Neutral citation number: [2025] UKFTT 00007 (GRC)

Case Reference: FT.EA.2024.0206

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 09 January 2025

Before

JUDGE BRIDGET SANGER
JUDGE SOPHIE BUCKLEY
MEMBER MARION SAUNDERS

Between

MARK BOYCE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed.

Original decision notice: IC-272516-K5X0 of 11th April 2024
Organisation: The Information Commissioner ("The ICO")

In this decision, the Information Commissioner, in its capacity as the public authority of whom the request was made, will be referred to as "the ICO". In its capacity as the organisation dealing with the complaint, it will be referred to as "the Commissioner".

REASONS

Background

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

2. This is an appeal against Decision Notice IC-272516-K5X0 of 11th April 2024, which held that the ICO was entitled to rely on s14 (1) Freedom of Information Act 2000 ("FOIA") to withhold the requested information.

3. The Commissioner found that the request made by the Appellant on 14th October 2023 was vexatious and that the ICO was, therefore, entitled to rely on the exemption provided by s14(1) FOIA.

Factual background to the appeal

The request

4. On 23rd October 2023 the Appellant wrote to the ICO in the following terms:

   Please provide all recorded information/discussions to date (excluding legal advice, which you say you do not possess) with regard to the stark difference between your published guidance and your actual practice on the application of section 14 FOIA and post-request events. Your published guidance says that post-request events CANNOT be taken into account, and yet your own head of FOI says they CAN be taken into account. Some of your published decisions say that post-request cannot be taken into account and many others say that they can be taken into account.

   There must be recorded information on this subject, because if there is not, it necessarily shows that the Information Commissioner, the guardian of the Freedom of Information Act, couldn't care less about its trashing of its own published guidance. It also sends out a very powerful message to ALL authorities: don't bother following our guidance - because we don't.

The response

5. The ICO responded on 24th October 2023. It refused the request as vexatious, citing the exemption in s14(1) FOIA. It pointed to previous Decision Notices (DN) and patterns of behaviour in correspondence with the ICO in support of its position. It considered that entering into any further correspondence with the Appellant would be "futile". It also commented on the tone of the Appellant's correspondence generally and noted that it had considered the effect of that on its staff.

6. The Appellant requested an internal review on 26th October 2023. The ICO conducted an internal review and, on 23rd November 2023, upheld its original position.

The Decision Notice

7. In a decision notice dated 11th April 2024, the Commissioner determined that the request was vexatious and therefore the ICO was entitled to rely on section 14(1) of FOIA.

8. He relied on the test set out by the Upper Tribunal in the case of *Information Commissioner v Devon County Council and Dransfield [2021] UKUT 440 (AAC)* and set out the four broad themes identified in that case as the themes to be considered by a public authority seeking to determine whether a request would be likely to be vexatious

9. He noted that the UT had emphasised, in that case, that the four themes are not a checklist and are not exhaustive and cited paragraph 82:

   "All the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA"

10. The Commissioner reviewed a series of correspondence between the Appellant and the ICO and concluded that the request appeared to have been made in order to place a disproportionate burden on the ICO and to harass and distress staff dealing with the request. He did not consider that making a request under FOIA was the appropriate mechanism for such a complaint (of the mis-application of s14 of FOIA) to be made.

The appeal

11. The Appellant appealed on 7th May 2024. His grounds of appeal can be summarised as follows:

    11.1. The right to request information from a public authority is an important constitutional right and therefore engaging s14(1) FOIA is a high hurdle;

    11.2. The Commissioner has misapplied the *Dransfield* test and has determined that he regarded the requestor and not just the request as vexatious;

    11.3. His request has a reasonable foundation, in that the information requested is of value to himself and the general public and it is not vexatious to try and obtain information in order to obtain some clarification;

    11.4. His request is a new request and is not linked to previous requests; it therefore has a legitimate motive and serious purpose;

    11.5. The Commissioner should not have considered "post-request" events in coming to its conclusion with regard to the vexatiousness of a request.

12. In its response, on 28th June 2024, the ICO submitted that the appeal should be dismissed for the following reasons [references in square brackets are to the paragraphs of the ICO's response]:

    12.1. The appellant has failed to set out, in the grounds of appeal, why the Commissioner's decision notice is not in accordance with the law or that the Commissioner ought to have exercised his discretion differently;

    12.2. Following the Upper Tribunal's decision in *Dransfield*, a key issue is "whether the request had adequate or proper justification" [para 7];

12.3. In his published guidance, the Commissioner considers that a key question to consider is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or stress;

12.4. In *Dransfield*, four broad themes were identified and those are helpful in approaching the question of whether a request was vexatious:

12.4.1. The burden imposed on the public authority by the request;

12.4.2. The motive of the requestor;

12.4.3. The value or serious purpose;

12.4.4. Any harassment of, or distress to, the public authority's staff.

12.5. The Commissioner submits that, in his course of dealings with the PHSO and the ICO, the Appellant has submitted numerous complaints, requests for information and additional correspondence and that responses provided are likely to simply be used to propagate the Appellant's grievances and lead to further complaints, requests and correspondence;

12.6. This is an example of "vexatiousness by drift", as characterised in *Oxford Phoenix v Information Commissioner [2018] UKUT 192 (AAC)* whereby "a series of requests for information that have an underlying justification lose that justification as they are pursued intransigently or with diminishing returns" [para 54];

12.7. The ICO was therefore entitled to find the request vexatious, with reference to the Appellant's "*pattern of harassing and derogatory behaviour*" [para 56], including repeated requests for information, appeals, the use of derogatory language on a public forum and as referenced in previous decision notices and Tribunal decisions;

12.8. This request is linked to the Appellant's earlier requests and demonstrates a pattern of repeated requests: this request for further information "*was not primarily intended to obtain information about the ICO, but a mechanism to repeat the Appellant's dissatisfaction*" [para 67] and it should therefore more properly be characterised as a complaint and it is not, therefore, a request for information under the Freedom of Information Act 2000;

12.9. If a request is found to be vexatious, public interest does not override that;

12.10. The post-request correspondence and communication is relevant in that it can be said to shed light on the Appellant's approach and actions at the time of the request;

12.11. The Commissioner concludes that the present request is an abuse to the right to information under FOIA.

13. In his reply to the Commissioner's response the Appellant reiterates his arguments and makes the following points:

    13.1. It is the request not the requestor that must be vexatious;

    13.2. The Commissioner has provided insufficient evidence;

    13.3. The Appellant has only made a small number of requests often on disparate subjects, asking for important information and intended to hold public authorities to account. Most were not classified as vexatious;

    13.4. This is not a case of vexatiousness by drift;

    13.5. The Commissioner, the First-tier Tribunal and the Upper Tribunal have made contradictory and confusing decisions in relation to whether and to what extent post-request events can be taken into account;

    13.6. His allegations that the ICO has repeatedly broken the law are not unfounded.

The Law

14. Section 14(1) FOIA states:

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

15. Vexatiousness is not defined in section 14 FOIA, but the law is clear that it is the request that must be vexatious and not the person making the request.

16. Amongst other things, the Commissioner's guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

17. Section 14 must not be interpreted in a way that in effect introduces a 'public interest' threshold that all requestors have to pass. If no exemption is engaged, there is a right to disclosure of information held by public authorities whether or not there is any public interest in disclosure.

18. The approach to vexatiousness is set out in the case of *Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC*). The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in Dransfield when it defined the purpose of section 14:

    Section 14…is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)… The purpose of Section 14… must be to protect the resources

(in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…'[para 10 of *Dransfield*].

19. Also in *Dransfield*, the Upper Tribunal took the view that the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding the request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. As the Upper Tribunal observed:

    There is… no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.

20. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. While these are not exhaustive, they are a guide.

21. The Upper Tribunal case of *Cabinet Office v Information Commissioner v Ashton [2018] UKUT 208 (AAC)* made it clear that s14(1) FOIA can apply purely on the basis of the burden placed on the public authority, even where there was a public interest in the request being addressed and where there was a 'reasonable foundation' for the request.

22. We note what the Upper Tribunal said in **Dr Yeong-Ah Soh v Information Commissioner and Imperial College London** [2016] UKUT 0249 (AAC) [79] and [80] (**Soh**):

> "79. The FTT's reasons conclude that "at the time the requests were made they were vexatious in their content by reason of the burden on the [second respondent] ... and the distress to the second mentor ...; the benefit sought from the disclosure was [the appellant's] private interest ... not the public interest. It was an inappropriate use of the FOIA and therefore vexatious". From these words, I find it inescapable that, at the least, a factor in the FTT's decision was the perceived lack of any public interest in the appellant's request for information.
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> 80. However, it seems to me that the real issue is whether there was a value or a serious purpose to the appellant's request. A request can have a value or a serious purpose while serving an entirely private interest. Judge Wikeley referred to objective public interest. He later stated at paragraph 14 that "of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14". He continued, "..., unless there are other factors present which raise the question of vexatiousness".
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> 81. It appears to me that the FTT would err in law if it considered that the request was vexatious for lacking public interest alone."

The Issues

23. Was the Commissioner correct in upholding the ICO's reliance on the exemption afforded by s14(1) FOIA?

The Evidence

24. The Tribunal read the bundle.

25. There was no further evidence to consider and no hearing in the matter, which was determined on the papers.

The Decision of the Tribunal

26. The panel considered the four broad themes identified in Dransfield and concluded as follows:

Burden

27. The request itself is vague, broad and provides for no time period. The request is for "**all** recorded information/discussions **to date** (excluding legal advice, which you say you do not possess) with regard to the stark difference between your published guidance and your actual practice on the application of section 14 FOIA and post-request events…" (emphasis added).

28. There are no clear parameters to the information sought and there are no dates between which to work. In the absence of a time frame the ICO would need to consider all documents of relevance produced since its inception in 1984, or at least since the introduction of its guidance.

29. We did not receive evidence on the burden from the ICO. However, the lack of specificity in the request would, in the view of the Tribunal, make it almost impossible for staff even to identify the documents to be reviewed without incurring a significant amount of time.

30. The process, with the request phrased as it is, would necessarily involve an exercise to identify what might be relevant before a detailed review of those documents. Within this vast amount of recorded information, the requested information is, in the tribunal's view likely to be difficult and therefore burdensome to locate. Within paper records, it is difficult to imagine where the ICO would even begin to locate that information. Within electronic records, it is difficult to conceive of search terms (such as 'section 14' or 'post-request events') that would not produce large quantities of irrelevant information that would need to be sifted through to identify any relevant information or discussions.

31. Even without evidence from the ICO as to how long it might take to deal with the request, it is a matter of common sense that such a task will necessarily impose a significant burden.

32. *Dransfield* makes it clear, at paragraph 29, that "*the present or future burden on the public authority may be inextricably linked with the previous course of dealings*" and, at paragraph 32, "*a requester who consistently submits multiple FOIA requests or associated correspondence within days of each other, or relentlessly bombards the public authority with e-mail traffic, is more likely to be found to have made a vexatious request*".

33. The panel noted that, prior to the current request, the Appellant had made FOIA requests to the ICO on 13th July 2019, 9th April 2020, 3rd July 2020, 15th August 2020, 8th July 2022, 19th January 2023, 7th April 2023, 20th June 2023 and 20th July 2023. All these requests related to the ICO's practice in responding to FOIA requests. The motive, which may be deduced from the thread that runs through the requests, appears to this Tribunal to be criticism of the ICO. Prior to the current request, two requests also reference the ICO's reliance on s14: that of the 8th July 2022 and that of the 7th April 2023. Those are reproduced below:

    8th July 2022:

    In your published guidance titled: 'Dealing with vexatious requests (section 14) you state the following:

    'The cut off point for evidence that a request is vexatious

    You may take into account any evidence you have about the events and correspondence which proceeded or led-up to the request being made.

    You have a set time limit (normally 20 working days) in which you must respond to a request. As long as you keep to this time limit, then you may also take into account anything that happens within the period in which you are dealing with the request (eg if the requester sends in further requests).

    However, you cannot take into account anything that happens after this cut-off point. This means that if you breach FOIA by taking longer than 20 working days to deal with a request, or if you make a late claim of section 14(1) after a complaint has been made to the ICO, then you need to disregard anything that happened after the time limit for responding had expired.'

    Please provide all recorded information on which the ICO has based the above quote. In other words please provide all recorded information which the ICO has relied upon to assert that such a cut off point exists in law.

    7th April 2023

    Please provide me with all the legal advice that the ICO possess with regard to section 14 FOIA (vexatious) and post-request events (beyond the legally stipulated 20 working days for response).

    Your published Guidance on section 14 FOIA says that an authority cannot take into account post-request events, yet the ICO's practice is often at complete variance to this position.

I have been informed in writing by the ICO's Information Access Service Manager that post-request events can and should be taken into account.

The case law of Dr Yeong-Ah-Soh v Information Commissioner and Imperial College London [2016] UKUT 0249 states that post request events in section 14 FOIA can be taken into account.

The ICO have published a number of decision notices that state that post-request events can be taken into account, including, but certainly not limited to, the following: IC-47042-P1S4, dated 20 August 2020 (paragraph 44); IC-46031-R5Z7, dated 05 February 2021 (paragraph 41); IC-164398-B6S1, dated 20 January 2023 (paragraph 16); and IC-207629-X4N3, dated 10 February 2023 (paragraph 32).

The ICO is under a legal duty to publish accurate and consistent guidance on section 14 FOIA, and it is under a legal duty to follow its own guidance.

34. The history of these repeated requests, and the correspondence which will be set out at paragraph 47 below, to the same public authority, leads us to find that the burden has already been imposed on the ICO and, that burden were the current request to be considered, would only be increased. The act of responding to repeated requests has already imposed burden on the ICO, who have sought to provide the information that they can to the Appellant. Indeed the Commissioner noted that, given the history of this matter, it was likely that the Appellant would not be satisfied with any response provided.

35. It is the finding of this Tribunal that the request in the present case, with the history of correspondence associated with the requests, would impose a significant burden on any the ICO.

Value or serious purpose

36. The Tribunal considered carefully what the Appellant sought to achieve by making the request. What purpose would the information serve, if received? If, as appears to be the case, the Appellant's concern is the misapplication of the law by the ICO, the route to appeal is through the First-tier Tribunal on a case-by-case basis, not by way of further requests. The receipt of the information requested would not achieve that purpose. It is not the role of the ICO to hold itself to account by the provision of information to individuals. It is the role of the Tribunal to hold the ICO to account through the appeal process.

37. The response to the April 2020 request was that the information was not held. The response to the July 2023 request was that the information was not held.

38. The current request follows the July 2023 response and appears, to the Tribunal, to be a refreshed attempt, by different phrasing, to obtain information which he has already been advised is not held. We found that widening the net to increase the reach of a request that has already been refused is a factor that points towards the request being vexatious.

39. The starting point in the current case was a request for information about the ICO's approach to and application of the exemption under s42 (legal professional privilege) and the thread that runs through the requests is the repeated calling into question of the legitimacy of the ICO's processes in the application of exemptions and timeliness in responding to requests.

40. The Appellant is right to urge caution in considering whether a request is "vexatious by drift". as characterised in *Oxford Phoenix v Information Commissioner [2018] UKUT 192 (AAC).* We agree with the Appellant that this is not a case that can be characterised as vexatiousness by drift.

41. This Tribunal has reached the same conclusion as the Tribunal in the Applicant's previous appeal, EA/2021/0064, reached in dealing with the request in issue in that appeal: that the real purpose of the request was to express his dissatisfaction. The tribunal concluded, therefore, that there was no reasonable foundation for concluding that the information requested would be of value to the requestor or to the public.

Motive

42. The purported motive of the Appellant is set out in the request.

43. He wishes to use the information requested to ascertain whether the ICO follows its own guidance on s14 when considering requests under FOIA. In correspondence he is clear that he holds the ICO to be the guardian of its own values and he purports to be concerned that, if the ICO is not following its guidance on vexatious requests, then other organisations may also feel free to do so.

44. The Tribunal did not, therefore, find the Appellant's motive to be improper, in that he has not made the request solely to cause disruption or out of vengeance. We accept that he genuinely perceives an inconsistency and a lack of clarity in the law. However we do not find that disclosure of the requested information would assist in resolving that problem, if it exists.

Causing harassment or distress to staff

45. At paragraph 39, the case of *Dransfield* states: "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive.*"

46. The Upper Tribunal expressly permits the surrounding conduct of the requestor to be taken into account when considering vexatiousness *of this particular request*. This does not mean that all future requests by this requestor will be vexatious, and accordingly does not offend against the principle that we are considering the vexatiousness of this request and not of this requestor.

47. At paragraphs 22 - 24 of its Decision Notice, the ICO Commissioner set out a history of the correspondence from the Appellant to the ICO and notes made on the website "What do they Know" website. Some examples are as follows:

47.1. *"The ICO are adamant that they do not possess any legal advice with regard to section 14 FOIA (vexatious) and postrequest events. I don't believe them ... It is not credible that the ICO do not possess legal advice on this issue. If they do not possess legal advice on this issue then they are clearly content to continue to behave as total hypocrites: say in their Guidance that post-request events cannot be taken into account and then do the exact opposite as and when it suits them. We are supposed to be able to trust the ICO. They cannot be trusted."* [2 August 2023, correspondence]

47.2. *"Let's just say that the ICO may be disingenuous (if it's good enough for our parliamentary friends, it's good enough for me). Then there is the issue of trust. Can we trust an organisation that says one thing in its published guidance (the guidance may or may not be correct), but then blatantly, admittingly and repeatedly often does the complete opposite in practice? Some people might think this is highly trustworthy behaviour. I don't. I have shown and proved quite clearly that the ICO cannot be trusted, in that their practice is frequently contrary to their published guidance. You cannot accept this obvious fact. If the ICO cannot be trusted, then they cannot be trusted. It's as simple as that. That's not a smear; it's just a fact."* [7 August 2023, correspondence]

47.3. *"If the ICO couldn't care less about other authorities deleting requested information (which may be a criminal offence), then are we to believe that they might not also delete requested information themselves (intentionally or otherwise)? I have no evidence that they have done so, but given that they say one thing with regard to section 14 and 42 of the FOIA and then they do the exact opposite in practice, and now they are not warning against the deletion of requested information when that information is subject to an ongoing tribunal case, even though their guidance does warn against this, should we not be at least suspicious? I am."* [16th August 2023, What do they Know website].

47.4. "If indeed it is not held, that tells us all we need to know about the ICO - they do not take any notice of the law or of fair and decent behaviour. They are acting against the law and they are hypocrites. And just for the record, something can't be defamatory if it is true. What I say is true." [9th August 2023, correspondence]

47.5. "I have never stated that the ICO HAVE deleted information (intentionally or otherwise), but I have stated that they MAY have done so. If they cannot be trusted and are incompetent I am indeed suspicious. The Tribunal may agree or they may disagree with my suspicions and my belief that information is held." [18th August 2023, correspondence]

48. The language used in these examples is intemperate, inflammatory and accusatory. The Appellant suggests dishonesty and characterises the organisation as untrustworthy. The Tribunal agrees with the Commissioner that staff required to deal with the request further to the correspondence above would be extremely likely to feel demotivated. In our view the public use of such language, some of it in a public forum, was a pointer towards vexatiousness.

Conclusion

49. The safeguard of s14 is in place in order to ensure that public authorities may run efficiently. The right to information is significant but it is a qualified right.

50. The authorities are clear that a holistic approach is to be taken to the question of whether a request can be properly characterised as vexatious. We have taken account of the nature of the request, the number of requests and the language used, both in public and in private. Although we do not find an improper motive, we do find that the request has no reasonable foundation with no real value or purpose. We have considered the likely burden of complying on the ICO. Given the lack of objective purpose and lack of value to the Appellant or the public, the burden of complying is disproportionate.

51. The history of correspondence between the Appellant and the ICO and his obsessive nature of the requests, which focussed on the ICOs application of the law to various different decisions, gave the current request hallmarks of a further vexatious request.

52. Looked at as a whole, our conclusion is that the request is vexatious, in that it is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.

53. The appeal is dismissed.

Signed: Date:

Tribunal Judge Sanger 20th December 2024