IN THE FIRST-TIER TRIBUNAL **EA/2013/0266**

GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

DONNIE MACKENZIE

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Hearing
Held on 2 May 2014 at Field House
Before Steve Shaw, Nigel Watson and Judge Taylor.

Decision
The appeal is unanimously dismissed for the reasons set out below.

Reasons

1. On 3 February 2013, the Appellant, who had already made a few requests from the Ministry of Defence ('MOD'), asked for further information. The public authority treated points G to M in the Appellant's email as a new request under the Freedom of Information Act 2000 ('FOIA'), and refused to provide the information on the basis that s14 FOIA enabled it to treat the request as vexatious. The Appellant is concerned that this was not a new request such that his communication should not have been labelled as vexatious.

2. The issue before us is restricted solely to whether points G to M constitute a new request under FOIA.

3. We have considered the documents before us in detail. From these we have derived the following chronology so as to help us to understand the handling and context of this case.

Chronology

4. Requests 1 and 2
   a. On 4 August 2012, the Appellant requested from the MOD under FOIA:

      "*With reference to section 2A8 'Emerging Technology' of MOD document JWP3-80(ics-www.leeds.ac.uk/papers/pmt/exhibits/2270/jwp3_80.pdf), can you confirm or deny that directed energy devices are being used on persons within the UK?*
      If the answer is in the affirmative; can you tell me if there is any specific policy or doctrine in place to instruct against misuse?
      Could you please specify the name and nature of any such document?
      Can you tell me the appropriate means, channel or method by which someone might complain if they believed that they were the subject of the misuse of such technology?.." ('Request 1')

   b. On 4 October 2012, the MoD responded confirming that it did hold information on the subject requested and stating that the devices mentioned were not being used on people within the UK.

   c. The Appellant replied explaining why he considered this to be inaccurate. The MoD then amended its response, on 12 October, stating instead that the information requested was not held, within the meaning of the FOIA.

   d. On 15 October 2012, the Appellant requested of the MoD:

      "…digital copies of the communications you made and received in order to establish the position you came to. I would also like to request that you do this within the same timescale as the last response was provided…" ('Request 2').

e. On 8 November 2012, the Appellant, having received advice, requested an internal review of its "last" response to Request 1 ('Internal Review').

f. On 9 November 2012, the Appellant, having received advice, told the MOD that Request 2 should be treated as a request under FOIA.

g. On 3 December 2012, the MOD sent the Appellant the results of its Internal Review confirming its position of 12 October 2012, stating:

"*Section 1(1) of the Freedom of Information Act gives an applicant the right to access recorded information held by public authorities at the time the request is made and does not require public authorities to answer questions… the Information Tribunal has clarified that any written question to a public authority can be considered to be a freedom of information request. If a question can be answered by simply providing the applicant with copies of recorded information that it holds then it should do so. Otherwise it should simply state that it does not hold relevant information." **The first part of your request at i, …** [see paragraph 4a above] **is in the form of a question and following an extensive search of the Department, no relevant information which can directly answer your question has been located**…" (Emphasis added)."*

5. Requests 3 and 4

a. On 4 December 2012, the MOD answered a further question from the Appellant as follows:

"The Department that was searched was the Ministry of Defence. Requests under the Act are directed at a public authority as a whole, not at distinct sections within it. As such we have an obligation to search within the entire MOD for any recorded information in scope of a request. In order to under-take this search, I forwarded your request to any area of the MOD, which might conceivably hold information in scope of your request. These areas within the MOD then looked for any recorded information that could answer the questions you asked. After conducting a search, each area of the MOD responded by saying that they held no recorded information. I can confirm that the MOD holds no information that can either directly or indirectly answer your question…"

b. On 4 December 2012, the Appellant replied:

"…I would like to request digital copies of those e-mails also as a new FOI request…In particular I would like the content of the emails, the departments, senders and the date…" *(We regard this as 'Request 3'. Emphasis added.)*

"Dear CIO-FOI-IR (MULTIUSER), I would also like to add another FOI request in regard to the following quote mentioned above in JWP 3-80: 'Emerging Technology includes the use of directed energy weapons

such as Radio Frequency, Laser, and acoustic and other non lethal weapons.' Please could you supply an inventory list of all of these assets which MOD has access to. I would define access as something which MOD has the ability to use or initiate the use of by others, either directly, through proxy, or in any other fashion. If this exceeds the total amount of hours please prioritise in this order: 1.Space based payloads 2.Land based payloads 3.Air and Sea based payloads This brings the total FOI requests in this link pending a first response to 3…" (We regard this as 'Request 4')

c. On 21 December, the MoD provided the Appellant with emails in response to Request 3.

6. Further Clarification and/or Requests 5 and 6

a. On 24 December, the Appellant asked for further clarification in relation to the information provided to him on 21 December in response to Request 3.

b. On 3 February 2013, the Appellant asked for clarification on matters arising from the email correspondence he had received on 21 December. He had clearly done extensive analysis and this email was over three pages long. The MOD subsequently provided information in relation to points A to F of his email.

c. Points G to M are the subject matter of this appeal and are similar in nature.[1] For example, point G states:
    i. *"On page 5 LF-SEC &GROUP responds that he/she "can not comment on any special projects that may or may not be in use by special forces." For an answer on that the question would need to be asked of "CAP Special projects (SP) or Director Special Forces (DSF)." Can you confirm or deny whether or not either of these sections were contacted and if so please confirm which e-mails were from them?"*

d. The Appellant's email ended:
"I realize this will take a little time to respond to but I hope for a full reply in due course as well as to the other requests mentioned above."

e. On 18 February 2013, the Appellant stated that he was not satisfied having twice sought guidance and clarification of the information provided on 21 December. He requested an internal review. (We presume this was a request for an internal review of the response to Request 3.)

f. On 20 February, the MOD responded to the Appellant's email of 3 February, providing the information in answer to points A to F. In relation to the rest it stated:

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[1] These are listed in paragraph 3 of the ICO's Decision Notice (Ref. FS50503531) and online at https://www.whatdotheyknow.com/request/use_of_directed_energy_devices_i

"…Your questions in G-M have been regarded by the Department as a fresh request … This is because these questions can only be answered with information which is out of scope of your original request (which was for emails about the handing of your original request between the internal review team and the wider Department – all of which were provided). It should also be noted that the Act does not give a right to receive answers to questions unless these are in the form of recorded information held at the time of the request.

… I note that much of the information you seek is seemingly aimed at carrying out an investigation into whether you have received all of the information held by the Department in scope of your original request. If this is so and you remain dissatisfied following the internal review conducted into the Department's handling of your initial request I recommend that you take your complaint to the Information Commissioner, who is best placed to investigate under the provisions of Section 50 of the Freedom of Information Act…"

g. On 6 March 2013, the MoD refused to reply to points G to M claiming that s14(1) FOIA enabled it to treat the request as vexatious having taken into account the large number of requests submitted.

h. On 8 March, the Appellant replied:
"The communication on 3rd February did not seek to open a new request. So it seems surprising that the MOD would try to create more work for themselves by interpreting some of the clarification as a new request when they state feeling burdened. Surely it would have made more sense to simply explain they were burdened and deny the clarification than us have to go through this. I believe this might potentially have been because there are a number of Internal Review requests which have all arrived with them at the same time. This was not my intention and it stems from a number of requests which were spread out across the second half of last year. When making requests I am conscious that I do not want to cause unreasonable burden, so it was entirely intentional that there was spaces reaching months between some of the requests… I have attempted informal resolution where possible. MOD documentation encourages individuals to do so prior to formal requests. I am grateful where clarification has been forthcoming. I would add that I am not pursuing this because I am dissatisfied with the lack of information, rather because they have categorized my attempt at informal resolution as a new request and deemed it vexatious. I see this as an inappropriate attempt to tie my hands…"

7. As part of the subsequent appeal the ICO was asked to consider whether points G to M were new requests for information, and not whether section 14 FOIA (on vexatious requests) had been correctly applied. It decided that Points G to M were new requests and the MOD had in that respect dealt with the request properly.

The Task of the Tribunal

8. Our task is to consider whether the decision made by the ICO is in accordance with the law or whether any discretion it exercised should have been exercised differently.

The Law

9. Under s1(1) FOIA:

   "Any person making a request for information to a public authority is entitled—

   (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."

10. Under s8 FOIA:

   "(1) In this Act any reference to any reference to a "request for information" is a reference to such a request which -

   (a) is in writing,
   (b)states the name of the applicant and an address for correspondence, and
   (c) describes the information requested.

   (2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request –
   (a) is transmitted by electronic means,
   (b) is received in legible form, and
   (c) is capable of being used for subsequent reference."

Submissions

11. We have read all submissions and papers received from the parties, even if not specifically referred to here.

12. The Appellant's arguments include that:

    a. Points G to M were within the scope of Requests 1, 2 or 3.
    b. He was asking whether certain departments were contacted via email for the search as part of the FOI email effort, which was within the scope of his request. It was in relation to emails that had already been provided.
    c. He stated that it was implicit in his earlier request (we were not clear whether he meant Request 2 or 3), that the emails he sought were all those made and received in order to establish the position of the MOD.
    d. Accordingly, the MOD could not have felt any more of a burden than before the email of 3 February 2013, and they chose to create a new FOI request as opposed to simply declining to informally resolve his queries.

e. Points G to M were an attempt at an informal resolution, as invited by the MOD by letter of 21 December which stated that if he were not satisfied with the response he should contact the official in the first instance. The emails provided under that letter had been long and confusing.
f. He never stated that he wished the points to be treated as a new request, and he had clearly stated that this was a request for clarification which he knew they were not obliged to respond to and could easily refuse. A common sense approach would be for communications to be answered in the manner they are intended and not the manner which potentially suits the authority.
g. Request 3 had wrongly been treated as narrower when he had not gone into specific detail in his request as to who the emails were between.

13. The ICO's arguments included:

a. Points G to M constituted a new FOIA request. This was because it falls within the meaning of s.8 FOIA and is for information in addition to that which had previously been provided and beyond the scope of Request 3.
b. Even though the Appellant sets out that he did not say he wanted the request to be treated as within FOIA, this is immaterial. Had the MOD not treated it as such it could have left itself open to a further complaint.

Our Findings

14. On the basis of all the information before us, we accept the ICO's arguments set out in paragraph 13 above. However, we note that to the extent that information requested in points G to M is within or evident from emails asked for under Request 2, it is not a new request. We consider this unlikely since they are questions arising from the response to Request 3.

15. From reading points G to M, we do not see how they can be interpreted as falling within the scope of the original request, namely Request 1, as they concern events after that request, such as the way the MOD has looked to see what it held.

16. To the extent that points G to M go beyond the provision of emails already asked for in Request 2 and 3, the points are clearly a new request. The Appellant actually states that the points were asking questions in relation to emails already provided, such that he is asking for information from the MOD beyond what had already been provided.

17. To the extent that he had been simply asking whether he had been provided with all the emails within the terms of Request 3, then this would not be a new request, but that does not seem to be the case here. As he explained, the material he had been provided with was confusing, and so he was asking questions about it beyond the task the MOD had already done of providing the relevant emails.

18. We do not accept that because the Appellant was seeking clarification of material provided this meant he could not have been making a new request. It is clear that his request for points G to M fell within s8 FOIA and as such triggered a right within s1(1) FOIA subject to the terms of that Act.

19. This is so regardless of whether the Appellant intended informal communication without triggering any obligation on the part of the MOD. (Although of no consequence to our decision, we think the MOD would have been fully justified to assume that Appellant would not have accepted a simple refusal to respond to answer given the pattern of correspondence as well as the final sentence in paragraph 6(d) above and his previous correspondence.)

20. To conclude, our Decision is that the requests in Points G to M are new requests to the extent they are not for information contained in emails within the scope of Request 2.

Other Matters

21. We note the following matters that do not form part of our decision:

    a. It seems to us that Request 3 was phrased in a somewhat ambiguous manner and perhaps the requester, who is clearly skilled, could have taken more care in this respect. Requests 2 and 3 could have been asking for the same or overlapping information, or Request 3 could instead have meant, as interpreted by the way the MOD, only those emails sent during the Internal Review. However, it seems likely, based on the correspondence we have seen, that had he been asked to clarify what he was requesting, the Appellant would have said that Request 3 was both a repeated request for information asked for under the as yet unanswered Request 2 and any further email correspondence resulting from the Internal Review.

    b. The issue of whether Request 2 has been complied with is beyond the scope of this appeal. If it has not, we would encourage the MOD to respond as soon as possible such that the Appellant may consider his options.

    c. We note that we agree with the final paragraph of paragraph 6f above, and that the Appellant might have been better served if he had complained about the MOD's response to Request 1, on the basis that the information requested was held, and that the MOD had not done a full search. This would have enabled the ICO to investigate the complaint and the emails asked for in Request 2 and 3 could have then been asked for.

22. We unanimously dismiss the appeal.

Judge Taylor, 8 May 2014