IN THE FIRST-TIER TRIBUNAL **EA/2015/0225**
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50581902
Dated: 9 September 2015

Promulgated: 3 March 2016

Appellant: GABRIEL WEBBER
Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 25 February 2016

Date of Decision: 29 February 2016

Before
Henry Fitzhugh
Michael Hake
Annabel Pilling (Judge)

Subject matter:
FOIA – Absolute exemption – Vexatious request – section 14(1)

Representation:
For the Appellant: Gabriel Webber
For the Respondent: Richard Bailey

Decision

For the reasons given below, the Tribunal considers that the Decision Notice of 9 September 2015 was not in accordance with the law as the request is not vexatious and the University of Sussex not entitled to rely on section 14(1) of the Freedom of Information Act 2000. We therefore allow the appeal.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9 September 2015.

2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the University of Sussex ('the University') to be informed of the amount of money the University spent on pursuing an appeal to the Tribunal in respect of an earlier request for information by the same Appellant. The University refused the request on the basis that the request is vexatious in accordance with section 14(1) of FOIA. It upheld that decision following an internal review.

3. The Appellant complained to the Commissioner, who investigated the way in which the request had been dealt by the University. He concluded that the University correctly applied section 14(1) and that the request is vexatious within the meaning of that provision.

The appeal to the Tribunal

4. The parties agreed that this was a matter that could be dealt with by way of a paper hearing. The University was not joined as a party and has taken no part in this appeal.

5. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We cannot refer to every document or address every point made in the written submissions but have had regard to all the material when considering the issues before us.

The Issues for the Tribunal

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

7. Section 14(1) provides that a public authority is not obliged to comply with a request for information if the request is vexatious.

8. The term "vexatious" is not further defined in the legislation. The Upper Tribunal[1] has considered the approach which should be taken when reaching what is ultimately a value judgment as to whether the request in issue is vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA.

9. It cautioned against a too rigid approach to deciding whether a request in "vexatious", stressing that it is important to remember that Parliament expressly declined to define the term. It did not purport to lay down a formulaic checklist or identify all the relevant issues, but suggested four broad issues or themes as relevant to the determination of whether a request is "vexatious" or "manifestly unreasonable" (under the similar provision for dealing with requests for environmental information under the Environmental Information Regulations 2004) - i) the burden on the public authority and its staff, ii) the motive of the requestor, iii) the value or serious purpose of the request and iv) any harassment or distress of or to staff. These are not exhaustive nor create a formulaic check list; it is an inherently flexible concept which can take many different forms.

10. The Court of Appeal upheld the decision of the Upper Tribunal and, although the guidance formulated was not the subject of the appeal, Lady Justice Arden considered, in the context of FOIA, that "*the emphasis should be on an objective standard and that starting pint is that vexatiousness primarily involves making a request which has no*

[1] Information Commissioner v Devon County Council and Alan Dransfield [2012] UKUT 440 (AAC) ('Dransfield')

reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requestor, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and this is consistent with the constitutional nature of the right".

11. In ***Dransfield,*** the Upper Tribunal emphasised the importance of viewing a request in its context which in this case we consider requires us to consider the background of the Appellant's dealings with the University.

12. There is no dispute that the Appellant has made a number of previous requests for information from the University. The Appellant accepts that he has been part of a campaign against the senior management of the University. The Appellant is the editor of a satirical blog and has, from time to time, satirised the members of the Vice-Chancellor's Executive group, and other senior employees of the University. He submits that the satire uses humour, irony and ridicule to convey serious arguments about the governance of the University.

13. We have read the lengthy written representations which the University made to the Commissioner during his investigation. It considers that the purpose of this request is to criticise the University staff in relation to an issue which has already been decided by the Tribunal, and that continuing to engage with the Appellant on this issue will have a disproportionately negative effect on the University.

14. We disagree with a number of the Commissioner's conclusions in his decision notice.

15. Firstly in respect of the burden on the University from what he refers to as the "*unreasonable persistence*" on the part of the Appellant. The University conceded to the Commissioner that the request is not obviously vexatious in itself but is *"contributing to the aggregated burden as the Appellant is placing a significant strain on the University's resources"*.

16. The Appellant has made 23 FOIA requests with further follow up requests within those, 10 have resulted in his requesting an internal reviews and 6 of those have resulted in appeals to the Commissioner. The University also sought to rely on the fact that the Appellant had been joined as a party to an appeal it brought against a decision of the Commissioner in favour of the Appellant. We agree with the apparent position taken by the Commissioner that this is irrelevant as it was the University which appealed to the tribunal. The tribunal dismissed the appeal and it is the costs of pursuing that appeal which are the subject of this request for information. The starting point for the previous requests, and the recurring theme, was for information in respect of the University's decision to outsource its catering services to a private services company.

17. We have been provided with copies of the Appellant's previous requests for information and in our view some of these were necessitated by fault on the part of the University in dealing with an earlier request.

18. The Commissioner appears to have accepted the University's bald assertion in respect of the burden upon it in complying with the Appellant's requests without considering whether there is any evidence and, if so, the extent off that burden. The University has not provided any direct evidence. For example, there is no evidence of the time that has been spent in dealing with the Appellant's previous requests. There is no evidence of the size of the FOIA department at the University. There is no evidence of its workload, or what proportion of that workload was spent dealing with this Appellant's requests. This is not a case in which the sheer volume, diversity of information requested and/or frequency of requests can be said to be evidence *per se* of the burden on a public authority. We are not persuaded that dealing with this request would result in a particularly onerous or costly burden on the University.

19. Secondly, the Commissioner considers that the *"these requests would have an unjustified effect on the University"*. He does not expand on

what that effect is or why it was unjustified. We do not consider that there would be a particular unjustified effect on the University in complying with this request for information.

20. Thirdly, we disagree with the Commissioner that, by making this request, the Appellant is seeking to reopen issues that have already been addressed. This request does not relate to the decision to outsource the catering services or to the operation of that decision. This request is for the amount of public money that a public authority spent in making an unsuccessful appeal. We consider that this is far from attempting to reopen earlier issues and consider that this request has real value and a serious purpose.

21. Fourthly, and for the same reasons, we disagree with the Commissioner's categorisation of the request being a continuation of the Appellant's obsessive campaign. The Commissioner was satisfied that the copies of the requests supplied to him by the University are "*sufficient evidence to demonstrate a series of frequent or overlapping requests on the same issue."* The previous requests might well be, but we do not accept that this request can properly or fairly be regarded as being on the same issue as the decision to outsource catering services; it is for the amount of public money spent in pursuing an appeal which ultimately was not successful.

22. Fifthly, we disagree with the Commissioner's conclusion that to comply with the request will cause "*irritation and distress*" to the staff involved. The Commissioner submits that the tone of the Appellant's correspondence with the University went beyond the level of criticism that the University or its employees should reasonably be expected to receive. He submits that this is not a decisive factor in this case but is still a matter which should be taken into account in the context and history of the request. We do not consider that the Appellant has frequently used "tendentious" or "aggressive" language as asserted by the University when making his requests or in the correspondence with which we have been provided, His tone, by and large, we regard as civil and some of the criticisms made have some justification. For

example, in light of the Appellant's expectations acting on indications of the provision of information after the expiry of a certain period of time only to be informed that the University would rely on a different exemption to refuse to provide that information.

23. It may well be that, if provided with the information, the Appellant uses it in his satirical on line publication but we do not consider that factor weighs against the value and purpose we find in the request itself. We agree with the Commissioner's submissions that the arguments put forward by the University and the Appellant on this topic are not decisive in this case.

24. Looking at the history, while we cannot be confident that the Appellant will not continue to make requests for information from the University, whether on the topic of outsourcing catering services or other topics, we are not satisfied that the Appellant's request for this information is vexatious.

25. For all the reasons given above we do not find that this was a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA. The Commissioner was wrong to conclude that the University was entitled to rely on section 14(1) of FOIA and not comply with its duty under section 1(1).

26. We therefore allow this appeal.

27. The University must now consider the Appellant's request for information. We cannot order that the information be provided as the University will have to consider whether the information is held, whether the cost of complying would exceed the appropriate limit or whether any part 2 exemption might be applicable.

28. Our decision is unanimous

29 February 2016