IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2011/0077

BETWEEN:

ELAINE COLVILLE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT FOR INTERNATIONAL DEVELOPMENT

Second Respondent

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Introduction

1. The Appellant has applied for permission to appeal to the Upper Tribunal against the Decision of this Tribunal dated 17 October 2011 dismissing the Appellant's Appeal.

2. The Appellant had appealed against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 24 February 2011.

3. The Decision Notice related to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Department for

International Development ('DfID') for information relating to audited World Bank Group ('WBG') trust fund accounts. DfID refused the request on the basis of section 14 of FOIA as the request was considered vexatious. That decision was upheld by both the Commissioner in his Decision Notice and the Tribunal in its Decision of 17 October 2011.

The Legal Framework

4. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

5. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. Section 14 of FOIA does not provide an exemption as such. Its effect is to render inapplicable the general right of access to information contained in section 1(1).

6. Section 14 of FOIA provides for two distinct situations in which a public authority is not obliged to comply with the section 1(1) duty. DfID and the Commissioner relied only on section 14(1).

> *Section 14(1): Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*
>
> *Section 14(2): where a public authority has previously complied with a request for information which was made by any person it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.*

7. In reaching the decision to dismiss the appeal, the Tribunal considered the following:

    (1) The term "vexatious" is not defined further in FOIA and is therefore to be given its ordinary meaning.

    (2) The Commissioner has published Awareness Guidance to public authorities suggesting the correct approach to determining whether a request is vexatious. In the Tribunal's opinion, the Guidance is just that and should not be used in too formulaic a way by public authorities, the Commissioner or the Tribunal.

    (3) The words of a differently constituted Panel of this Tribunal in *Coggins v Information Commissioner* (EA/2007/0130):

        "A decision as to whether a request was vexatious within the meaning of section 14 was a complex matter requiring the weighing in the balance of many different factors. The Tribunal was of the view that the determination whether a request was vexatious or not might not lend itself to an overly structured approach."

    (4) That while each Appeal must be decided on its own facts and other decisions of the Tribunal are not binding, it was helpful to look at the decision of a differently constituted Panel of this Tribunal in *Carpenter v IC and Stevenage Borough Council (EA/2008/0046)* in which the Tribunal reminded itself of the principles that have emerged from previous cases in relation to section 14 of FOIA, (and then went on to set the context for the way in which Regulation 12 (4)(b) EIR should be applied):

        i) It is important to ensure that the standard for establishing that a request is vexatious is not too high;

ii) The various considerations identified in the Commissioner's Guidance on Vexatious Requests are a useful interpretive guide to help public authorities to navigate the concept of a "vexatious request". There should not however be an overly-structured approach to the application of those considerations and every case should be viewed on its own particular facts.

(iii) When deciding whether a request is vexatious a public authority is not obliged to look at the request in isolation, unlike the majority of cases which are said to be "motive blind" or "applicant blind". A public authority could consider both the history of the matter and what lay behind the request made in the past by the complainant. A request could appear, in isolation, to be entirely reasonable yet could assume the quality of being vexatious when construed in context;

(iv) Every case turns on its own facts. Considerations which may be relevant to the overall analysis include:

a) the request forming part of an extended campaign to expose alleged improper or illegal behaviour in the context of evidence tending to indicate that the campaign is not well founded;

b) the request involving information which had already been provided to the applicant;

c) the nature and extent of the applicant's correspondence with the authority and whether this suggests an obsessive approach to disclosure;

d) the tone adopted in the correspondence being tendentious and/or haranguing;

e) whether the correspondence could reasonably be expected to have a negative effect on the health and well-being of the officers; and

f) whether responding to the request would be likely to entail substantial and disproportionate financial and administrative burdens.

(5) The public interest in the disclosure of the requested information is not a relevant consideration.

The Tribunal's Decision

8. The Tribunal took the following into account in the analysis of whether the Appellant's request for information under FOIA was vexatious:

(i) the number of requests for information under FOIA and the volume of correspondence with DfID over a period of years;

(ii) that the Appellant's correspondence with DfD suggested an obsessive or unreasonable approach, particularly that the background material provided gave a flavour of the correspondence and action taken by the Appellant whenever an answer was given with which she was dissatisfied or an answer was not provided as speedily as she would have liked, and that the Appellant would frequently make allegations of maladministration or collusion when the decision given was not as she sought.

(iii) the tone used in the correspondence which, although not offensive in itself, revealed a tendency to use intemperate or threatening language, and that the Appellant had made a number of unsubstantiated and serious allegations against individuals and entities;

(iv) the effect of the request on DfID which annoyed and upset staff;

(v) that responding to the request would have been likely to entail substantial and disproportionate financial and administrative burdens;

(vi) that although it was agreed that the request had a serious purpose, in the context of the Appellant making the request DfID had chosen to rely on section 14(1).

9. Not one single factor would necessarily lead to a finding, by itself, that the request was vexatious. However in analysing the number of factors that were present in this case and the strength of those factors, for the reasons set out in detail in the Decision, the Tribunal concluded that the Commissioner was correct to reach the decision that DfID were entitled to treat the request as vexatious under section 14(1) of FOIA. Accordingly, the Appeal was dismissed.

The Application

10. The Appellant applied for permission to appeal to the Upper Tribunal on 14 November 2011. In Section D, *"Please state what error(s) of law you consider the Tribunal has made and what outcome you are seeking"*, the Appellant stated that she *"expects to raise the following issues*":

> *Whether in terms of the background to the case the Tribunal erred by making findings of fact that were clearly erroneous where there is insufficient or no evidence of probative value at all to support those findings in the sense of being uncontentious and objectively verifiable; whether this absence or insufficiency of evidence constitutes a legal deficiency; whether the reasons were made on certain factual assumptions that were mistaken on the Tribunal's treatment of the available evidence, and whether the Tribunal has made true errors of fact by*

mishandling the evidence resulting on a breach of natural justice.

Whether the Tribunal erred in allowing the Respondents' hearsay evidence as admissible without applying a test of verifiability when it was directly contradictory to the best evidence.

Whether the Tribunal abused its discretion by depriving Appellant of any opportunity to adduce additional material of probative value in the furtherance of justice which, had it been placed before the Tribunal, might have deterred it from making the findings in the decision, and whether orders and rulings in the course of the case were legally sound.

Appellant requests the whole decision be nullified. Appellant further encourages the Tribunal to hold accountable the person/s who wrote the language that mischaracterised the Appellant's 'Case History' as represented by Second Respondent in a letter and attachment to First Respondent dated 26 November 2010 [Open Bundle pgs 198-208] apparently to mislead the First Respondent, ultimately, the Tribunal."

11. As it was not immediately apparent what errors of law the Appellant considered the Tribunal had made, the Tribunal directed the Appellant to provide amended numbered grounds of appeal, identifying, with reference to the Decision, the errors of law, the particular findings of fact she submits were *"clearly erroneous",* the hearsay evidence referred to in her second paragraph, what evidence she submits was the *"best evidence"*, details of the alleged abuse of the Tribunal's discretion and the basis upon which she submits the Tribunal deprived her of any opportunity to adduce additional material of probative value, and the orders and rulings she submits were not legally sound.

12. A 16 page amended Grounds document was provided by the Appellant on 25 November 2011 as directed, and she provided, without seeking permission, an amended 25 page version on 28 November 2011. The Appellant has sent subsequent emails to the Tribunal with links to other information she submits is relevant and also a reference to an authority she would seek to rely on.

13. The Appellant has complied with the direction to number her grounds of appeal, although she has simply allocated numbers to the paragraphs quoted above, in paragraph 10, as her grounds 1-5.

14. I have read the 16 and 25 page documents submitted by the Appellant several times but remain unclear as to the errors of law she submits have been made by the Tribunal. It appears to me that the Appellant's submissions are to the effect that the Tribunal should not have relied upon any assertion made by DfID in the light of the history of its dealings with the Appellant which she regards as unsatisfactory and therefore the Tribunal was wrong to have concluded that the request was vexatious.

15. In the Decision of 17 October 2011, the Tribunal stressed that it was important to note that it is not for this Tribunal to resolve the complaints or allegations about wrongdoing by DfID or the WBG raised by the Appellant in respect of which she is not satisfied. The Tribunal was of the opinion that it was clear from the voluminous material provided by the Appellant that she continues to believe her actions are necessary to unveil injustice, such that she has pursued many different avenues over the years, and that she is likely to make a complaint or further allegation if the individual or entity has not provided the result or remedy she sought.

16. I do not consider that the matters raised by the Appellant in her amended grounds of appeal identify any error of law made by the Tribunal in its analysis of section 14(1) of FOIA and its conclusion that

the request made by the Appellant was vexatious. The Tribunal was entitled to come to the conclusions it did on the material provided.

17. I am satisfied that the Appellant, although unrepresented, was provided with a fair hearing. The Appellant has had a number of appeals before this Tribunal and has demonstrated a good grasp of the process by her participation. The bundle was prepared in stages by agreement between the parties over a period of time. The Appellant knew which documents had been included and would be considered by the Tribunal. She had ample opportunity to comment on or challenge its contents. Further, the Tribunal allowed the Appellant to put additional material before it that was provided late in the process, was not paginated or otherwise organised, and the relevance of which was not entirely clear.

18. Despite a direction from the Tribunal, the Appellant has not identified how the Tribunal deprived her of an opportunity to adduce additional material of probative value. In advance of the Appeal hearing, the Tribunal had been provided with an agreed Bundle of material, a bundle of authorities and written submissions from the parties. The Appellant provided additional material to the Panel; she had asked the Commissioner to include these items in the Agreed Bundle, but the Commissioner did not consider the additional material relevant to the issue to be determined. Part of this additional material took the form of an unpaginated bundle of email correspondence that was not in chronological order and the relevance of each individual email not made clear. The Tribunal did not find this helpful; particularly as it had been stressed throughout the appeal process the reasons for the need to have an agreed bundle of material for each of the Panel members to aid deliberations. However the Tribunal did take the additional material into account. I therefore consider this ground of appeal to be without merit.

19. Despite a direction from the Tribunal, the Appellant has not identified any order or ruling made by the Tribunal in the course of the case that were not legally sound.

Decision

20. Under Rule 43(1) of the Rules, I must first consider, taking into account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 44. There does not appear to me to be any basis upon which to review the decision of 17 October 2011.

21. I do not consider that there was any error in law in the decision of 17 October 2011 and therefore I refuse the application.

22. The Appellant submits that the conduct of DfID merits sanction and invites the Tribunal to impose such sanction or to refer wrongdoing to another court. I am unaware of any such powers of this Tribunal.

Signed:

Annabel Pilling
Tribunal Judge

13 December 2011