IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2014/0118

BETWEEN

POL WONG

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

THE WELSH ASSEMBLY GOVERNMENT

Second Respondent

Before

Brian Kennedy QC
Jacqueline Blake
Malcolm Clarke

DECISION

The Tribunal allows the Appeal in that we find in all the circumstances the request was not vexatious.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 (" FOIA "). The Tribunal and the parties worked from an Open Bundle (" OB ") indexed and paginated and from a smaller Closed Bundle (" CB ") also indexed and paginated. The appeal was heard at an oral hearing at Chesney Court, Wrexham on 11 November 2014.

[2] The impugned decision under appeal is the Decision Notice (" DN ") from the Respondent dated the 3 April 2014: Reference FS50515394.

Background to the Appeal:

[3] The relevant background to this appeal is set out at paragraphs 2 - 5 of the DN. The Appellant was personally and deeply involved with an organisation called Powys Fadog, which entered into a lease from the second respondent for a property known as the River Lodge. This property had been purchased by the second Respondent in March 2007 with a view to developing the property, to secure an acceptable community use for the building ("the River Lodge project"). For a long time, the project was encouraged and supported by officials from the Second Respondent.

There was a complex history to the financing and development of the project which we won't repeat here, but suffice to say at the end of the lease period, Powys Fadog had not succeeded in raising sufficient finance for the project to proceed. It is clear that the attitude of the Second Respondent towards it changed dramatically during this period, because of concerns about probity and value for money. The Appellant believes that politically motivated prejudice and inappropriate interference by certain politicians played a significant part in this.

There has clearly been a great deal of public and political interest in the whole matter, which has been the subject of two major reports by the Welsh Audit Office and the Welsh Government Public Accounts Committee which, in different ways were highly critical of the standards of governance and decision-making processes of the second respondent which led to support for the Powys Fadog scheme in the first place. A Welsh Government official who supported the scheme and sat on its Management Committee was dismissed from her post. The second Respondent was also criticised for a failure to communicate properly to Powys Fadog what was happening whilst these enquiries were going on.

The appellant has made a number of previous requests for information some of which have been referred to the First Respondent, as have other members of the public, and a considerable amount of information has been put into the public domain by both those requests and the reports referred to above. The nature and extent of the requests are set out fully in the DN, the detailed grounds of appeal and the Respondents formal response.

The requests which are the subject of this appeal were for copies of correspondence, notes of telephone conversations and notes of meetings with the second respondent, relating to the project or the complainant held by three named Ministers.

[4] In response specifically to the Appellants request of 29 July 2013 as set out at paragraph 7 of the DN *("the requested information"),* the Second Respondent (Welsh Government), provided a response on 27 August 2013 stating that it was refusing the three requests on the basis of section 14(1) FOIA as the requests are considered to be vexatious.

[5] On 3 September 2013 the Appellant requested an internal review and the Second Respondent provided the outcome of its internal review in relation to the three requests on 11 October 2013 and upheld its position that section 14 applied to the requests.

[6] The Appellant complained to the First Respondent on 4 October 2013 and the Commissioner has found that the Second Respondent has appropriately applied section

14 to the parts of the requests which do not relate to the complainant's own personal data.

The Decision Notice:

[7] Section 14(1) FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. There is no public interest test. The Respondents properly identify the criteria to be considered in the issue of vexatious requests and refers to the Dransfield decision wherein the Upper Tribunal, inter-alia commented that vexatious could be defined as *"manifestly unjustified, inappropriate or improper use of formal procedure"* and further refers to instructive identification examples such as the burden imposed by the request, the motive of the requester, harassment or distress to Public Authority employees, while reminding us these were not exhaustive tests. As in any case before these courts and tribunals each case must be decided on its' merits. Proportionality and justification are important aspects also and again in Dransfield the Upper Tribunal helpfully identifies the importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not. We note and have noted in many of these cases the significance of a previous course of dealings, as there is in the facts of this case.

[8] In the DN, the First Respondent sets out his reasoning for his Decision and examines the case broadly under the following heads; Burden to the authority, Unreasonable persistence, Scattergun approach and Futile requests. He essentially accepts: ***"****that responding to the requests would impose and unjustified level of disruption on the Welsh Government, out of proportion to any value that the wider public might derive from the response."*

[9] This Tribunal heard at length from the Appellant at the oral hearing of this appeal and considered carefully his grounds of appeal, the Responses from the Respondents and the evidence given on behalf of the Second Respondent by Mr. Christopher Mundy. On balance we do not accept that an imposition of unjustified disruption on the Second Respondent as a result of the subject request has been established. We are satisfied on balance having considered all the evidence that the request for the disputed information in this case, while further to a number of earlier requests was not unduly persistent, unjustified, inappropriate or an improper use of FOIA. In our view, given the complex and controversial background to this issue falls short of being obsessive or lacking in proper motivation or proportionality and in all the circumstances we do not find the request vexatious.

Reasons:

[10] We remind ourselves that FOIA promotes disclosure and transparency and accountability are the desired result. In this case there is, as is evidenced by the papers before us and the oral evidence given at hearing, was and remains a great deal of significant and well placed public interest in the River Lodge Project, and the reasons for its failure, having at one stage had the support of the Second Respondent. The internal audit by the Welsh Audit Office and other investigations including that by the Public Accounts Committee of the National Assembly of Wales recognise the height and extent of public concern raised in relation to the subject matter concerned in this appeal. The findings of these investigations raised many concerns about the decision-making processes which led to support for the scheme, as well as a failure by the Second Respondent to properly communicate with Powys Fadog.

The Respondents have correctly pointed to the thorough investigations already undertaken in these matters by the two external reports referred to above, as well as the number of FOIA requests already dealt with as a result of the River Lodge project although it must be noted that not all the complaints or requests for information emanated from the Appellant.

It is not disputed by the Respondents that any earlier requests for information by the Appellant were justified and properly responded to. We find it is not surprising that there would be such interest and resulting multiple requests for information in the circumstances of this case and the conduct of the Second Respondent directly in relation to, and surrounding the River Lodge project.

[11] We do not accept that the request was designed to cause disruption and annoyance to staff of the Second Respondent or to cause distress and while it might have done, this has to be considered in the light of the complex and controversial history of the project, and the criticisms made of the Second respondent.

[12] We are convinced beyond doubt about the bona fide motive behind the subject request from the Appellant. He has been deeply affected by these events. He makes the point, which we accept, that the specific issue which is the subject of these requests, namely the possible involvement of three Ministers, was not covered by the above reports.

[13] Again we do not accept that the Appellant used his request as a means to vent anger at any particular decision or to harass and annoy the public authority. There is no significant evidence or even suggestion that the Appellant has acted in an offensive manner such as one usually finds when a request is deemed vexatious. We have considered carefully the response to the Grounds of Appeal and the Appellants detailed evidence before us and are satisfied that there were reasonable grounds for his request. We noted, and accepted, his evidence that these are what he regards as the final pieces of the jigsaw and that he does not envisage making further requests.

[14] We noted the respondents' view that there would be a significant burden on the Second Respondent in responding to the subject request. We find that even if it were the case that the burden was significant or unacceptable, which we find on balance is not proven, this would not in our view be sufficient to establish the request was vexatious. Other exemptions, such as section 12, might be engaged for the objections that the Second Respondent seems to have but we are not satisfied that Section 14 can be relied upon on the facts before us.

[15] Having considered the evidence and on hearing the Appellant on what were clearly his genuine concerns we find that the backdrop of other correspondence and complaints only exacerbated his grounds for concern and the frustration he felt in all the circumstances of this case. The Appellant clearly was not getting satisfaction nor the meaningful response he deserved. This Tribunal reminds itself that there is duty on Public Authorities to assist members of the public in formulating and processing their requests. On hearing the Appellant on the facts in this case we are of the view that more could have been done to assist the processing of this request. This failure to properly or adequately respond to earlier requests led to confusion and frustration and a break down in communications such that the Appellant did not seek or deserve. We are of the view that it is wrong to suggest that the effect of the request was such as to cause harassment or distress. We do not accept this as proven on balance on the papers and have heard no evidence in support of these assertions. Further if there were any perceived harassment or such distress then the burden for

such, in our considered view, cannot be placed solely on the Appellant or his request.

[16] We accept the appellant's assertion that this was not "*a Scattergun approach*" as stated in the DN. It is, as the Appellant points out, a request that seeks information about a single project within a specific, relevant time frame relating to communications, if any, from named and relevant Ministers. The first respondent concludes that it is a "fishing exercise" which lacks clear purpose and that the appellant does not know what he will get out of it. Of course, there is a real sense in which it is true that, without seeing the information requested, if it exists, he cannot know what significance, if any, it has to his belief about inappropriate interference. But we conclude, given the background to the case, that he has a legitimate interest in exploring this issue.

[17] Taking a holistic view of the facts and history of this particular case, and the guidance given in Dransfield, on balance we do not find that the request is vexatious. For the avoidance of doubt, this finding is without prejudice to the possible engagement of other exemptions, if the requested information exists, and makes no findings on the validity of the appellant's complaints about the handling of the project by the second respondent, which are completely outside our jurisdiction.

[18] The Tribunal has not considered the position in relation to FOIA 2000 as opposed to EIR 2004 as we agree with the respondent that the test for a vexatious request is the same under both.

[19] Accordingly we allow the appeal and reverse the finding of the DN under appeal.

Brian Kennedy QC
Tribunal Judge

2 February 2015.