IN THE FIRST-TIER TRIBUNAL **Cases Nos.** EA/2012/0049, 0085
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notices Nos: FS50384608 (1 February 2012), FS50397683 (20 March 2012)

KING'S COLLEGE, CAMBRIDGE

Appellant

-and-

THE INFORMATION COMMISSIONER

1st Respondent

JOHN LEE

2nd Respondent

Determined on documents

Date of decision: 15 October 2013

Before

Andrew Bartlett QC (Judge)
Henry Fitzhugh
Andrew Whetnall

Representation:
For King's College Cambridge: Timothy Pitt-Payne QC

The Information Commissioner

Mr Lee in person

Subject matter:
Freedom of Information Act 2000 – s 3 - whether information held on behalf of College by individual Governors

Cases:
University of Newcastle v IC and BUAV [2011] UKUT 185 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

Our decision on the further preliminary issue in appeals 0049 and 0085 is that information held by individual non-Fellow Governors of King's College School may be held on behalf of the College.

We further note and adopt the College's express concession that information held by Fellows of the College in relation to their role as School Governors would be held by the College for the purposes of FOIA. We take this concession to apply to the Chair and Deputy Chair of Governors, the Organist, the First Bursar, and three other Fellows who were Governors at the material times.

In the directions below, "Mr Lee's first request" means the requests identified in paragraph 16 of the Tribunal's decision dated 18 December 2012; and "Mr Lee's second request" means the request identified in paragraph 26 of the Tribunal's decision dated 18 December 2012.

The Tribunal orders and directs:
(1) The College shall make inquiries with those persons who were Governors in the period November 2009 to December 2010 to identify information held by them, falling within the scope of Mr Lee's first request, held on behalf of the College.
(2) The College shall make inquiries with those persons who were Governors in the period March 2010 to April 2011 to identify information held by them, falling within the scope of Mr Lee's second request, held on behalf of the College.
(3) In determining for the purposes of steps (1) and (2) above whether the information is or was held on behalf of the College, in the case of non-Fellow Governors the College shall apply the guidance set out in paragraphs 31-32 of this present Decision as clarified by paragraph 37.
(4) Within 28 days from the date of this decision the College shall complete the steps set out in (1)-(2) above and shall issue to Mr Lee (with a copy to the Information Commissioner) a fresh response under FOIA in respect of the information held and falling within the scope of one or other or both of Mr Lee's first and second requests.
(5) Should Mr Lee be dissatisfied with the College's compliance with the above directions, he may submit a new section 50 complaint to the Information Commissioner.
(6) The parties are to have liberty to apply. This means that direction (5) above shall not prevent Mr Lee or another party referring this matter back to the Tribunal to issue further directions in the light of this present decision, in the event that some further order of the Tribunal is required in order to give full effect to the present decision. See further paragraph 42 of the decision.

REASONS FOR DECISION

Introduction

1. This decision is concerned with whether information held by individual Governors of King's College School, Cambridge, who are not Fellows, is held on behalf of King's College.

The issue for decision

2. The background to the appeals is found in our decision dated 18 December 2012, which determined a number of preliminary issues.

3. The scope of the material requests made by Mr Lee is as set out in paragraphs 16 and 26 of our decision of 18 December 2012.

4. After the partial withdrawal of the appeals by the Appellant (the College), as approved by the Tribunal on 12 April 2013, the Appellant's appeals in cases 0049 and 0085 were continued only in relation to information held by individual Governors and not otherwise held by or on behalf of the College or the School.

5. Accordingly, the issue remaining in the appeals is whether information held by individual Governors of the School (but not otherwise held by the College or School) and which falls within the scope of the material requests made by Mr Lee was (or is) 'held' by the College or the School within the meaning of section 3(2) of the Freedom of Information Act 2000 (FOIA).

6. On 10 May 2013 we gave directions for this issue to be determined without an oral hearing.

7. At the time of making that order we noted the statement in the Appellant's email of 14 March 2013:

> the College is unable to specify the exemptions that might be claimed because it has not seen the Governor-held information. The Governors have been unwilling, on a point of principle, to disclose any information (whether relevant or not) which they had not intended to disclose either to the College or the school at the time the information had been generated.

8. Our order consequently stated:

> In preparing its documents and submissions for the appeals the Appellant should keep in mind that the Tribunal does not exist in order to answer hypothetical questions. These appeals can only proceed on the basis that

Governors do (or did at the time of the requests) in fact hold information falling within the scope of the material requests made by Mr Lee, the principal issue being whether such holding by Governors amounts to holding by the Appellant within the meaning of FOIA s3(2). If no such information were held by Governors, the appeals would lack subject matter.

9. The appeals were pursued, and we accordingly inferred that the College knew or believed that the Governors do (or did at the time the requests were dealt with) in fact hold information falling within the scope of the material requests made by Mr Lee. We refer to this aspect further below.

10. In its written submissions dated 12 July 2013 the College (so far as we are aware, for the first time) conceded that information held by Fellows of the College in relation to their role as School Governors would be held by the College for the purposes of FOIA. We take this concession to apply to the Chair and Deputy Chair of Governors, the Organist, the First Bursar, and three other Fellows who are Governors.

11. We are therefore only required to decide the narrow issue whether the same is true of information held by other Governors who are not Fellows of the College.

12. For the meaning of "held" in FOIA s 3(2), we were referred by the parties to *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), [23]-[27].

13. Prior to finalisation of the present decision we sent it in draft to the parties, inviting not only clerical corrections in the usual way but also wider submissions as to the appropriate disposal of the appeal and appropriate directions in the light of the view at which we had arrived. All three parties responded. We understand that, as at the date of our decision, no information held and disclosable as a result of the concession has been disclosed to Mr Lee; we have therefore included an order concerning this in our decision.

Facts and evidence

14. The requests made by Mr Lee relevant to appeal 0049 were made in November 2009. The College's internal review was completed in December 2010. By appeal 0049 the College appealed to the Tribunal against Decision Notice FS50384608 (dated 1 February 2012).

15. The request made by Mr Lee relevant to appeal 0085 was made in March 2010, and the College's internal review was completed in April 2011. The College appealed to the Tribunal against Decision Notice FS50397683 dated 20 March 2012, by appeal 0085.

16. It is not necessary for us to describe here the events which resulted in the internal reviews being completed so long after the requests.

17. The governing body of the College is a public authority for the purposes of FOIA: see Schedule 1 to FOIA, at Part IV, paragraph 53(1)(e). The requests made by Mr Lee relate to King's College School. In a decision not under appeal in these proceedings the Information Commissioner ruled that the School is part of King's College for the purposes of FOIA.

18. We were provided with and have considered the Regulations of the College in force at the material time, together with an explanatory statement by the Dean, who is the current Chair of Governors of the School. Mr Lee also drew to our attention a commentary on the governance of the School issued by the Legal and General Purposes Sub-committee, dated 13 February 2012. This seems to show that the Governors conduct their business mainly in their formal meetings, whether meetings of the whole of the Governors or of their sub-committees. It also states: "Business conducted by individual governors outside meetings of the Governors must be brought to that body for formal approval before being circulated or disseminated."

The parties' submissions

19. Mr Pitt-Payne QC on behalf of the College submits:

12. The key points, as explained in the Dean's statement, are these.
- Non-Fellow Governors are not officers of the College.
- They are not employed by the College in any capacity whatsoever.
- They do not receive any remuneration (even expenses) for their work as Governors.
- They are not given any equipment by the College in connection with their work as Governors. For instance, they are not provided with computer equipment.
- They are serving in a wholly voluntary capacity, contributing their specific expertise to the work of the Governors.
- They have no security of tenure, and can be removed at will by the College Council.

13. Non-Fellow Governors may well hold information relating to their role as Governors. For instance, they may make notes for their own purposes in relation to the business of the School Governors. They may carry out correspondence in relation to the work of the School Governors, on paper or by email. Any information of this nature will be held by the non-Fellow Governors personally, rather than by the College.
14. There are four reasons why the College does not "hold" this information, within the meaning of FOIA section 3(2).
15. *First*, the nature of the role played by the non-Fellow Governors is material. It is a wholly voluntary role. As explained above, they are neither officers nor employees of the College.
16. *Secondly*, the institutional relationship between the non-College Governors and the College is material. The non-Fellow Governors are not subject to the direction or control of the College. They are not part of its organisational structures. They cannot be given directions or instructions by the College, except in the sense that College Council can remove them from their position as School Governors.
17. *Thirdly*, the College has no knowledge or awareness of the information that is held by non-Fellow Governors in relation to their role as School Governors. The College does not provide non-Fellow Governors with email accounts; it has no way of knowing

what information they may hold on their own personal email accounts. Likewise, it has no way of telling what other records they may hold about School business, or how those records are held.

18. *Fourthly*, the College has no way of directing or requiring non-Fellow Governors to provide it with information that they hold about the School. The College could direct that any non-Fellow Governors who refused to do so would be replaced as School Governors; but even this step would not compel them to disclose information to the College in relation to their work as School Governors. To treat information held by the non-Fellow Governors as being "held" by the College, would give rise to very severe practical difficulties: it would potentially impose obligations on the College, in relation to FOIA disclosure, that it had no practical means of fulfilling. FOIA ought not to be construed in a way that makes the statute unworkable.
19. Applying the fact-sensitive approach set out in the *Newcastle* case, above, these four considerations taken together should lead the Tribunal to conclude that information held by non-College Governors is not held by the College for FOIA purposes.
[End of quotation]

20. Mr Lee submits, in summary:

    a. The fact that non-Fellow Governors act voluntarily, are unpaid, and have no security of tenure has nothing to do with whether relevant information is held on behalf of the College.

    b. The College has ultimate control of the School. Governors are under the control of the College Council (which itself has delegated authority from the Governing Body) to the extent that the Governors are accountable to the Council.

    c. The College's lack of awareness of what is held by Governors is not a relevant argument, as it is the information that matters, not the means of communication.

    d. The College could direct Governors to produce relevant information which they hold about the School.

21. The Information Commissioner maintains the view which he came to in his Decision Notices, that information falling within the scope of Mr Lee's material requests and held by individual Governors was held by the College for FOIA purposes. The Commissioner draws attention to the fact that the College Council exercises its responsibility for the School through the Governors, who are a committee of the Council, and who have delegated authority to act on its behalf. He submits that pursuant to *BUAV* the issue is whether there is an appropriate connection between the information and the public authority. If the information is held by a Governor as a result of his or her role and relates to the business of the School, it is held by or on behalf of the College.

22. He also agrees with Mr Lee's points that the use of private email accounts (see the Commissioner's published guidance) and the non-Fellow Governors' status as volunteers rather than employees make no difference.

Analysis

23. We respectfully adopt and follow the guidance given in *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), at [23]-[27].

24. We fully acknowledge the relevance of the nature of the role fulfilled by Governors who are not Fellows of the College. However, the fact that they are volunteers does not of itself rule out the possibility of their holding information on behalf of the College. All the circumstances must be considered.

25. Suppose, for example, that an individual non-Fellow Governor were delegated by a Governors' meeting to write to an outside body. It would be the duty of that individual to make the reply available to the Governors as a body. Information contained in the reply would plainly, in our judgment, be held by that individual on behalf of the Governors, and hence by the College.

26. We are unpersuaded by the argument that the College would have no means of enforcing the duty which would arise in such a case. In the ordinary course, we would expect Governors to fulfil their duties without the threat of legal measures to compel them to do so. In any event, where a non-Fellow Governor held information on behalf of the College, we consider it likely that there would be a legal basis for such compulsion, if necessary, whether by an implied contract or an equitable obligation.

27. While the individual non-Fellow Governors do not have a place within the institution of the College in the same way as Fellows or employees, and this greatly reduces the College's powers of direction and control, we are unable to accept the submission that it has no control at all over individual Governors other than to dismiss them. The Governors as a whole are accountable to the College Council. If individual Governors take actions in pursuance of their gubernatorial duties and within the scope of their authority, such actions are taken on behalf of the Governors as a body and hence on behalf of the College Council. This supports the conclusion that information held by an individual non-Fellow Governor may (depending on the circumstances) be held on behalf of the College. If information were so held, in our view it would be the duty of a Governor to supply that information to the College, if requested to do so.

28. For the above reasons, we reject Mr Pitt-Payne's submission that no information held by individual non-Fellow Governors is held by the College within the meaning of FOIA s3. The College's decision at an earlier stage not to make inquiries with individual Governors to discover whether they held, on behalf of the College, information falling within Mr Lee's request, was in our view based on an incorrect understanding of its duty under FOIA.

29. While the College's case in our view makes too much of the nature of the Governors' role and relationship with the College, the case for the Commissioner and for Mr Lee in our view makes too little of it. The nature and terms of the non-Fellow Governors' voluntary role are relevant factors which must be taken into consideration. We are unable to accept the

Commissioner's broad submission that, if information is held by a Governor as a result of his or her role and relates to the business of the School, it is necessarily held by or on behalf of the College.

30. The significance of the nature of the Governors' role may be highlighted by comparing it with other possible relationships. In the case of an employee, it might be true that information relating to the business of the School, held by the employee as a result of his or her role, would almost necessarily be held by or on behalf of the College. But in the case of other relationships this would certainly be too sweeping a statement. We find it instructive to compare the situation of a solicitor engaged to carry out a transaction on behalf of the College. Some information held by the solicitor as a result, and relating to the business of the College, would be held by him on behalf of the College, and some would not. For example, a reply from a third party, to a letter sent on behalf of the College, would be held by the solicitor on the College's behalf, and the College would be entitled to call for it. But the solicitor's own notes on how to proceed, made in order to assist him in carrying out his duties effectively, would not be held on behalf of the College, and the College would not be entitled to call for delivery up of the notes, or of the information contained in them. The mere facts that the information in the notes related to the business of the College and that it was held as a result of the solicitor's role would not be sufficient to establish that it was held by him for the College.

31. What is done by the Governors as a group, or by a sub-committee of the Governors as a group, is done on behalf of the College. Information contained in agendas, minutes, and other documents prepared for submission to such meetings, is held by the College, through the hands of individual Governors. Similarly, authorised actions taken by individual Governors on behalf of the whole group, or on behalf of a sub-committee, are taken on behalf of the College, and information prepared or received as part of such actions is held by such Governors on behalf of the College. But notes or jottings by individual non-Fellow Governors, or communications to or from individual non-Fellow Governors by way of informal discussion outside meetings, and not intended for submission to such meetings, are not made on behalf of the College, and information within them is not held by the College. In our view this analysis is consistent with the understanding of the Governors' role evident in the guidance issued by the Legal and General Purposes Sub-committee.

32. By way of further explanation, we would emphasize that our decision does not stand for the proposition that, where a private individual serves on a public authority, the public authority has a general right to instruct that individual to hand over emails or other materials held on private email accounts. In our view the right is confined to those particular items (if any) which are held on behalf of the public authority. Depending on the circumstances, the latter are unlikely to include informal discussions among volunteers not intended for submission to the relevant decision-making body. We would endorse the principle identified in the Commissioner's published guidance on official information held in private email accounts (15 December 2011 Version 1.0), where it states: "FOIA applies to official information held in private email accounts (and other media formats) <u>when held on behalf of the public authority</u>" [our emphasis].

33. We also agree, as stated in that guidance, that, where a public authority considers that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any information falling within the scope.

34. The Commissioner's guidance on official information held in private email accounts further states:

> Public authorities should also remind staff that deleting or concealing information with the intention of preventing its disclosure following receipt of a request is a criminal offence under section 77 of FOIA. For example, where information that is covered by a request is knowingly treated as not held because it is held in a private email account, this may count as concealment intended to prevent the disclosure of information, with the person concealing the information being liable to prosecution.

35. We consider this to be prudent guidance, which is as relevant to officers or governors as to employees. We note that there is no suggestion that the present case is one where there was deliberate use of private e-mails for official business in order to keep them off the official e-mail system. In such a case FOIA might well reach further into informal communications than it otherwise would.

36. In a response to our draft decision, Mr Lee stated:

> I would appreciate the Tribunal's further guidance in connection with the wording contained in the penultimate sentence of Para 31 of the Draft Decision. In particular, the references to "informal discussion" and "not intended for submission to Governors' meetings" might be interpreted in varying ways by different individuals. My concern about the guidance given in Para 31 is that Governors may argue that their correspondence on the failed inspection, misleading letter and breakdown in governance simply constituted informal discussion outside meetings of the Governors and as a result, provide no information. Because many Governors live a long way from the school and, in the very fast and frenzied environment (following the failed inspection) email exchanges between governors would by necessity have been the norm. In addition, the Provost has consistently maintained that much of the Governors business is carried out by email because many school Governors live a long way from the school. Does, for example, the Para 31 guidance mean that Governors' emails relating to the substantially misleading letter need not be disclosed simply because Governors given an opinion that they were in the form of an informal discussion outside a Governors' meeting and not submitted to formal Governors' meetings? I, therefore, respectfully ask for greater clarity on the wording of the penultimate sentence.

37. Where emails were sent or copied by individual Governors to Fellows or Officers of the School or College, these will have been held by the College in any event, so we understand Mr Lee's question to refer to emails between non-Fellow Governors. In line with the reasoning that we have set out in

paragraphs 23-32 above, in our view informal emails between such Governors would not generally be held on behalf of the College unless they were part of a process which was carried out in substitution for a formal meeting of the Governors. In the latter event they would be records of a meeting held by email instead of by meeting in person, and would therefore be held on behalf of the College. We have here used the qualifier "generally" because we cannot completely rule out the possibility that other informal emails might be generated in circumstances which would make them held on behalf of the College. For example, it is conceivable that some particular informal notes or emails of an individual Governor might be held on behalf of the College if that Governor was delegated to carry out a specific task and the task included the preparation of those notes or emails for the College. However, we consider that the usual status of Governors' informal notes or emails, when not either intended for submission to a formal Governors' meeting or as a substitute for such a meeting, would be more akin to the solicitor's notes in our example in paragraph 30 above, ie, merely notes written to help the person carry out his or her duties effectively.

38. We wish to add that we firmly disagree with the Commissioner's submission that the issue is whether there is an "appropriate connection" between the information and the public authority. We are confident that in *BUAV* the phrase "appropriate connection" was not put forward as a test to replace the statutory wording, or as a definition of the issue to be decided, but was used by way of shorthand explanation in the discussion of the statutory words and of the examples given in paragraph [47] of the First-tier decision. As the Upper Tribunal said at [29]:

> I do not regard the tribunal's reference to the need for "an appropriate connection between the information and the authority" as a misguided attempt to replace the statutory language with its own "rather nebulous" test ... . On the contrary, the tribunal was simply pointing to the need for the word "hold" to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2).

Conclusion and orders

39. Our decision on the further preliminary issue in appeals 0049 and 0085 is that information held by individual non-Fellow Governors of King's College School may be held on behalf of the College, but we find in favour of the Commissioner and Mr Lee only to the limited extent indicated above – in particular, in paragraphs 31-32, as clarified by paragraph 37.

40. Having considered the parties' responses to our draft decision, we order and direct as set out at the head of this decision.

41. Following the issue of our draft decision to the parties, we were concerned to receive a response from the College taking issue with paragraph 9 above, as originally drafted. The College stated:

Paragraph 9 states that the College "knows or believes that the Governors do (or did at the time the requests were dealt with) in fact hold information falling within the scope of the material requests made by Mr. Lee". The College has repeatedly made clear, most recently through Mr. Pitt-Payne's submissions, that the College does not in fact possess this knowledge. All it can state is that the Governors may hold such information.

42. Paragraph 1 of Mr Pitt-Payne's submissions referred to information held by individual Governors and falling within the scope of Mr Lee's material requests.[1] But the College's response seems to indicate that the College wholly disregarded the warning in paragraph 13 of the Tribunal's directions order made on 10 May 2013, and has so far not even asked the non-Fellow Governors whether they hold any information which, if held on behalf of the College, would fall within Mr Lee's requests. If no such information is in fact held, the appeal will have been in our view an abuse of process, being merely theoretical, and a waste of Mr Lee's time, of the time and costs of the Tribunal and the Commissioner, and indeed of the College's own legal costs. We therefore reserve for potential future consideration whether there should be a special order as regards costs, pursuant to rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. Any party wishing to apply for such an order should do so promptly after learning of the true position as regards what was held by the non-Fellow Governors and in any event not later than 6 months from the date of this present decision. The latter time limit is an extension of the period allowed in rule 10(4), the extension being made pursuant to rule 5(3)(a).

Signed on original:

Andrew Bartlett QC

Tribunal Judge

[1] We had accordingly understood paragraph 17 of his submissions to be a general argument, rather than a statement that the College still did not know in this particular case whether the Governors held relevant information.

IN THE FIRST-TIER TRIBUNAL **Cases Nos.** EA/2012/0015, 0049, 0085
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notices Nos: FS50374489 (14 December 2011), FS50384608 (1 February 2012), FS50397683 (20 March 2012)

JOHN LEE
Appellant in 0015/Second Respondent in 0049, 0085

INFORMATION COMMISSIONER
First Respondent

KING'S COLLEGE CAMBRIDGE
Second Respondent in 0015/Appellant in 0049, 0085

Heard at Field House, London, EC4

Date of hearing: 21 November 2012

Date of decision: 18 December 2012

Before

Andrew Bartlett QC (Judge)
Henry Fitzhugh
Andrew Whetnall

Attendances:

Mr Lee in person

For King's College Cambridge: Timothy Pitt-Payne QC

The Information Commissioner did not attend the hearing

Subject matter:
Freedom of Information Act 2000 – vexatious or repeated requests – cost of compliance and appropriate limit – late reliance on exemptions

Cases:
All Party Parliamentary Group on Extraordinary Rendition v IC and MOD [2011] UKUT 153 (AAC)
Att-Gen v Barker, 16 February 2000
Att Gen v Singer [2012] EWHC 326 (Admin)
Bhamjee v Forsdick (Practice Note) [2004] 1 WLR 88
Birkett v DEFRA [2011] EWCA Civ 1606
Camden LBC v IC [2012] UKUT 190 (AAC)
DEFRA v IC and Birkett; Home Office v IC [2011] UKUT 39 (AAC)
E Rex Makin & Co v IC EA/2011/0163 (3 August 2012)
IC v HMRC and Gaskell [2011] UKUT 296 (AAC)
Independent Police Complaints Commission v IC EA/2011/0222 (29 March 2012)
Randall v IC EA/2007/0004 (30 October 2007)
Rigby v IC EA/2009/0103 (10 June 2010)
Roberts v IC EA/2008/0050 (4 December 2008)
Sittampalam v IC and BBC EA/2010/0141 (29 June 2010)

DECISION OF THE FIRST-TIER TRIBUNAL

Our decisions on the preliminary issues are:

> In appeal 0015 we rule against the College's reliance on the FOIA s14 exception.
>
> In appeals 0049 and 0085 the College is not permitted to advance a case of reliance on s14.
>
> In appeals 0049 and 0085 the College is not permitted to advance a case of reliance on s12.
>
> If, contrary to the above, the College should be permitted to advance a case of reliance on s14 and on s12, the College's reliance on those exceptions in appeals 0049 and 0085 is rejected on the merits.

Paragraph 108 of the Reasons contains further directions.

REASONS FOR DECISION

Introduction

1. Mr Lee has made many information requests under the Freedom of Information Act ("FOIA") to King's College Cambridge. Some have been answered; others have been referred to the Information Commissioner, who has issued seven relevant decision notices. The present three appeals are concerned with three of the decision notices. One appeal (0015) is brought by Mr Lee; two (0049 and 0085) are brought by the College.

2. On 21 November 2012 we held a hearing to determine issues concerning FOIA s12 (costs limit) and s14 (vexatious requests).

3. Our decision involves consideration of what is a "vexatious" request under s14(1) and consideration of the law on late reliance on exemptions.

The background to the College's appeal 0049

4. We set out the background to appeal 0049 first because the information requests to which it relates are the earliest in time. We include some findings of fact on matters which were not common ground between the parties.

5. The governing body of King's College, Cambridge, is a public authority for the purposes of FOIA: see Schedule 1 to FOIA, at Part IV, paragraph 53(1)(e). The requests made by Mr Lee relate to King's College School in Cambridge. In a decision not under appeal in these proceedings (but referred to further below) the Information Commissioner ruled that the School is part of King's College for the purposes of FOIA.

6. Mr Lee is a senior executive in a technology business and also sits on a University committee. He had a connection with the School, which was that, until the end of the 2009 Summer Term, two of his children were pupils there. A dispute arose between Mr Lee and the School while his children were still pupils there. Matters connected with the dispute triggered the requests made by Mr Lee. It is not the Tribunal's function to rule on the merits of that dispute, but we need to be aware of its nature and understand the facts relating to it in order to make our decisions on the present issues. Mr Pitt-Payne QC on behalf of the College expressly accepts that the question whether Mr Lee's concerns had some basis has some part to play, while also submitting that the real question is whether at the time the requests were made there was any real interest and purpose in the disclosure of the information sought. We agree that in substance that is the correct approach.

7. During 2008, while two of his children were pupils at the School, Mr Lee made a number of complaints regarding an employee of the School. These included an allegation that the employee had used coarse language in front of pupils. Mr Lee was not satisfied with what he considered to be the apparently

dismissive way in which the School dealt with these complaints. He had a face-to-face discussion with the employee at the School on 19 September 2008.

8. After consulting the employee, the Headmaster decided, without hearing Mr Lee's side of the story, to exclude Mr and Mrs Lee from school premises and to require them to remove their children by no later than the end of term. He also issued a statement to the staff[1] notifying them of this decision and stating that it was due to Mr Lee's "unreasonable" treatment of the member of staff concerned. On 23rd September 2008 the School's solicitors, Kester Cunningham John, wrote to Mr Lee alleging that his conduct on 19 September was unreasonable and had caused the employee great distress; and stating that as a result he and his wife were required to abide by onerous conditions excluding them from normal contact with the School and to remove their children from the School by the end of term.

9. The Lees appealed against that decision, and a Review Panel considered that appeal in December 2008. The Review Panel hearing ended with a settlement agreement (signed in January 2009) under which the Lees were no longer required to remove their children. The terms of the agreement (which was shown to us) are confidential to the parties. The Headmaster made a statement to staff, which said: "all aspersions on the reputation of Mr and Mrs Lee are withdrawn, most particularly in my statement to staff on 25th September 2008, and the good reputation of Mr and Mrs Lee is thereby restored." The Lees' children remained at the School until the end of Summer Term 2009, when they were due to leave in any event.

10. Mr Lee's investigations had given him apparently solid grounds to believe that the employee had had to leave a previous school as a result of an untoward incident, and had been employed by the School without properly independent references being obtained. The employee's stated position was that the work at the previous school had been temporary cover for an employee who was on sick leave or maternity leave, and whose return meant that the need for temporary cover came to an end. Mr Pitt-Payne submits, and we agree, that we are in no position to make a firm finding on why the employee left the previous school or whether proper vetting was carried out. At the same time Mr Pitt-Payne accepts that these were legitimate matters for Mr Lee to be concerned about.

11. Mr Lee's misgivings about the quality of governance at the School were heightened by the fact that it appeared during the events prior to the agreed settlement that the School regarded his children's places at the school as bargaining chips to be used to silence his concerns. In a heavily redacted internal email subsequently disclosed to Mr Lee, the date of which is unclear, the writer proposed certain actions in relation to Mr Lee's complaint "whilst his children's attendance at the School is still a strong bargaining point".[2]

[1] 25 September 2008

[2] A further internal email disclosed to him under FOIA appeared to show that in the Spring of 2009 the School again considered using his children's places as bargaining chips to silence his concerns.

12. In June 2009 there was a new incident, in which the employee was again alleged to have used coarse language. Mr Lee complained to the School, which took the view that his complaint was unfounded. The Deputy Head wrote to Mr and Mrs Lee, stating that the allegation of bad language could not be "proved beyond doubt to be accurate". Why that should be the appropriate standard of proof was not explained. To write in such terms was capable of giving the impression that the School's approach to possible issues concerning the appropriateness of an employee's conduct in relation to young children was to take no action unless or until the matter of concern were proven beyond reasonable doubt. In a subsequent email of 1 September 2009 the Headmaster wrote to Mr Lee stating that the Deputy Head had concluded "it was all based on hearsay and there was not a shred of evidence". The email concluded by recommending to Mr and Mrs Lee "a very moving book" which would help them "to get life in perspective". This was capable of being understood as evidencing a dismissive attitude to matters of concern reasonably raised by a parent, and was so understood by Mr Lee.

13. In September 2009 the Independent Schools Inspectorate ("ISI") conducted an unannounced inspection of the School. This was prompted by Mr Lee's earlier complaint about the School's behaviour towards himself and his family in 2008, but had been held back until his children had left. The ISI's inspection related to the School's compliance with regulatory standards generally rather than to Mr Lee's specific complaints. It reported on 30 October 2009 that there were a number of "serious regulatory failings", including breaches of Standard 3 (welfare, health and safety of pupils), Standard 4 (suitability of proprietor and staff), Standard 6 (provision of information) and Standard 7 (complaints handling). The Secretary of State (DCSF) issued a formal statutory notice requiring an action plan for remedying the failings, under threat of deletion of the school from the Register of Independent Schools. This was regarded by the Provost of the College as (in his own words) "a serious and very important warning".

14. On 4 November 2009 the DCSF informed Mr Lee that the inspection had taken place, and that the report had brought a number of failings to the attention of the Department, which were being "vigorously pursued" with the school.

15. On 6 November 2009 the Provost wrote to all parents of children at the School, informing them of the ISI inspection and its outcome.

16. Mr Lee was concerned that the Provost's letter was materially misleading to parents. He therefore submitted to the College on 13 November 2009 a letter containing 17 numbered requests relating directly or indirectly to the ISI inspection. Five requests in this letter are the subject of appeal 0049, being requests numbered (v), (vii), (viii), (ix) and (xiii), as follows:

> (v) details of who drafted the Provost's letter dated 6 November 2009;
>
> (vii) all correspondence and emails (along with supporting papers) between the headmaster, senior management and staff on the

matter of the DCSF inspection, including minutes of each and every meeting held to discuss this matter;

(viii) all correspondence and emails (along with supporting papers) with any Governor on the matter of the DCSF inspection, including minutes of each and every meeting held to discuss this matter;

(ix) detailed minutes (along with supporting papers) of all King's School Governor's meetings since May 2008, including minutes of any sub-committee (including the Legal sub-committee);

(xiii) copies of any correspondence (including emails and supporting papers) between the senior management of King's and the Governors in response to the Lees' letters to the Chairman of Governors (on 19 April and 23 October), Kester Cunningham John (25 March 2009) and Mr Reynolds (22 February 2009) in which they repeatedly refer to the systematic failure in procedures (including regulatory failures).

17. Before moving on to the College's response to these information requests, we need to pause to consider the circumstances in which this first batch of requests was made and what it was that gave rise to it.

18. Mr Pitt-Payne submits that it is unclear in what respect the Provost's letter to parents dated 6 November 2009 was supposedly misleading. We do not agree. On the material placed before us it is plain, in our judgment, that the Provost's letter was substantially misleading. It minimised the importance of the serious regulatory failings found by the ISI, by giving the false impression that the deficiencies found at the inspection on 18 September 2009 consisted simply of a shortfall in achieving the heightened rigours of new guidance introduced by Ofsted at the beginning of that very month, when the reality was otherwise. At a later date the Provost admitted to Mr Lee, in writing, that his letter had been misleading. Mr Lee felt no doubt that the Provost was a man of complete integrity, inferred that the letter must have been prepared for him by others, and was concerned to find out how such a misleading letter had come to be drafted for the Provost's signature.

19. Mr Lee's perspective on the way he had been dealt with was that what had originally started as a very small complaint had escalated by the way it was handled on behalf of the School. The written material and explanations which were put before us demonstrate, in our judgment, that Mr Lee had a reasonable basis for having strong concerns about the running of the School and its governance. Mr Pitt-Payne, while not accepting on behalf of the School that there was anything truly amiss beyond the findings of the ISI, did not seek to persuade us that it was unreasonable of Mr Lee to have concerns in 2009. The combination of the apparently dismissive attitude to parental complaints, the apparent readiness to use Mr Lee's children as bargaining chips, the findings of the ISI, and the misleading letter sent to parents, provided in our view ample justification for making use of the Freedom of Information Act in order to try to seek some greater transparency and accountability in the governance of the School.

20. The Provost of the College (of whose personal integrity Mr Lee spoke positively at the hearing) tried to resign as Chair of Governors of the School on 3 December 2009, but was prevented from doing so for some 15 months. The College provided only a small amount of information in response to the request. It adopted the position that the School was an independent body, not subject to FOIA. Mr Lee complained to the Information Commissioner. A further ISI inspection in January and February 2010 was followed by a very positive report about the School, from which we infer that the serious failings identified in 2009 had by then been remedied to the satisfaction of the inspectors.

21. In Decision Notice FS50285876 dated 21 October 2010 the Commissioner decided that the College's argument concerning the independence of the School was not correct, and also decided a number of other points against the College.

22. Following this decision, the further handling of the requests by the College culminated in an internal review by the College, the results of which were communicated to Mr Lee on 17 December 2010. This led to a further complaint by Mr Lee to the Commissioner, which was investigated by the Commissioner from about June 2011, leading to Decision Notice FS50384608 dated 1 February 2012. The exemptions investigated were those under FOIA ss 36(2)(b)(i)-(ii), 40(1) and (5)(a), 40(2) and 40(3)(a)(i), and 42. The outcome can be described as a mixed result. In the course of the Commissioner's investigation the College conceded it should have disclosed certain items; the Commissioner upheld certain refusals; and he ordered disclosure of some items. He also required the College to confirm or deny to Mr Lee whether it held certain further items, and, if held, to either provide them or issue a refusal notice.

23. By appeal 0049 the College appealed to the Tribunal against Decision Notice FS50384608 (dated 1 February 2012). It has sought to withhold a number of items of which disclosure was ordered, including some which it had conceded it should have disclosed.

<u>The background to the College's appeal 0085</u>

24. We take this next because of the date of the relevant request. The background up to November 2009 is as stated above.

25. After Mr Lee's first information request of 13 November 2009, he added to and clarified that request by emails dated 20 November, 24 November and 28 November 2009. He also made additional requests on 6 December 2009 and on 8 March 2010, the latter being numbered (i)-(iv).

26. On 16 March 2010 he made further requests, numbered (v)-(xii). Number (xi) was-

What documents were seen by the Provost and each Governor prior to the Provost's letter being issued to all parents on 6 November 2009.

27. The College initially relied on its argument that information held by the School was not subject to FOIA. This was rejected by the Commissioner in his Decision Notice FS50318306 dated 8 December 2010 (which was to the same effect as his decision of 21 October 2010 on the same argument).

28. The College responded to the requests on 10 January 2011. In regard to request (xi) it stated that no records survived. It maintained this stance upon internal review on 5 April 2011. Mr Lee complained to the Commissioner, whose investigation commenced in about September 2011 on this and related matters.

29. During the investigation the College stated, contrary to its previously expressed position, that it had located information relevant to request (xi), some of which it was prepared to disclose. Some of the material was withheld in reliance on FOIA ss40(2) and (3)(a)(i), and on s42.

30. It emerged during the investigation that the College had not carried out any searches to establish whether any relevant information was held by the Governors, as it did not consider that any information held by the Governors was held on behalf of the public authority. At first sight this contention by the College is rather surprising. The Commissioner took the view that if information was held by the Governors, falling within the scope of request (xi), such information would be held by the College for the purposes of FOIA.[3]

31. In his Decision Notice FS50397683 dated 20 March 2012 the Commissioner ordered in relation to request (xi):

    a. that the College disclose information which it had identified for disclosure in its letter of 13 October 2011;

    b. that the College disclose information set out in paragraphs 2 and 6 of a confidential annex, subject to the redaction of third party personal information;

    c. that the College should confirm or deny to the complainant whether it held any further relevant information in relation to request (xi), being information held by school governors, and, if there were such further information, the College should provide it to the complainant, or provide a refusal notice under section 17 of FOIA.

[3] We have not considered the College's detailed reasons for its contention, which may perhaps have more to it than at first appears, and we are not making any decision on it at the present stage of the proceedings. But in considering the costs estimates put forward by the College, which include time for searching for information held by Governors, we have assumed the correctness of the Commissioner's view. We have not found it necessary to consider Mr Lee's contention that the estimates should take into account that the Governors are not remunerated for their time.

32. The College appealed to the Tribunal against Decision Notice FS50397683 dated 20 March 2012, by appeal 0085.

The background to Mr Lee's appeal 0015

33. The background facts up to mid-March 2010 are as stated above.

34. After the requests made on 16 March 2010, Mr Lee made a further, short request on 13 April 2010. After a gap of about 5 months, Mr Lee embarked upon further requests:

    a. a detailed request on 7 September 2010,

    b. a short request on 8 October 2010,

    c. a detailed request on 22 October 2010 (immediately following the Commissioner's decision of 21 October 2010) clarifying a request made on 13 November 2009,

    d. a detailed request on 5 November 2010 (17 numbered items).

35. On 25-26 November 2010 Mr Lee received a mixture of information and refusals from the College pursuant to the Commissioner's decision of 21 October 2010 and his requests of 13, 20, 24 and 28 November 2009 and 6 December 2009. Mr Lee responded with a long letter which was dated 29 November 2010 and emailed on 30 November 2010, which consisted partly of thanks for the information supplied, partly of requests for internal review, and partly of further information requests arising out of his consideration of the College's responses.

36. On 29 November 2010 Mr Lee also submitted separately a long and detailed request referring to the June 2009 incident, containing 28 questions.

37. The College responded initially on 3 December 2010, stating that his requests of 5 November and 29 November 2010 were vexatious, and relying on FOIA s14. On 18 January 2011 it provided a similar response to the requests of 7 September 2010. On internal reviews in the period February-April 2011 the College partly overturned its use of s14 in relation to a number of the specific items of request, but otherwise maintained it. Mr Lee complained to the Commissioner. By Decision Notice FS50396867 dated 14 December 2011 the Commissioner upheld the College's reliance on s14. Mr Lee appealed to the Tribunal by appeal EA/2012/0013. On 15 July 2012 he withdrew appeal 0013, while maintaining that his requests had not been vexatious.

38. As regards the long letter of 29 November 2010 (emailed on 30 November 2010), the College responded on 10 January 2011, relying on s14 and stating

that the requests were either vexatious (s14(1)) or repeated (s14(2)). Mr Lee requested internal review. Upon review, the College wrote to him on 30 March 2011, conceding that four requests were not vexatious or repeated but otherwise maintaining its position.

39. Mr Lee complained to the Commissioner. In the course of the investigation the College relied only on s14(1) rather than s14(2). By his Decision Notice FS50374489 dated 14 December 2011 the Commissioner upheld the reliance on s14(1).

40. Mr Lee appealed to the Tribunal against Decision Notice FS50374489 dated 14 December 2011, by appeal 0015.

41. On 15 July 2012 Mr Lee withdrew part of appeal 0015. The part remaining live constituted certain requests contained in his letter of 29 November 2010, which contained follow up of earlier requests as follows:

> **Request (v) dated 13 November 2009 - Details of who drafted the Provost's letter dated 6 November 2009 and the advice given on the drafting of such letter.**
>
> Using the referencing numbers adopted by the Information Commissioner:
>
> [4] Please let me know which firm of solicitors was involved and which governors? Your answer gives the impression that the headmaster and senior management were not involved in the drafting of the Provost's letter and did not see any draft versions of the final letter. [5] Would you please confirm this? [6] What did these individuals do with this information?
>
> **Request (xiii) dated 13 November 2009 - Copies of any correspondence (including emails and supporting papers) between the senior management of King's and the Governors in response to the Lees' letters to the Chairman of Governors (on 19 April and 23 October), Kester Cunningham John (25 March 2009) and Mr Reynolds (22 February 2009), in which they repeatedly refer to the systematic failure in procedures (including regulatory failures).**
>
> [34] Please also let me know what actions were taken by the respective recipients of the correspondence?
>
> **Request dated 28 November 2009 - (a) Immediately following the Review Panel hearing on 8 December 2008, I gave Mr Reynolds (Chair of the Review Panel) a copy of a letter dated 5th December 2008 from Woodroffes (solicitors). A copy of this letter was also given to the Provost some months later. This letter summarised the findings of an internal investigation carried out at the [previous] School by its own solicitors and was very revealing in its findings.**

Mr Reynolds indicated to me that he would look into the matter. The FOI request is for copies of all minutes, discussion notes, notes of telephone calls and other written material that shows how the school, Mr Reynolds, the Provost and the other governors considered the additional material contained in the Woodroffes letter dated 5 December 2008 and the actions that were taken as a consequence.

[39] Given that Mr Reynolds gave his personal assurance (at the end of the Review Panel hearing) that he would look into this matter, could you confirm whether he did or did not look into this matter? [40] What form did any enquiry or investigation take? [41] The same question applies to the Provost who, having received the same letter, ought to have been very concerned by the contents of the Woodroffes letter.

Request (b) dated 28 November 2009 - Confirmation (with date) that a professional reference (re the [employee]) was eventually provided by the Principal of [the previous] School.

[43] What actions did the headmaster or any of the governors make [*sic*] (after he/they had been put on notice that the reference on [the employee] was unreliable) to satisfy himself/themselves that [the employee] was a suitably qualified and honest person, that the circumstances surrounding [the employee's] departure from the [previous school] were explained to his/their satisfaction and that what the employee told him/them was true and accurate in all material respects and consistent with the employee's application for employment?

42. To fill out the picture, we should add that Mr Lee made further information requests on 26 February 2011. These were requests about a named employee of the School, and information about the actions of the School in relation to an entry on Wikipedia. The College stated that the requested information was not held. The College's position was upheld by the Commissioner in Decision Notice FS50399162 dated 14 December 2011. Mr Lee appealed to the Tribunal by appeal EA/2012/0014. On 15 July 2012 he withdrew appeal 0014, stating that it had become clear who was instrumental in the re-writing of the Wikipedia page.

43. In making the various withdrawals, Mr Lee explained that he would like to minimise the complexity of this case for all parties as well as save time, disruption and cost. He stated that he would like-

"to focus the Tribunal Hearing on three issues, which also happen to be the main issues of EA/2012/0049 & EA/2012/0085 in connection with:

3.2.1 the misleading letter sent by the Provost.

3.2.2 regulatory failings and a breakdown in governance at the school, which were ignored by the School, but confirmed by the unannounced

emergency inspection by the Independent Schools Inspectorate in September 2009,

3.2.3 the failure of the school to professionally check and take action in connection [with an employee] who had joined the school on false references, who had given the school a reason for leaving [the employee's] previous school that was untrue and whose behaviour was inappropriate and unacceptable by any standards of decency."

The issues for the current hearing

44. The parties proposed draft directions which involved the making of decisions on preliminary issues.

45. For reasons set out in a Case Memorandum dated 10 August 2012 the Tribunal ordered on that date that there be an oral hearing on the following issues:

    a. whether the College's reliance on the s14 exception should be upheld in appeal 0015,

    b. whether the College should be permitted to advance a case of reliance on s14 in appeals 0049 and 0085,

    c. whether the College should be permitted to advance a case of reliance on s12 in appeals 0049 and 0085, and

    d. whether, so far as relevant after the decision of points (b) and (c), the College's reliance on those exceptions should be upheld in appeals 0049 and 0085.

46. At the oral hearing of the above issues we received copious documentary evidence. There were no formal written witness statements and no oral witness evidence was taken, but each side filled out its case with explanations given in written materials and oral submissions, without any objection being taken to our receiving these under rule 15 of our rules of procedure.[4] Mr Pitt-Payne did not ask to cross-examine Mr Lee on matters of disputed fact. Mr Lee presented his case himself, with courtesy and (in Mr Pitt-Payne's words) "very moderately". Both in correspondence and in person, Mr Lee showed himself to be articulate, intelligent, capable and straightforward. We have a doubt over whether he always keeps sufficiently in mind that people he deals with may sometimes be of lesser ability, and may for that reason sometimes find him rather overpowering notwithstanding the gentleness of his manner. For the same reason he may sometimes misread situations where other people make what seem to him to be elementary errors of understanding, judgment or behaviour.

[4] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended.

47. Mr Lee in his written and oral submissions made some limited concessions concerning the possibility of the College relying late on s12 and s14 in certain circumstances. We informed Mr Pitt-Payne that we intended to make our own judgment on late reliance without regard to any such concessions made by an unrepresented party; Mr Pitt-Payne confirmed that the adoption of this approach was in line with his expectation, and he did not seek to persuade us to take any different course.

48. The Commissioner did not attend the oral hearing, but provided useful written submissions, which we have taken into account.

Late reliance on Part I exemptions: the law

49. Issues (b) and (c) above arise because in appeals 0049 and 0085 the College has sought to introduce reliance upon s12 and s14 at the stage of appeal to the Tribunal. It is therefore necessary for us to consider the legal position concerning late reliance on exemptions. On the current state of the law, this is not a straightforward topic.

50. The right of access to information held by public authorities is contained in FOIA s1(1). The duty of a public authority to give effect to this right is subject to two kinds of exemptions in FOIA:

    a. Part II of the Act is headed "Exempt Information". Sections 21-44 set out a series of substantive exemptions defined by reference to the character of the information which is requested (including the purpose for which it is held or the effect that its disclosure might have). Some of these exemptions are absolute, and some are qualified by the public interest balance (see s2). Most are imposed because there is a public interest in protecting such information. A few are imposed because the availability of the information is subject to a different regime outside FOIA.

    b. There are provisions in Part I of the Act which in certain circumstances limit the public authority's duty of disclosure pursuant to s1(1). In particular, s12 enables a public authority to rely on a costs limit, and s14 enables a public authority to refuse vexatious or repeated requests. These are in the nature of preliminary objections, rather than being based specifically on the character of the information requested as under Part II. While the Part II exemptions protect the information, the Part I exemptions are tools provided to the public authority for preventing disproportionate use of the rights available under the Act, so as to protect the resources of the authority from being misused.

51. The late claiming of substantive exemptions was considered by the Upper Tribunal (Judge Jacobs) in *DEFRA v IC and Birkett; Home Office v IC* [2011] UKUT 39 (AAC). The Birkett case was decided under the Environmental Information Regulations ("EIR"), and the Home Office case under FOIA. The Upper Tribunal decided that both under the EIR and under FOIA public authorities had a right to change the exemptions on which they relied at any time, subject only to the Tribunal's case management powers.

52. In *All Party Parliamentary Group on Extraordinary Rendition v IC and MOD* [2011] UKUT 153 (AAC) (hereinafter, "*APPGER*") a three member Upper Tribunal expressed doubts about the decision and reasoning in the *DEFRA* case in relation to substantive exemptions under Part II of FOIA: see [36]-[44]. These doubts were *obiter*, because in *APPGER* the issue which the Upper Tribunal decided was late reliance on FOIA s12 (costs limit). The Upper Tribunal held that the costs limit could not be relied on late in circumstances where such reliance would be inconsistent with the statutory scheme, the primary considerations being the scheme's emphasis on prompt decision making and access to information (including after dialogue to refine a too broad request), and the purpose of the s12 exception, which was to save estimated future costs above the limit: see [45]-[48], [84]-[86], [92]-[96]. The Upper Tribunal expressly stated that this was the correct approach to s12 irrespective of the position in regard to substantive exemptions: see [45]. We consider the *APPGER* approach can fairly be summarised as requiring, in the case of late reliance on s12, a reasonable justification for permitting late reliance consistent with the relevant statutory purposes: cf *APPGER* at [39]. What is meant by late reliance in this context was discussed in *Sittampalam v IC and BBC* EA/2010/0141 (29 June 2010) where, having regard to the reasoning in *APPGER*, it was explained at [46]-[48] that late reliance meant reliance after the time required by s17(5), namely, promptly and in any event not later than the 20th working day after receipt of the request.

53. Mr Pitt-Payne submits that what the Upper Tribunal said about s12 in *APPGER* was strictly *obiter*, being unnecessary for any of the decisions taken in that case. However, we note that the Upper Tribunal stated a definite position in regard to s12 at [45]-[48], and that this was applied at [96] as justifying a conclusion that the MOD could not rely on s12, albeit an additional, case management, reason for the same conclusion was given at [95].

54. The *DEFRA* case went to the Court of Appeal: *Birkett v DEFRA* [2011] EWCA Civ 1606, where the decision of Judge Jacobs was upheld. We note, however, that the position was there considered only under the EIR, not under FOIA, and the Court expressed concern as to the limited nature of the arguments - in particular that the Court was not addressed concerning the possibility of a middle way between the extremes presented on each side (that late reliance was either a right or was never permissible): see [11], [31]. *APPGER* does not appear to have been cited to the Court.

55. Accordingly, the Court of Appeal decision in *DEFRA* does not determine the question of late reliance on s12 or s14 of FOIA, because it was concerned only with substantive exceptions under the EIR. Nor does the Upper Tribunal decision in *Home Office v IC* determine that question, since the decision made under FOIA in that case was concerned only with substantive exemptions. Sitting as a First-tier Tribunal we consider that we should follow the approach expressed and applied by the Upper Tribunal in *APPGER* in regard to FOIA s12.

56. We were referred to the decision of the First-tier Tribunal in *Independent Police Complaints Commission v IC* EA/2011/0222 (29 March 2012), where

the Tribunal permitted late reliance on FOIA s12, even though the issue was formally raised for the first time on appeal.[5] Mr Pitt-Payne submits that we should follow this decision in regard to late reliance because the Upper Tribunal in *APPGER* did not have the benefit of the Court of Appeal's decision in *Birkett*. However, we note that the *APPGER* case was not cited, so that the reasoning of the First-tier Tribunal was formulated without knowledge of what the Upper Tribunal had said in *APPGER*. We also observe that the views expressed by the Court of Appeal in *Birkett* would have been of only limited assistance to the Upper Tribunal in *APPGER*, for the reasons identified above.

57. Late reliance on s12 was further considered by the First-tier Tribunal in *Sittampalam* in relation to arguments concerning the latest time at which it could be invoked. The Tribunal held that, because the estimate had to be in existence at the time the request was dealt with, section 12 could not be invoked later than the time of internal review: see [49]-[52]. However, it would be open to the Commissioner to take into account the cost of insisting upon disclosure when exercising his 'steps discretion' as to enforcement under s50(4): see [53]-[61]. The existence of the 'steps discretion' was subsequently confirmed in *IC v HMRC and Gaskell* [2011] UKUT 296 (AAC).

58. Mr Pitt-Payne submits that the true view of s12 is that, while the relevant state of affairs as regards the costs of compliance has to be in existence at or about the time when the request is made, the estimate does not have to be actually produced at that time. We are not persuaded by this submission, which seems to us to be inconsistent with the express words of s12 and with the considerations set out at [51] of *Sittampalam*. In the alternative Mr Pitt-Payne relies on the steps discretion.

59. The next question is what approach we should follow in relation to late reliance upon s14 (vexatious or repeated requests). The effect of s14, where it is validly relied upon, is that public authorities avoid having to deal with vexatious or repeated requests at all, except to the minimal extent of giving such refusal notice as is required by s17. The combined effect of sections 1(1), 10(1), 14 and 17(5)-(6) is that-

    a. in response to the first vexatious request made by a particular applicant, the public authority is required to give a refusal notice promptly and in any event not later than the 20th working day following the date of receipt of the request;

    b. in response to a repeated or subsequent vexatious request made by the same applicant, where the refusal notice referred to above has previously been given, the public authority is not required to give a further refusal notice where it would be unreasonable to expect the authority to do so.

60. The evident objective of s14 is to weed out vexatious or repeated requests at an early stage of the process, so that public authorities are not required to incur substantial time, effort or expense in dealing with them. This objective

[5] See the *IPCC* decision at [8]-[9].

sits alongside the objectives of prompt decision making and access to information highlighted by the Upper Tribunal in *APPGER*. In our judgment the section 14 exemption has more similarity with the s12 costs limit than with substantive exemptions under Part II.

61. Given the statutory requirement highlighted in *APPGER* and *Sittampalam* by which the proper time for reliance is promptly and in any event not later than the 20th working day following the date of receipt of the request, we consider that after the 20th working day there is not an absolute right to rely upon s14, and that reasonable justification must be shown for late reliance. However, if an authority were to fail to appreciate at the time of its first response that a request was repeated or vexatious (for example, because of a change of FOI personnel without an effective handover, so that a request was initially dealt with by an employee unaware of a previous history of related requests), the statutory purpose of s14 would still be served by reliance on s14 at the internal review contemplated by the statutory scheme (cf *APPGER,* [40]), notwithstanding the breach of the time limit for reliance, and it is hard to see how such reliance could or should justifiably be prevented at that stage. Up to that point, from the very nature of s14 and of the purpose of the internal review process, showing reasonable justification should not in the general run of cases present a difficulty, unless there have been circumstances of gross delay or other detriment to the requester. Conversely, it is more difficult to see how the purpose of s14 would be properly served, consistently with the other statutory objectives, by a belated attempt to rely on s14 for the first time at a later stage of the process. Adapting the approach which is binding upon us in relation to s12, we consider that belated reliance upon s14 during the Commissioner's investigation or on appeal to the Tribunal requires a reasonable justification that is consistent with the relevant statutory purposes, and at those later stages such justification may be difficult to find. If this analysis sounds flexible, in contrast to the cut and dried extremes canvassed before the Court of Appeal in *DEFRA*, we refer again to the relevant binding authorities laying down the correct approach to the construction of statutory time limits identified in *APPGER* at [41] and [45].

Meaning of "vexatious" in FOIA s14(1)

62. Mr Pitt-Payne refers us to the Information Commissioner's published Awareness Guidance on what constitutes a vexatious request, and points out that different tribunals have taken different approaches to s14(1) and to the Commissioner's Guidance. He draws our attention in particular to *Rigby v IC* EA/2009/0103 (10 June 2010) (where the Tribunal sought to summarise the key principles emerging from 13 previous Tribunal cases, listed relevant factors, and referred to the Commissioner's Guidance as a useful guide for public authorities, while deprecating an overly-structured approach), *Independent Police Complaints Commission v IC* (succinct discussion, with deprecation of using the Guidance as a tick-box check-list), and *E Rex Makin & Co v IC* EA/2011/0163 (3 August 2012) (where the Commissioner's Guidance was put to one side). In view of the variations of reasoning in other cases we are required to reach our own view afresh upon reconsideration of the relevant arguments. Our concern is to identify and apply the legal meaning of s14(1), and nothing we say is intended as implying any views concerning the outcome of previous cases.

63. In this connection we note Judge Jacobs' comment concerning First-tier decisions in *Camden LBC v IC* [2012] UKUT 190 (AAC), [20]:

> Previous decisions are of persuasive authority and the tribunal is right to value consistency in decision-making. However, there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle. This, in my view, is what has happened in the decisions on vexatious requests (section 14 of FOIA). It can also lead to statements being taken out of their context and given a general significance.

64. The meaning of words is affected by their context. On consideration, we therefore do not find helpful the dictionary definition discussed in *E Rex Makin*: "causing, tending or disposed to cause vexation", the latter being defined as "the state or fact of being mentally troubled or distressed, in later use especially by something causing annoyance, irritation, dissatisfaction or disappointment". A purpose of FOIA is to promote transparency, accountability and good government. If, for example, an information request about wrongdoing or incompetence at a public authority could be refused on the ground that the culpable officials found the request distressing or annoying, the Act would be emasculated. That cannot be right. Similarly, if, for example, an opposition politician or investigative journalist made an information request to a Government Department for a serious purpose in the public interest, it cannot be right, consistently with the purpose of the Act, that the existence also of an intent to embarrass or annoy the responsible Minister would justify the Department in relying on s14(1).

65. In *Independent Police Complaints Commission* the Tribunal observed that while "vexatious" was not defined in FOIA, it was a term familiar to lawyers. We understand this to be a reference to the fact that it is used in a very large number of statutory provisions in order to place a limit on the right to pursue formal procedures – as, for example, in the Unfair Terms in Consumer Contracts Regulations 1999/2083 reg 10 (vexatious complaints to the Director General of Fair Trading), the Senior Courts Act 1981 s42(1) (restriction of vexatious legal proceedings), the Representation of the People Act 1983 s133 (vexatious petition to election court), and the Companies Act 1985 s442(3A) (vexatious application for investigation). In some statutes the term is coupled with related descriptive terms[6]; in others, including FOIA, it is not.

66. In *Att-Gen v Barker,* 16 February 2000, Lord Bingham CJ said at [19]:

> "Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way

[6] One or more of: "frivolous", "abuse of process", "improper", "unnecessary", "malicious", "prolix", "unreasonable", "manifestly ill-founded", "scandalous", "trivial".

> which is significantly different from the ordinary and proper use of the court process.
>
> And at [22]:
>
> the hallmark of persistent and habitual litigious activity ... usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.

67. These remarks have often been referred to in the context of vexatious court proceedings, notably in *Bhamjee v Forsdick (Practice Note)* [2004] 1 WLR 88 (where Lord Phillips MR explained at [7] that the courts had traditionally described the bringing of hopeless actions and applications as "vexatious"), and very recently in *Att Gen v Singer* [2012] EWHC 326 (Admin).

68. Mr Pitt-Payne expressly accepts that the term "vexatious" takes colour from its legal usage as a control device for access to proceedings or to a right, and accepts that we can take guidance from the well-known cases such as *Att-Gen v Barker* and *Bhamjee v Forsdick,* provided the differing statutory contexts are taken fully into account. He rightly observes that under s14 the test is whether the request is vexatious, not the requester; and he draws the contrast that to bar someone from access to the ordinary courts of law is very weighty and significant, with more serious consequences for an individual than a decision that a specific FOI request need not be answered because it is vexatious. The strength of that contrast is in our view fact-sensitive. We do not think it is possible to say that, for example, the right to ask for information concerning MPs' expenses is less important than an individual's right to pursue allegations in the courts.

69. Having regard to the common usage of the term "vexatious" in legal parlance, we understand it to connote manifestly unjustified, inappropriate or improper use of a formal procedure. The Act exists in order to enable the citizen to obtain information held by public authorities. Section 14 is a protection against misuse of the right given by s1(1). Adapting the words of Lord Bingham to this statutory context, a vexatious request is one that is not made in proper pursuance of the purposes of access to information promoted by FOIA; it is a use of the right under s1(1) for a purpose or in a way which is significantly different from the ordinary and proper use of that right.

70. We wish to emphasize that our remarks above should be understood as an explanation, rather than a definition, of the statutory concept of a vexatious request.

71. The Information Commissioner's Guidance states: "The term "vexatious" is intended to have its ordinary meaning and there is no link with legal definitions from other contexts (eg vexatious litigants)." Given our explanation above, we consider that this is mistaken.

72. As regards the inter-relationship of s14(1) with s14(2), which deals with repetition, our view is that the existence of s14(2) does not have the effect that repetition is irrelevant for the purpose of s14(1); we understand s14(2) rather as a detailed clarification on a matter which would otherwise be unclear if s14(1) stood alone.

73. The inter-relationship of s14(1) with s12 is less straightforward. The present chairman felt some initial doubts about the correctness of the observation in the *Independent Police Complaints Commission* case at [15][7], partly because of the difficulty of seeing how requests made for a proper purpose could be a misuse of the right in s1(1), however expensive they might happen to be to answer, and partly because the problem of excessive cost for answering otherwise proper requests is dealt with by s12 (together with the regulations made under it, which provide for aggregation of certain requests made within any period of 60 working days). On further reflection, we all agree it is right to acknowledge that the concept of proportionality has a part to play in understanding the intent of s14(1). This does not mean that a request can be refused under s14(1) simply on the basis that the request is burdensome because a large amount of effort or cost would be required in order to answer it. What it means is that the extent of the burden is to be judged in relation to the purpose and value of the request, in the context of the purposes of the Act. Where the purpose of the request is in line with the purposes of the Act, the question whether the answering of it would be vexatious because unduly burdensome will rarely arise, since in most cases either the costs limit will apply or, if it is inapplicable or not relied upon, a request which has a proper purpose must be answered (subject to the application of other exemptions). However, we consider that in some cases, while the subject matter of the request may be legitimate when judged in the abstract, the heaviness of the burden of answering it may be disproportionate to the value of the request, seen in the light of the purposes of the Act. Such a request would properly be characterised as vexatious if the disproportion were such as to take it outside the ordinary and proper use of the Act.

<u>The College's appeal 0049</u>

74. Because it involves the requests that were earliest in date, it will be convenient to address appeal 0049 first. The background facts and the nature of the Commissioner's decision FS50384608 have been set out above.

[7] "A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12."

75. The issues we have to decide in appeal 0049 are whether the College should be permitted to advance a case under s14 (vexatious requests) or s12 (costs limit) and, if so, whether those exemptions should be upheld.

76. In relation to the information requests made by Mr Lee on 13 November 2009 the College did not rely on s14 or on s12-

    a. in its original responses in 2009,

    b. during the Commissioner's first investigation in 2010,

    c. during its further responses in 2010,

    d. upon internal review in 2010, or

    e. during the Commissioner's second investigation in 2011-12.

77. Section 14 was first raised in the College's grounds of appeal (dated 30 March 2012) against the Decision Notice (FS50384608 dated 1 February 2012).

78. Section 12 was not raised in the grounds of appeal, or in the College's reply to the Commissioner of 11 May 2012; it was first raised in the College's reply to Mr Lee dated 6 July 2012.

79. At first blush it is remarkable that requests made on 13 November 2009, which were not characterised as vexatious when received, have been belatedly characterised by the College as vexatious over 2 years later, only after two rounds of responses and two investigations and decisions by the Commissioner. Mr Pitt-Payne rightly accepts that the issue for us is whether these requests were vexatious at the time when they were made. He submits, however, that "in determining the extent to which the requests are burdensome it is relevant to consider the likelihood that any answer would have given rise to yet further requests: the subsequent history, after the contested requests were made, casts light on this and shows that it is overwhelmingly likely that further requests would have followed."

80. We are doubtful that a request can ever be rendered vexatious by something that happens at a later date. We do accept that there might be cases where subsequent conduct enables the true nature and circumstances of a request to be appreciated, because the subsequent conduct gives a more accurate insight into the requester's true purpose and the true circumstances surrounding the request at the time it was made.

81. In the present case we are of the firm view that the requests made by Mr Lee on 13 November 2009 were not vexatious within the meaning of s14. We

have indicated our view of the relevant facts above. In our judgment the requests were made for a serious purpose which was fully in line with the purposes for which FOIA is on the statute book. The evidence concerning Mr Lee's subsequent conduct does not lead us to the conclusion that those requests were in truth vexatious. We do not find that there is any reasonable justification for late reliance upon s14. In our view the College's reliance on s14 is both too late and in any event misplaced.

82. In relation to section 12, if *Sittampalam* is right, it is too late for reliance on s12, because the estimate of costs did not exist at the time when the request was responded to by the public authority. If we should be exercising a judgment in accordance with *APPGER* on whether there is reasonable justification for late reliance on s12, our view is that there is no such justification. The purpose of s12 is to avoid undue expenditure in dealing with requests. The College has chosen to expend considerable sums over a long period instead of relying on s12; the time when it might have made sense to rely upon it is long past. Moreover, a Reply is not the appropriate place for raising reliance upon a new exception not previously relied upon, and whether to permit this is a matter for the procedural discretion of the Tribunal, irrespective of the legal arguments concerning entitlement at earlier stages. Mr Pitt-Payne is right to say that the College is seeking to take the point after the Commissioner has ordered it to do some more searching, so that there is a possibility that (assuming the estimate is a proper one) reliance on s12 could save expense. Moreover, the College explained in its Reply dated 6 July 2012 that s12 would have been relied on in the grounds of appeal if the decision in *Independent Police Complaints Commission v IC* EA/2011/0222 (29 March 2012) had been published earlier. But we consider it would be unfair and inappropriate to allow late reliance in this case. The costs limit point should ordinarily to be taken at the start so that the requester can refine the request if necessary, so as to get it under the limit. It is unfair to the requester and contrary to the scheme of the Act that the requester is met with refusal more than two years down the road on the basis of a preliminary objection which could have been raised at the time of the first response. This is also, in our view, not a suitable case in the circumstances for exercise of the 'steps discretion' in the College's favour on the basis of the expense to which the College would be put in answering the requests.

83. The College's estimates were first produced and set out in the Reply dated 6 July 2012. We note that, despite the comprehensive criticisms of them made by Mr Lee, no witness was brought forward to testify to their accuracy or reasonableness. The Commissioner submits, referring to *Randall v IC* EA/2007/0004 (30 October 2007), that an estimate should be sensible, realistic and supported by cogent evidence.[8] Mr Pitt-Payne expressly accepts that the available material is "quite limited" and that we are entitled to use our experience and common-sense in considering the estimates. In relation to request (v) ("details of who drafted the Provost's letter dated 6 November 2009"), the College's estimate is that up to 21 individuals, including Governors, would each have to spend at least 30 minutes locating, retrieving and reviewing emails received by them. It is not clear to us why. The drafting is likely to have taken place in the short period between receipt of the ISI

[8] We note that the Tribunal in *Randall* did not suggest that this should be a general test, merely describing the particular estimate made in that case in those terms; however in *Roberts v IC* EA/2008/0050 (4 December 2008) the Tribunal treated it as a useful test.

report dated 30 October 2009 and the sending of the letter on 6 November 2009. The information requests were made one week after that date. It would be reasonable to suppose that it was then, and still is, perfectly clear from the records held by the College who it was that drafted the letter. If to find the answer to the question it were necessary to search emails sent or received during the week between the report and the letter, then we, like Mr Lee, would expect that to take a very short time. Request (xiii) relates to correspondence between the senior management and the Governors in response to four specific letters. The College's estimate for a reasonable search in relation to this is over 90 hours, which we regard as absurd. Some of the requests included in the letter of 13 November 2009 might have taken a little longer to deal with than requests (v) and (xiii), but we are not in a position, on the untested material provided, to make a finding upholding an estimate that the costs limit would have been or would now be exceeded.[9]

The College's appeal 0085

84. The background facts and the nature of the Commissioner's decision FS50397683 of 20 March 2012 have been set out above.

85. As in the previous appeal, the issues we have to decide in appeal 0085 are whether the College should be permitted to advance a case under s14 (vexatious requests) or s12 (costs limit) and, if so, whether those exemptions should be upheld.

86. In relation to the information requests made by Mr Lee on 16 March 2010 the College did not rely on s14 or s12-

    a. in its original responses in 2010,

    b. during the Commissioner's first investigation in 2010,

    c. during its further response in 2011,

    d. upon internal review in 2011, or

    e. during the Commissioner's second investigation in 2011-12.

87. Sections 12 and 14 were first raised in the College's grounds of appeal dated 6 May 2012.

[9] There is a reference to possible aggregation with other requests at paragraph 2.4 of the College's Reply dated 6 July 2012, but the details are not spelled out and we have seen nothing to persuade us that consideration of aggregation would lead to the conclusion that the College is entitled or should be permitted to rely on s12.

88. The request at issue here is "What documents were seen by the Provost and each Governor prior to the Provost's letter being issued to all parents on 6 November 2009." This must be understood in its context. It is plainly intended to relate to documents seen in the few days between receipt of the ISI report and the issuing of the letter of 6 November 2009, and to be limited to documents relevant to what was to be said in the Provost's letter.

89. We have considered the College's contentions concerning the burden placed upon the College by this request, the context and history (including the number and frequency of Mr Lee's requests, their repetitive nature, and the tendency for responses to generate further requests), the effect of this request upon College staff, the lack of serious purpose or value in it, its obsessive nature, and its purpose being to cause disruption or annoyance. We are wholly unconvinced by these contentions. Given the content of the Provost's letter and the circumstances surrounding it, in our judgment this request was an entirely appropriate and proper use of s1(1). While it is true that, as the College points out, Mr Lee put forward a number of other requests on the same or related subject-matter, we do not find this surprising in circumstances where the facts were unclear and the College was less than forthcoming with answers. We do not regard this request as vexatious within the meaning of s14.

90. We regard it as counting against the College that no reliance was placed upon s14 in regard to this request in the College's original responses in 2010, during the Commissioner's first investigation in 2010, during its further response in 2011, upon internal review in 2011, or during the Commissioner's second investigation in 2011-12. If the request was vexatious, the College was in a position to recognise that fact when it was first received in March 2010. In our view the reality is that the College must have had some awareness in March 2010 of the seriousness of the topics to which this request, and other requests from Mr Lee, related, and for that reason did not raise a contention that the request was vexatious. This reinforces our view that this request should not properly be characterised as vexatious. We also consider that there is no reasonable justification within the scheme and purposes of the Act for such belated reliance upon s14.

91. In relation to section 12, if (as we think) *Sittampalam* is right, it is too late for reliance on s12, because the estimate of costs did not exist at the time when the request was responded to by the public authority.

92. The College chose not to rely on s12 in regard to this request in the College's original responses in 2010, during the Commissioner's first investigation in 2010, during its further response in 2011, upon internal review in 2011, or during the Commissioner's second investigation in 2011-12. The only justification for late reliance put forward in the College's grounds of appeal is an alleged entitlement to rely on s12 as of right, however late.[10] If we should be exercising a judgment in accordance with *APPGER* on whether there is reasonable justification for late reliance on s12, our view is that there is no such justification.

[10] Paragraphs 4.1-4.2.

93. Mr Lee submits that the amount of costs now estimated by the College in relation to request (xi) is grossly overstated. We agree.

94. The College also relies on aggregation with requests (v)-(x) in Mr Lee's email of 16 March 2010. The relevant amounts put forward are all very small, with the exception of request (viii), in relation to which it is stated that 34 hours were spent. The wording of this request was "Copy of advice (legal and professional) given to King's College School as a result of the serious regulatory failures notified to the school by the inspectors." It is not clear to us why a request in these terms apparently led to such wide-ranging and time-consuming work as is described in the Grounds of Appeal. Such advice would have been given over a short period of time and we would have expected it to be readily available from the relevant files held by the central management of the School. If the time for locating the legal and professional advice received following the failed inspection had been 34 minutes, we would have found this more credible. For this reason, and in the absence of evidence capable of being tested, we do not consider that we would be justified in making a finding upholding the appropriateness of this estimate of time spent. That it was apparently spent at some time in the past, long before any attempt to rely on s12, further underlines, in our view, the inappropriateness of that attempt.

95. In the circumstances our judgment is that the College is not and should not be entitled to rely upon s12. Even if it were potentially permissible for such belated reliance to take place, we are not in a position to make a finding in the College's favour as regards the relevant amount of costs.[11]

Mr Lee's appeal 0015

96. We have set out above the background facts concerning Mr Lee's requests in his long letter of 29 November 2010, which the College initially declined to answer, mainly on the ground that the requests were vexatious or repeated.[12] As we have mentioned, on internal review the College conceded that certain of the requests were not vexatious or repeated; and the Commissioner in his decision notice FS50374489 of 14 December 2011 upheld the College's reliance on s14(1) in regard to the balance of the requests. Both the College and the Commissioner reached their decisions by application of the criteria for vexatious requests set out in the Commissioner's published guidance.

97. The Commissioner took the view that, while the requests could be seen objectively to have a serious purpose or value in providing transparency into the events surrounding the ISI inspection and the subsequent actions of the College and School, they were nonetheless rightly characterised as

[11] Paragraph 4.8 of the Grounds of Appeal indicated that there was "scope under Regulation 5 of the Regulations for aggregating further requests made by Mr Lee before and after the email of 16 March 2010". This unspecific contention was not further developed either in writing or orally. In the absence of appropriate evidence and analysis we are not persuaded that we either could or should give effect to it. We should add that we do not consider there is any sufficient ground to persuade us to exercise the 'steps discretion' in the College's favour on the basis of the cost of complying with the Act.

[12] In some instances the College took the view that the question posed was not a request for recorded information, did not relate to material held at the School, or related to justified redactions.

vexatious, taking into account the wider context and in particular "the pattern of requests being repeatedly made, and the obsessive quality (and quantity) of these requests". This analysis throws into sharp relief the importance of clarity concerning the intended meaning of "vexatious" in s14. Where requests can be seen objectively to have a serious purpose or value in providing transparency into the actions of a public authority – one of the very things for which FOIA was enacted – are there circumstances in which they can nonetheless properly be characterised as vexatious because of factors such as those identified by the Commissioner? We consider that such circumstances can potentially exist, but only where there is a clear disproportion between the purpose and value of the request on the one hand and an excessive burden of answering it on the other, in the sense which we have explained in our discussion of the intent of s14(1). Such purpose, value and burden have to be assessed in the light of the whole circumstances, and we consider it is proper to take into account the degree of repetitiveness or indications of obsessiveness which may be hallmarks of vexatious use of s1(1).

98. Mr Pitt-Payne places reliance on a letter written by Mr Lee on 22 February 2009, in which he stated that the Headmaster's actions would not be forgotten or forgiven, and explaining why Mr Lee did not have it in his heart at that stage to be generous to the persons concerned in the attempted expulsion of his children and related events. He submits that Mr Lee has been using FOI to keep alive a grievance that ought to be a matter of past history and to seek the removal of the Headmaster or of the employee. He points out that all the requests were made at a time when Mr Lee no longer had children at the school.

99. He stresses as a key point that it is highly likely that, if the College had answered the requests made on 29 November 2010, this would simply have prompted yet further requests for information. We agree that this is a relevant consideration in the assessment of whether the requests of 29 November 2010 were made in the ordinary and proper use of the right given by FOIA s1(1). We note, however, that the impact of this consideration depends upon the reasons why it was likely that further requests would have been prompted. It would not show misuse if or in so far as the reason why it would generate further requests was that the College's approach was to avoid answering Mr Lee's requests so far as it could, and to reveal as little information as possible. Perhaps recognising this, Mr Pitt-Payne submits that, *however the College had responded*, it is highly unlikely that Mr Lee would have accepted that his enquiries regarding the subject matter of the contested requests had been completed. He further points to subsequent requests which were made.

100. Mr Pitt-Payne also relies on the extensive nature of the correspondence, which we accept has imposed a substantial burden on the School administration. He urges us to take into account that, while the College receives public money for certain purposes, prep schools are not normally subject to FOIA, and the School's position is exceptional in this respect only because it is part of the College. He submits that no public interest is served by Mr Lee "acting as a freelance regulator", particularly after the positive ISI report made in February 2010.

101. Mr Lee stresses, in defence of his requests, the importance and seriousness of the subject-matter. We have found his concerns to relate to matters of some seriousness and to have a reasonable basis. He also says, with some justice, that the history evident in the Commissioner's decision notices demonstrates that Mr Lee's repeated refusals to accept what he was initially told by the College were in numerous instances well founded, and that the College has at times indulged in unjustified stonewalling. He disclaims any objective of securing the removal of the Headmaster or of the employee and states that the motivation behind his requests was a genuine and sincere attempt to obtain fundamental information about what he considers to be the wrongdoings and instances of incompetence which he considers took place at the School. He considered that finding out the truth would "help ensure that such things did not happen again". His explanation of his letter of 22 February 2009 was that "the wounds were still very raw at that point".

102. We accept what Mr Lee told us concerning his current motivation. We take the view that his motivation has varied over time. We consider that at the time of the November 2010 requests he nurtured at least the hope, if not the objective, that the Headmaster or employee might be removed. However, we do not find this a decisive consideration, given that his requests in November 2010 had, as the Commissioner found, objectively serious purpose and value, in line with the purposes for which FOIA exists.

103. In our judgment, particularly having regard to the contents of the later correspondence, the College is right to contend as a general proposition that Mr Lee has in total made excessive and disproportionate use of the Act. The burden of dealing with the sheer number and minutiae of requests, of having to analyse and re-analyse what is new as opposed to what has been asked for or supplied previously on overlapping subject-matter, and sometimes of having to disentangle FOI requests for recorded information from among a variety of other kinds of queries and questions in the same letter, has been disproportionate in the sense which we have earlier explained.

104. However, we remind ourselves that in appeal 0015 we are required to decide only whether the specific requests which are the subject of this appeal were vexatious. Notwithstanding Mr Pitt-Payne's forceful submissions, we are not persuaded that they were. Mr Lee has had the good sense to review his requests and, while making no admission about the alleged vexatiousness, not to pursue all of them. The College accepted that not every request in the letter of 29 November 2010 was vexatious. It seems to us that the particular requests which he has chosen to pursue in appeal 0015 were proper and legitimate requests which were of closely limited scope, and which arose out of earlier requests, not fully answered, on matters of serious concern. While we recognise that the exceptional position of the School is a relevant fact, to be weighed along with all other relevant facts, we cannot properly approach the case as if FOIA did not apply. Nor do we accept that the existence and actions of an independent regulator provide in this case a reason for regarding as vexatious a request from a member of the public on matters of serious concern.

Conclusions

105. Before finalising our reasoning and conclusions we have sought to stand back and review the whole picture, lest anything highlighted during our consideration of any one of the appeals should affect our analysis in any of the others, and to ensure that we have taken all relevant circumstances into account.

106. Our conclusion in Mr Lee's appeal 0015 is that the issue currently before us should be decided in Mr Lee's favour. We rule that the limited outstanding requests made on 29 November 2010 were not vexatious within the meaning of FOIA s14(1).

107. In the College's appeals 0049 and 0085 we rule that the College is not entitled to rely on s12 or on s14(1), both on the ground of lateness and in any event as a matter of substance.

108. We direct the parties, including the Commissioner, to submit to the Tribunal within 42 days from receipt of this decision their agreed or rival proposed directions for the further progress and determination of the matters remaining in issue. We hope very much that, before they do, they will consult each other fully, not only on the matter of directions but also on whether they can reach an amicable resolution of all matters outstanding so as to avoid the need for further formal proceedings.

Signed on original:

Andrew Bartlett QC

Tribunal Judge