IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0208
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50494861
Dated: 10 September 2013

Appellant:	**MR M BOYCE**
First Respondent:	**INFORMATION COMMISIONER**
Second Respondent:	**DEPARTMENT FOR TRANSPORT**
On the papers:	**FIELD HOUSE, LONDON**
Date:	**19 FEBRUARY 2014**
Date of decision:	**11 MARCH 2014**

Before

ROBIN CALLENDER SMITH
Judge

and

NIGEL WATSON and ANDREW WHETNALL
Tribunal Members

Representations:

For the Appellant: Mr M Boyce
For the First Respondent: Mr R Bailey, Solicitor for the Information Commissioner
For the Second Respondent: Mr T Watson, Department for Transport

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0208
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter: FOIA

Vexatious or repeated requests s.14

Refusal of request s.17

Cases: *Information Commissioner v Devon County Council and Dransfield* [2012] UTUT 440 (AAC) ('Dransfield').

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 10 September 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant has made numerous requests for information from the Department of Transport (DfT) about airport security scanners. Between 2 February 2010 and 31 August 2013 he wrote directly to the DfT over 50 times.

2. He has also made 24 Freedom of Information Act (FOIA) requests to the DfT between 11 June 2011 and 17 July 2013.

3. This appeal arises from a letter he wrote to the DfT on 21 February 2013 requesting information as follows:

> (1) There is no current security scanner direction for Manchester Airport available on the DfT website.
>
> Could you please supply me with a copy of this direction?
>
> (2) Which UK airports currently only use security scanners that employ automatic target recognition (ATR) software (i.e do not currently review naked images of passengers)?
>
> (3) The DfT appears to be citing legislation that simply does not exist.

> The current DfT security scanner regulations all quote point 4.1.1.10 of Regulation (EU) No 185/2010, Annex. Could the DfT please supply me with a copy of Regulation (EU) No 185/2010 which includes point 4.1.1.10?

4. The DfT did not respond to the request. On 31 August 2011 it had provided a refusal notice to the Appellant in respect of an earlier request (Decision Notice FS50411835) stating that the DfT would not provide any further responses to the Appellant on requests relating to scanners.

5. In this appeal the DfT informed the Commissioner that, in accordance with section 17 (6) FOIA, it considered that it would be unreasonable to expect the Department to continue to give further notices of the application of section 14(1) of FOIA to the Appellant for subsequent related requests.

6. The Commissioner decided that, in all the circumstances, it would be unreasonable to expect the DfT to issue a separate notice regarding this request.

7. The Commissioner had already determined that a previous request by the Appellant about the underlying subject matter was vexatious and that made the issuing of a further notice unreasonable. The Commissioner concluded that section 17 (6) had been appropriately applied to the request which is the subject of this appeal.

The appeal to the Tribunal

8. In his appeal to the Tribunal the Appellant presented 16 pages in his Grounds of Appeal, a 39-page Final Response in November 2013 (to the Information Commissioner's Response to those grounds dated 21 October 2013) and a 46-page 'Absolutely Final Response' dated 13 January 2014.

9. Summarising the matters highlighted in these three documents, his main points are:

(1) He states that, in his early correspondence with the DfT, he

> made the mistake of allowing my obvious frustration and deep concern at what the Government was doing with regard to its policy of compulsory body scanning to emote my early correspondence. I was naive and sometimes intemperate, but my sincere intention, albeit very clumsily, was only to elicit information on the subject, and to use this information to try to effect a more reasonable government policy (which eventually happened). My correspondence was never intended to annoy or disrupt: if there was any annoyance it was only through embarrassing disclosure, and if there was any disruption it was only because the DfT consistently failed to address my questions in this dynamic field. The DfT portray themselves as inerrant and, as always, supplying correct and reasonable information - this is manifestly incorrect.

(2) The DfT applied - and the Commissioner endorsed - a pre-*Dransfield* regime to the information request within the current appeal.

(3) The *Dransfield* indicators, properly applied to this information request, would have produced a result favouring him.

(4) The Commissioner, in making his decision, had excluded contextual information sent by the Appellant that the EU Commission had completed its legal assessment of the UK's "No Scan No Fly" policy and concluded it was unlawful.[1]

(5) He had always had legitimate and serious health and privacy concerns about compulsory body scanning. Those concerns were confirmed. Compulsory body scanning did breach the EU Charter of Fundamental Rights and the UK Government had to comply with EU law in respect of this in November 2013.

[1] From email evidence, presented to the Tribunal (and the Commissioner's Office) and sent to the Appellant from an individual at the European Parliament dated 25 November 2013 in relation to the Appellant's EU Petitions 0749 and 1636, is the following: "Commission [sic] reported (having opened infringement proceedings against UK based largely on your petition) that UK Government issued now guidelines to be followed last Friday……the machines have now been withdrawn from Manchester apparently:….".

(6) The DfT had, historically, attempted to mislead him and then – so as to close down all correspondence with him – had labelled him as vexatious.

(7) His information requests about body scanners were useful and constructive because they sought information that would hold the Government to account for a disproportionate and illegal "No Scan No Fly" policy.

(8) He had not targeted or become unreasonably fixated – in respect of his information requests - on an individual DfT member of staff.

(9) The effect of a specific email from him dated 20 June 2011 to the DfT had been misrepresented. In that email he had stated:

> You have made it clear that the DfT will never publish the responses to the public consultation on airport body scanners. You will never accept legitimate privacy concerns and you will continue to completely ignore people and lie to them. Fine. I will now spend the coming months and years filing freedom of information requests to the DfT to show that the DfT is constantly lying and has nothing but contempt for civil liberties and common decency.

What he had meant was that he would file FOIA requests until the issues he had raised were resolved. He had no intention of filing a large number of requests but only a sufficient number to obtain the information he required.

(10) The DfT's view that he was being persistent despite having been provided with a large volume of information did not make his further requests for information vexatious because he validly believed that the DfT's legal reasoning was wrong.

(11) In terms of any deliberate intention to cause annoyance he had never stated that it was his intention to disrupt the DfT.[2] What he had stated (in full) was:

> I will have huge amounts of time to legally study and challenge your assertion that I have no rights to privacy, and no rights to dignity. I will never, ever, stop until this vile abuse of innocent passengers is stopped. As I have said before – what right-minded person would object to fair, proportionate and effective use of airport technology to detect a Muslim [terrorist] threat to passengers?

and

> I will now spend the coming months and years filing freedom of information requests until the issues I have raised are resolved.

(12) Neither the DFT nor the Commissioner had based their decisions on *Dransfield* and the decision notice of 10 September 2013 was technically illegal and deliberately unfair. There had been a serious purpose and value to his requests that outweighed any earlier errors in respect of his attitude.

(13) If the Tribunal found that he had not been vexatious in respect of the matters in this appeal then, as far as he was concerned, that was the end of the matter "and the end of all correspondence from him on this subject (providing the DfT continues to obey the law)."

<u>The questions for the Tribunal</u>

10. Was the information request made by the Appellant on 21 February 2013 vexatious by virtue of s.14 FOIA?

11. Was the DfT correct to refuse to respond to the Appellant's request – and the Commissioner correct to confirm the DfT's approach - under the provisions of s.17 FOIA?

[2] The Appellant's statements: 18 March 2010 "I will have huge amounts of time to legally challenge your obscene behaviour. I will never ever stop." 20 June 2011: "I will now spend the coming months and years filing freedom of information requests to the DfT".

Conclusion and remedy

12. Section 17(5) of FOIA provides that :

> A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

13. Section 17(6) of the FOIA states that a public authority is not required to provide a refusal notice where :

> (a) the public authority is relying on a claim that section 14 applies,
>
> (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
>
> (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

14. Factually the Appellant had been the subject of an earlier notice from the DfT on 31 August 2011 in respect Decision Notice FS50411835. The Commissioner had already determined that a previous request about body scanners addressed to the DfT was vexatious.

15. What we, as a Tribunal, need to consider is whether that casts such a practical shadow over the Appellant in respect of this information request on the same subject to the same public body that it effectively blights it.

16. The key to answering that is found in the Upper Tribunal's decision in *Dransfield.*[3] The decision of Upper Tribunal Judge Wikeley was made on 28 January 2013. The Appellant's information request in relation to this appeal was made nearly a month later on 21 February 2013.

17. The Appellant criticises the DfT and the Commissioner for not having absorbed it and reflected the *Dransfield* guidelines at the initial stage of their respective decision-making functions. That is a counsel of perfection

[3] *Information Commissioner v Devon County Council and Dransfield* [2012] UTUT 440 (AAC).

which ignores the reality of how leading judgments become to be understood and to have effect.

18. *Dransfield* formed a significant part of the Commissioner's Response to the Appellant dated 21 October 2013, allowing the Appellant to see how the Commissioner viewed matters in the light of the binding authority and explanations provided by that case. The DfT picked up the same points in its Response dated 12 November 2013.

19. Even if none of those things had occurred it would be for the Tribunal – as it has now - to apply *Dransfield* to this appeal.

20. There are a number of key points made by Upper Tribunal Judge Wikeley in *Dransfield*:

- Paragraph 10: It is sometimes said that there is an "exemption" under FOIA for public authorities faced with vexatious requests. This is not strictly accurate. There are, of course, a number of absolute and qualified exemptions, properly so-called (see section 2 and Part II of FOIA), which turn on the nature of the requested information. Section 14, on the other hand, is concerned with the nature of the request and has the effect of disapplying the citizen's right under section 1(1). It follows that the purpose of section 2 and Part II is to protect the information because of its inherent nature or quality. The purpose of section 14, on the other hand, must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA ….

- Paragraph 11: To that extent, section 14 of FOIA operates as a sort of legislative "get out of jail free card" for public authorities. Its effect is to relieve the public authority of dealing with the request in issue, except to the limited extent of issuing a refusal notice as required by section 17. In short, it allows the public authority to say in terms that "Enough is enough – the nature of this request is vexatious so that section 1 does not apply." However, what section 14 or indeed FOIA does *not* do is to seek to define what it means by a "vexatious" request (see e.g. the absence of any such definition in section 84, the interpretation section). Nor are there any regulations made under the Act which provide any assistance.

- The Upper Tribunal's analysis of section 14: *What is a "vexatious" request under section 14 of FOIA?*
  Paragraph 24: "Vexatious" is a protean word, i.e. one that takes its meaning and flavour from its context….[T]he term in section 14 carries its ordinary, natural meaning within the particular statutory context of FOIA. It follows, I believe, that the ordinary dictionary definition of "vexatious" as "causing, tending or disposed to cause … annoyance, irritation, dissatisfaction, or disappointment" can only take us so far. I accept as a starting point that, depending on the circumstances, a request which is annoying or irritating to

the recipient may well be vexatious – but it all depends on those circumstances.

- Paragraph 25: In particular, we must also not forget that one of the main purposes of FOIA is to provide citizens with a (qualified) right to access to official information and thus a means of holding public authorities to account. It may be both annoying and irritating (as well as both dissatisfying and disappointing) for politicians and public officials to have to face FOIA requests designed to expose possible or actual wrongdoing. However, that cannot mean that such requests, properly considered in the light of all the circumstances and the legislative intention, are *necessarily* to be regarded as vexatious.…

- Paragraph 27: The common theme underpinning section 14(1), at least insofar as it applies on the basis of a past course of dealings between the public authority and a particular requester, has been identified by Judge Jacobs as being a lack of proportionality (in his refusal of permission to appeal in *Wise v Information Commissioner* GIA/1871/2011)….I agree with the overall conclusion….namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".

- Paragraph 28: Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms.

21. It can be seen from all of the above that the clear messages from *Dransfield* relate to proportionality and context.

22. In this appeal, and in the context of the burden on the public authority and its staff, the Appellant had historically adopted a position that he would have

> …..huge amounts of time to legally study and challenge your assertion that I have no rights to privacy, and no rights to dignity. I will never, ever, stop until this vile abuse of innocent passengers is stopped. As I have said before – what right-minded person would object to fair, proportionate and effective use of airport technology to detect a Muslim [terrorist] threat to passengers?

Also

> I will now spend the coming months and years filing freedom of information requests until the issues I have raised are resolved.

23. It was quite reasonable and proportionate for the DfT to consider the Appellant's request in this appeal – and to refuse it - in the light of such earlier bellicose remarks. The Appellant has sought to put a gloss of reason and gentleness on them in this appeal but the words stand as an example of how he has chosen to express himself.

24. Equally, because of his subsequently successful petitions to the EU in respect of the breach of his Charter of Fundamental Freedoms Article 7 privacy rights, and because technology moved on in a way that addressed concerns about privacy and health and safety issues, his concerns were on their way to being resolved.

25. In so far as his information requests to the DfT had pinpointed issues relating to these concerns, and the legal framework within which they should have been addressed, they were clearly legitimate and persistence was justified where answers were unsatisfactory. But there is an important distinction between use of the FOIA regime as a precision instrument and its use here which appears to be intended to create an ordeal of siege backed by threats. This crosses the border into an abuse of the processes permitted for information requests and is vexatious.

26. Considering the request at the root of this appeal, although he has succeeded winning the point elsewhere, that does not justify the history of intemperate and threatening language that has characterised his many previous requests and it does set the context for how the request can properly and proportionately be judged and responded – or not responded – to.

27. There is still evidence in his final words of the final sentence of his 46-page "Absolutely Final Response" dated 13 January 2014 of an inappropriately aggressive tone:

> ….This will then, as far as I am concerned, be the end of the matter, and the end of all correspondence from me on this subject (*provided the DfT continues to obey the law*) [emphasis added].

He appears to be threatening to return to the fray with the DfT if he is not satisfied with what it is doing. That is something, in the context of the history of matters between him, the DfT and this appeal that would have been better left unsaid.

28. In terms of the motive of this request it carries with it all the negative connotations evidenced in previous information requests. That language used has been detailed sufficiently above.

29. In the event there has been value and a serious purpose to the request – and he has obtained a positive result in the EU - but that has to be weighed in the balance of the other factors in play.

30. It is quite possible to make information requests which have a value and a serious purpose but to do so in a manner which was and continues to be vexatious because of the tone used and – as important – the lingering effect of any harassment or distress of or to staff.

31. The Tribunal is satisfied, for all the reasons above, that when examined in relation to the ordinary everyday meaning of vexatiousness and the principles in *Dransfield* that the information requested in this appeal was vexatious within the meaning of s.14 (1) FOIA given the history in the context of the request.

32. The DfT was justified in its use of its s.17 powers to refuse to answer.

33. Our decision is unanimous.

34. There is no order as to costs.

Robin Callender Smith
Judge
11 March 2014