THE FIRST-TIER TRIBUNAL Case No. EA/2011/0121 and 127
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal and upholds the Decision Notices **FS50351891 and FS 50346909 both** dated 28th March 2011 for the reasons set out in main body of the Decision.

Signed

Fiona Henderson (Judge)
Dated this 15th day of December 2011

REASONS FOR DECISION

Introduction

1. The Appellant has been in dispute with the Student Loan Company (SLC) having lodged a complaint in 2006. The Appellant had issued proceedings in the County Court, however, as of September 2011 these are now settled in the Appellant's favour.

2. Pursuant to his attempts to resolve the underlying dispute the Appellant has made on his own account 30 FOIA requests[1] between January 2006 and June 2008. These requests often included more than one part and amounted to some 45 separate elements. Answering these elements often entailed the collation of several pieces of information[2]. He has successfully appealed to the Commissioner on 3 occasions, 2 of which related to the provision of documents in paper form when the Appellant had asked for documents in an electronic format. The last 5 requests of 2008 were refused on the basis that they were vexatious. At this point the Appellant modified his behaviour and ceased making requests until the requests that are the subject of this appeal in 2010.

Appeal EA/2010/0026

3. The information request of 22nd June 2007 asked the SLC for 12 listed documents in electronic format. Following the involvement of the Commissioner these were all provided in electronic format except for "a correspondence manual" which had required redaction. This had been redacted manually and the SLC argued that it was too large to be scanned and emailed by its systems and that it was not therefore reasonably practicable to provide electronically. The redacted document had been provided in paper format.

4. Whilst the matter was before the Commissioner the SLC explained that the version of the Correspondence Manual held at the date of the request was version 19, this was now only held in paper form. Version 20 was held

[1] Additionally there were 3 requests for personal data
[2] The request of 22.6.2007 asked for 12 separate documents

electronically and was said not to vary significantly from version 19. They offered to provide version 20 in electronic format on 1st October 2009. The Appellant did not at that stage ask for a copy of version 20 and the Commissioner in Decision Notice FS50241605 dated 14th December 2009 held that it would not be reasonably practicable to provide version 19 in electronic format.

5. The Appellant appealed that decision Notice to the Information Tribunal (EA/2010/0026). As a consequence of preparing the appeal papers for the Tribunal Judge in that case, the Tribunal Office scanned the paper version of version 19 into electronic format which was offered to the Appellant. This would have fulfilled his original information request. The Appellant declined to accept the document and indicated that he wished to continue with the appeal.

6. The history of Appeal EA/2010/0026 is that:

    - It was struck out by the Tribunal on 14th May 2010 on the basis that the grounds had no reasonable prospect of succeeding.
    - The Appellant applied to set aside the strike out on 14th July 2010.
    - This was refused on 2nd August 2010.
    - The Appellant applied to the First Tier Tribunal for permission to appeal to the Upper Tribunal on 7th September 2010.
    - The First Tier Tribunal refused permission to appeal on 20th September 2010 and informed the Appellant that he could apply for permission to appeal to the Upper Tribunal within 28 days of the decision. Any such appeal would have been on a point of law only.
    - The Appellant has not yet done this, but has drafted an application for permission to appeal dated 22nd September 2011 which has been provided to the first tier Tribunal as part of these appeal proceedings, but not lodged with the Upper Tier Tribunal. The draft grounds of appeal do not include an application to appeal out of time notwithstanding that this document was drafted 11 months after the 28 day time limit for appealing had expired.

The requests for information in this appeal

The first Request[3]:

7. On 16th May 2010 the Appellant wrote to the Student Loan Company referring to their email of 1st October 2009 stating:

   "*You offer to provide me with an electronic copy of issue 20 of the document known as the Correspondence Manual. If you would advise me of the date on which issue 20 of this document came into effect at Student Loans Company, I would be grateful*."

   On 25th May 2010 the SLC informed the Appellant that no further information would be provided, as they considered this to be relevant to the appeal which had been struck out. Given the time that had elapsed since its offer to provide a copy of version 20 (over 7 months) they were of the view that the matter was concluded.

8. After further correspondence in which the Appellant clarified that this was a request under FOIA, the SLC provided a refusal notice dated 15th June 2010 informing him that they viewed the request as vexatious under s14(1) FOIA. They upheld this decision in an internal review dated 22nd July 2010.

The second Request[4]

9. On 19th July 2010 the Appellant asked for information from the Student Loans Company[5]:

   1. "*Information on word processing software (July 2007)*

      The manufacturer, name and version number of the word processing software used by SLC in July 2007 to create or update internal guidance documents (such the company's CLASS Training Manual and its "correspondence Manual") are required.

   2. *Information on document scanning equipment (July 2007)*

   ..

[3] Decision Notice FS50346909 relates to this request
[4] Decision Notice FS50351891 relates to this request
[5] The full terms of the request are set out on pages 3-5 of the Decision Notice FS50351891

a) *For each document scanning unit in the company's possession in July 2007 that served an administrative purpose, the manufacturer and model number*

b) *The total number of document scanning units in the company's possession in July 2007 that served an administrative purpose."*

10. The Appellant provided notes for clarification defining

- "document scanning unit" as an item of equipment capable of rendering an A4 paper document as an electronic file,
- "Possession" included owned, hired or otherwise in the company's care
- "Administrative purposes" excluded equipment used solely as an integral part of the company's core operational activities (e.g. high volume processing of deferment application forms).

11. The Appellant confirmed that with regard to 2(b) of the request an estimate should be provided if it was not possible to provide an accurate figure and that if the cost of complying with the request would be higher than the statutory limit (because of part 2a of the request) the answer should be provided for parts 1 and 2b only (providing the manufacturer and model for individual document scanning units where convenient).

12. The Appellant concluded the request with:

"If a response to this request is not received within ten working days, I shall assume that the company believes the request to be vexatious. A response stating that this is the case would nonetheless be appropriate for the sake of clarity."

13. The SLC refused the request on the basis that it was vexatious in its effect on the public authority (on 26th July 2010). The Appellant requested an internal review on 30th July 2010 and 25th August 2010. No internal review was conducted.

The complaint to the Information Commissioner

14. On 31st August 2010 the Appellant complained to the Commissioner in relation to both the information requests. The Commissioner issued Decision Notices FS50351891 and FS 50346909 both dated 28th March 2011 in which he found that the public authority correctly refused the requests for information as vexatious under s14(1) of the Act. In relation to the first request, decision Notice FS 50346909 also held that there was a breach of s17(5) FOIA in that SLC took 21 days to respond to the information request once it had been identified as such under FOIA.[6]

The appeal to the Tribunal

15. The Appellant appealed against the 2 Decision Notices to the Tribunal on 20th May 2011. In his grounds of Appeal the Appellant disputed the application of each of the criteria relied upon by the Commissioner in finding that the requests were vexatious. The Tribunal consolidated the appeals on 14th July 2011.

Legal submissions and analysis

16. S14 FOIA provides:

(1)Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

....

There is no definition of vexatious within FOIA however, in *Rigby v Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103* following a review of existing case law vexatious was held to be defined as an activity that "*is likely to cause distress or irritation, literally to vex a person to whom it is directed*". In *Hossack v Information Commissioner and DWP EA/2007/0024* it was noted that the consequenes of a finding that an information request is vexatious is much less serious than a

finding of vexatious conduct in other contexts and therefore the threshold for a request need not be set too high.

17. *Rigby* noted that the Commissioner's awareness Guidance 22 sets out a checklist of considerations to help determine whether a request is vexatious or not and found that whilst not binding "*the considerations it identifies are a useful guide to public authorities when navigating the concept of a "vexatious" request*" whilst noting that every case must be viewed on its own facts. Not every factor needs to apply but there should be strong arguments under one or more headings.

18. The Tribunal observes that there is a danger of "double accounting" in the use of the Commissioner's checklist as there is the potential for overlap between the categories. Many of the factors that are considered to be e.g. harassment may also apply equally to whether the requests cause an administrative burden. There is a risk that the same behaviour would fulfil 2 criteria thus leading to a weaker basis for finding a request was vexatious. The Guidance 22 criteria were used by the Commissioner to analyse the request and this approach is not challenged by Mr Swain. The Tribunal adopts this approach and has marshalled the arguments in terms of the headings identified by the Commissioner, however, it has remained alive to the danger of reaching the conclusion that the request fulfils several criteria based upon the same evidence.

19. The Tribunal is satisfied that it is not necessary to view the disputed information since the appeal turns on the nature and context of the request rather than the detail of the withheld information.

[6] This is not the subject of appeal and is not dealt with further in this decision.

Could the Request fairly be seen as obsessive, manifestly unreasonable or disproportionate?

20. The Tribunal notes that categorizing a request as "obsessive" is often distressing for an Appellant who may consider that it is a judgment upon them rather than the terms of the request. This Tribunal considers it more helpful to apply the terminology adopted by the Scottish Information Commissioner to define this characteristic of a vexatious request and asks itself whether in the opinion of a reasonable person the request[7], would be considered to be manifestly unreasonable or disproportionate (for example, in its complexity or in responding to it in the context in which it was made).

21. The Commissioner argues that the requests link to the earlier request (EA/2010/0026) and form part of the history of the Appellant's underlying dispute with the SLC. The Appellant argues that this case is separate from his underlying complaint with SLC and these 2 requests concerned appeal proceedings. The Tribunal is satisfied that the request cannot be separated from the Appellant's earlier correspondence since it has arisen out of his initial dispute with the SLC and was for information that he had applied for in connection with his case against the SLC.

22. The Freedom of Information Act is a mechanism for granting access to information. Whilst the Tribunal acknowledges that the way in which information is provided can provide a barrier to access (it can be easier to analyze information in electronic form rather than a paper copy), the Tribunal is satisfied that the Appellant's response to the provision of information is indicative of the fact that each request is manifestly unreasonable and that his focus has shifted as the complaint has evolved, making it impossible to resolve the matter satisfactorily.

i. The initial request was for "document 19". A preference was stated for it to be in electronic format. This was provided to the Appellant in paper format because it required redaction and this had been done manually.

[7] Not the requestor

ii. When the case was before the Commissioner in September 2009 (more than 2 years after the request was made) the Appellant was offered version 20 electronically. This had been redacted for other reasons and was said not to vary significantly from version 19. The Appellant did not take up this offer but persisted with the case before the Commissioner on the basis that he had asked for version 19 in electronic format.

iii. Version 19 was offered to the Appellant in electronic format when case EA/2010/0026 was before the Tribunal, but the Appellant did not by then wish the information itself.

23. Appeal EA/2010/0026 was now pursued on a point of principle relating to the facts as they existed some 3 years earlier. The focus had now shifted to the scanning capabilities at the time and the argument that the document could have been redacted electronically and/or scanned from a paper version. The decision would have had no practical impact on either the Appellant or the SLC, being out of date and confined to the facts as they were at the relevant time.

24. The Appellant argues that the information in both requests is necessary to further his appeal (EA/2010/0026). The Commissioner argues that these information requests are seeking to reopen an issue that has already been decided. The Tribunal notes that the status of the appeal at the date of:

- the first request was that it had been struck out and
- the second request was that the application for reinstatement had been refused.

The Appellant still had the option to apply to the First Tier Tribunal for permission to appeal on a point of law, and then if that was unsuccessful (as proved to be the case), the right to apply for permission to appeal to the Upper Tribunal. Whilst the Commissioner argues that using each avenue of appeal in the face of adverse rulings is itself indicative of manifestly unreasonable behaviour. The Tribunal reminds itself that the Appellant is not represented and that he has been informed of his right to appeal. It is for the Court from whom permission is sought to indicate whether the application has merit. The

Tribunal is therefore satisfied that the information requests do not represent an attempt to reopen a decided matter.

25. However, the Tribunal does note that on the Appellant's own account, the information was for use in the eventual appeal and NOT to assist him in making the applications to have the appeal reinstated or the application to appeal. The Tribunal is satisfied that asking for information, that the Appellant believed to be necessary for an appeal hearing (that might never take place), rather than focussing upon getting the appeal back on track; is manifestly unreasonable and disproportionate in its effect. It is focussing upon the actions of the SLC rather than the decisions of the Tribunal. The Tribunal is supported in this finding by subsequent events: the Appellant chose to pursue this information request rather than lodge an application to appeal with the Upper Tribunal during the time allowed.

26. Additionally in relation to the second request, the Tribunal notes that in the knowledge that his May request was being treated as vexatious, the Appellant submitted an even more detailed information request on a related topic. This is a factor that the Tribunal takes into consideration in concluding that this request was disproportionate and manifestly unreasonable.

Does the request lack any serious purpose or value?

27. In *Welsh v Information Commissioner EA/2007/0088* the Tribunal held that in assessing whether the request is vexatious:

"*... Identity and purpose can be very relevant in determining whether a request is vexatious"* para 21.

It is accepted that the request holds significance for Mr Swain who argues that it is necessary to advance his appeal EA/2010/0026. However, the fact that an applicant feels strongly about a matter does not give them the right to continue to pursue a matter under FOIA long after this is reasonable.

28. The Appellant's case is that

    i) the information was factually important to assist him to argue his case in Appeal EA/2010/0026. and

    ii) Pursuing the appeal had a serious value namely:

        a) He had had a recurring problem with SLC providing documents in paper format for no good reason despite his having specified that he wished to have them in electronic format.

        b) An amended Decision Notice in his favour would help to educate other authorities,

        c) He had a personal curiosity as to whether or not SLC and ICO had been at fault, and wanted to be vindicated.[8]

29. Whilst the Appellant has provided arguments as to why it was important that he persisted with his appeal, the Tribunal reminds itself that the Appellant had to get the Appeal readmitted before he could argue the substantive appeal. The Tribunal is satisfied as a matter of fact that this information was not necessary to enable him to make the set aside/appeal applications, neither was it requested by him in order to argue that the case should be reinstated. Those arguments could be (and in relation to the application to set aside and the application for permission to appeal were) made without the answers to the information requests.

30. The Appellant argues that at some point the Judge would "need to know" the answers. However, as set out in paragraph 35 below the answers to the requests would not have been determinative of the issues that he was seeking to prove. Additionally the Appellant's information requests were misconceived since in EA/2010/0026:

    a) the Commissioner did not dispute that the relevant time for consideration of the practicality of disclosing the document in electronic format was when the matter was being considered by the SLC and not when the matter was before the Commissioner.

[8] Other reasons for pursuing the appeal are not material to these information requests e.g. his challenge to the Commissioner's robust handling policy

b) There was also no dispute that at the time that the document was redacted it was held in electronic form.

31. By the time of the information requests of May and July 2010, it was some 3 years since the 22nd July 2007 request had been made. Any Tribunal decision would have been confined to the facts as they existed 3 years earlier and would be out of date in terms of scanning and word processing capability. It would not bind the Tribunal or even the Commissioner in other cases and rather than stating a legal principle, would be determined on the application of the facts. The Tribunal is satisfied that requiring the disclosure of this information for personal curiosity and a desire for vindication is disproportionate and does not constitute a serious purpose.

32. Whilst the Tribunal accepts that the Appellant believed that each request had value and a serious purpose and that these information requests would help in the eventual appeal which he believed would be reinstated: the Tribunal is satisfied that the requests did not in fact serve a useful purpose both in terms of the stage that had been reached in the proceedings and also in terms of what could be achieved through an appeal.

Would complying with the request impose a significant burden in terms of expense and distraction?

33. From the schedule provided by the Appellant, it is apparent that the Appellant's use of the Freedom of Information Act in terms of the volume and ambit of the requests made between 2006 and 2008 was reactive and unfocussed; in that he would learn of the existence of a piece of information and request it, as it might be of use. The Appellant has explained that once his requests were being classified as vexatious, although he did not agree with the categorization he modified his behaviour and did not make any requests between June 2008 and May 2010. The Tribunal accepts this, but considers that the historic pattern of the information requests was not linear but changed focus with a scattergun

approach, in that the Appellant can be seen to have followed a theme for a while and then changed course, all within the general field of the SLC administration. The Appellant's 2010 requests are typical, focussing as they do upon a matter tangential to the original information asked for. The Tribunal is satisfied that from the history of the case it would be reasonable for the public authority to conclude that the Appellant's desire for information from SLC would not be satisfied by answering the requests.

34. The Commissioner argues that responding to this request would lead to significant number of further requests and should therefore be considered as imposing a significant burden. The Appellant points to the simplicity of request of 16th May, and argues that the July request could be dealt with by reference to an assets register. He is further adamant that this request would not lead to additional requests and that any answer from SLC would be an end to the matter (in terms of FOIA requests).

35. It is not suggested that the response to either of these information requests would exceed the appropriate fees limit and s12 FOIA is not relied upon. Neither is it suggested that the response to either information request in isolation would impose a significant burden. However, the Tribunal is not satisfied that providing the information requested would be an end of the matter. The first information request was clearly not an end in itself as it was followed by the second information request. Additionally the Tribunal is satisfied that answers to the terms of the requests would not provide the definitive answers necessary to advance his case that the Appellant believes they would as:

a) the date when version 20 came into effect does not determine when version 19 ceased to be held electronically e.g. as a back-up file.
b) Word processing capability does not address staff training and knowledge and the ability of staff to use the software.

36. The Tribunal also notes that answering the July request potentially represents a significant amount of work (tracing the serial numbers and determining the use to which all the relevant machines in a large organization were to be put).

37. The Tribunal is satisfied that the administrative burden imposed by each of these requests and the cumulative effect of earlier information requests must be considered carefully. In the case of *Welsh v Information Commissioner EA/2007/0088* the Appellant had suggested that a doctor employ temporary workers to lift any burden. In that case the Tribunal observed that "*Simply to shrug off the burden placed on the doctors shows no awareness of the real burden placed on them from the cumulative effects of persistent demands, and the potential distraction from their ability to perform their normal duties*". The Tribunal considers that there is a parallel to be drawn even though the SLC is a much larger organization with a FOIA Officer. Request two included a timetable outside the Act and states: *"If a response to this request is not received within ten working days, I shall assume that the company believes the request to be vexatious..."* A public authority is entitled to have up to 20 working days under the Act and the inclusion of a shorter timeframe could be seen as adding to the burden of dealing with the request or as pointing to the request being unreasonable in nature.[9]

38. Even allowing for the "self inflicted" administrative burden due to the handling of some of the requests, the Appellant's linked information requests have involved the SLC in an increased workload. The Appellant argues that the function of a Freedom of Information Officer is to answer FOIA requests and that as such resources are not being diverted but appropriately applied. The Tribunal is satisfied that the fact that an individual is tasked to deal with FOIA requests does not mean that they are an unlimited resource and that they do not have other demands upon their time such as dealing with other requests. The Tribunal is satisfied from the way that the focus of the case has changed over time, that each of these requests is likely to lead to further correspondence and that this element is made out.

[9] Additionally in relation to the first request when the SLC were ascertaining whether this was a FOIA request the Appellant began to impose time limits for their response.

Is the request designed to cause disruption or annoyance?

39. The Commissioner did not conclude that this element was made out and it is not argued at this appeal. The Tribunal does not consider it further here.

Is the request harassing the authority or causing distress to staff?

40. Although the Commissioner focuses at appeal principally upon the manifestly unreasonable and disproportionate nature of the requests, in his decision notice he found that the requests were harassing. The Commissioner argues that:

- These requests were in the context of 45 previous linked requests 5 of which had been refused because they were deemed vexatious,
- The requests whilst not repetitive were linked, and related to a dispute with a long and detailed history.

Additionally the Tribunal observes that the terminology of the second request was daunting with legalistic definitions, caveats and qualifications.

41. The Appellant argues that:

- he had modified his behaviour in response to 5 requests being deemed vexatious in June 2008, and had not sent any requests between June 2008 and May 2010.
- this is an organization with professional administrative staff and a FOIA Officer.
- Not all the requests were dealt with by the same person,
- The Appellant's tone was polite and not accusatory or hectoring.
- The correspondence pertaining to these requests was not voluminous and amounted to 9 emails only.
- The tone was concise and reflected the purpose of the communication.

42. The Tribunal does not accept that either of these requests harassed the authority or caused distress to staff. The Tribunal notes that some of the correspondence has been generated by the SLC failing to fulfil its obligations under FOIA and

the Appellant has had to appeal (successfully) to the Commissioner in relation to some of these requests. Even in relation to the original request of 22nd June 2007 although not the subject of the Decision Notice, much of the disclosure was only resolved once the Commissioner became involved. Although it may be the same personnel who at times deal with the information requests, they are professional administrative staff. The Tribunal is satisfied that insofar as the requests may have created an administrative burden that should be considered under that heading rather than as harassment of the authority.[10]

Conclusion

43. For the reasons set out above, the Tribunal upholds the Commissioner's Decision Notices FS50346909 and FS FS50351891 dated 28th March 2011 and rejects the appeal.

Signed:

Fiona Henderson

Judge Dated this 15th day of December 2011

[10] See para 33 et seq above

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0121 and 127**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

BETWEEN:-

Mr ANTHONY SWAIN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

Refusal of application for permission to appeal

---

1. Mr Swain seeks leave to appeal the Tribunal's Decision dated 15th December 2011 which refused his appeal. His application was originally sent dated 12th January 2012 which was within the time allowed under the regulations and Mr Swain sent another enquiry dated 25th January 2012 seeking confirmation that his application was being actioned. This correspondence was sent to a Tribunal email address which is no longer used although it is checked periodically. The Tribunal Office have confirmed that there have been difficulties with receipt of correspondence to this email address. Mr Swain re-submitted his grounds on 15th February 2012 to the correct email address.

2. I accept Mr Swain sent the email within time to the Tribunal and that he received no error message to suggest that it had not been received. I am satisfied that his application is therefore not out of time, and if it were I would be satisfied that it is in the interests of justice that I extend the time allowed under rule 5(3)(a) GRC rules.

3. Mr Swain's grounds of appeal are clearly set out in his application and I do not repeat them here. Insofar as ground 2 is concerned Mr Swain argues that the Tribunal made a factual error in that it recorded that on his own account the

information from the 19th July 2010 request was not intended to be used to have the appeal reinstated but in furtherance of the substantive appeal after it had been reinstated.[1] His case is that the information would have been used both in an application for leave to appeal the strike out and at the eventual substantive hearing following what he believed would be a successful appeal before the Upper Tribunal.

4. The FT Tribunal found in paragraphs 29, 30 and 35 of its decision that:

   a) the Appellant was focussing upon the actions of Student Loan Company rather than the decision of the Tribunal,
   b) the information was not necessary to enable Mr Swain to make the appeal application,
   c) the information was not determinative of any issue of the appeal.

   I am satisfied that in the context of the case as a whole this issue is not material and could not have altered the outcome.

5. Mr Swain seeks to argue that the Tribunal took into account matters that it ought not to (such as the context and history of his dealings with the Student Loan Company). I am satisfied that these points were argued at the hearing and have been addressed in the Decision. This was a matter for the Tribunal's Judgement, Mr Swain's application does not identify an error of law in this regard.

6. In relation to the rest of the grounds of appeal, the application seeks to reargue issues of fact and judgement. These were for the Tribunal to decide and their conclusions have been explained to the standard required by law. An appeal to the Upper Tribunal can be made only on a point of law. Permission to appeal is therefore refused.

Fiona Henderson

Judge Dated this 14th day of March 2012

[1] He does not challenge the Tribunal's finding of fact in relation to the 16th May request.