IN THE FIRST-TIER TRIBUNAL **EA/2015/0196 AND 0197**
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notices: FS50580353 and FS50579646

Dated: 5 August 2015

Appellants: SIMON GOULD and MICHAEL EYDES
Respondent: THE INFORMATION COMMISSIONER
Second Respondent: CHIEF CONSTABLE OF AVON AND SOMERSET

Date of hearing: 23 February 2016

Date of Decision: 9 March 2016

Promulgation Date 10th March 2016

Before
Gareth Jones
Jean Nelson
Annabel Pilling (Judge)

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

Representation:

For the Appellants: Simon Gould and Michael Eydes
For the Respondent: Peter Lockley
For the Second Respondent: Alison Hewitt

Decision

For the reasons given below, the Tribunal refuses the appeals and upholds the Decision Notices.

Reasons for Decision

Introduction

1. These are appeals against Decision Notices issued by the Information Commissioner (the 'Commissioner') each dated 5 August 2015.

2. Each Decision Notice relates to requests made by each of the Appellants under the Freedom of Information Act 2000 (the 'FOIA') to the Chief Constable of Avon and Somerset Constabulary ('the Constabulary').

3. The Constabulary refused the requests pursuant to section 14(1) of FOIA on the basis that it considered the Appellants' requests were part of an orchestrated campaign and, taken together, they were vexatious. It upheld that decision on internal review.

4. The Commissioner investigated the way in which the requests had been dealt by the Constabulary.

5. The Commissioner concluded that the Constabulary had correctly applied section 14(1) and that the requests formed part of a wider campaign against the Constabulary whose purpose was not merely to elicit relevant information, but (i) to fish for information with which to criticise the Constabulary, and (ii) to disrupt the functioning of the Constabulary, and in particular its FOI department. The Commissioner was satisfied that the requests, considered in light of all relevant circumstances, were vexatious and the Constabulary entitled to apply

section 14(1).

The appeal to the Tribunal

6. In accordance with the Tribunal's case management powers these two appeals have been heard together as they raise common issues.

7. The Constabulary was joined as a party by the Tribunal.

8. All parties agreed that this was a matter that could be dealt with by way of a paper hearing.

9. 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 and submission but have had regard to all the material when considering the issues before us.

Relevant background

10. It is necessary to record, in brief, something of the background to this case as the context is relevant, particularly in the consideration of section 14(1).

11. Both the Appellants are former police officers who served with the Constabulary. Both are in receipt of an Injury on Duty award and pension ('IOD'), pursuant to the scheme for officers injured in the course of duty that is established by the Police Pensions Act 1976 and the Police (Injury Benefit) Regulations 2006.

12. Mr E was retired on medical grounds in 2011. He is seeking to take his case before the Police Medical Appeal Board as he believes that there was a deliberate decision to place him in a wrong award Band.

13. Mr G says that he was forcibly retired in 1994 aged 37, with a 100% IOD award, that is, the highest Band (Band 4).

14. The Constabulary commenced a review of the IOD awards of sixteen individuals in 2014. The Commissioner incorrectly stated in his decision

notices that this was as a result of new Home Office guidance. The Commissioner also incorrectly stated in his decision notices that each Appellant has had his IOD award reviewed; neither Appellant is currently subject to this review. Mr G says that he was informed that his pension and award would never be reviewed.

15. A support group has been established called the Injured on Duty Pensioners' Association ('IODPA'). It has a website and maintains a Facebook page upon which its "mission" is set out.

16. Both Appellants made their requests for information to the Constabulary using the What Do They Know website, which allows for the submitting of requests and archiving requests and responses.

17. It is disproportionate to record in full in this judgement the date of and detail of each request for information. These can be found at Annex A to each of the Commissioner's decision notices.

18. Mr E made 6 requests for information on 9 February 2015. The Constabulary gave these reference numbers from 250/15 to 255/15. His complaint to the Commissioner was in respect of one request only, 250/15, which was for e-mail correspondence passing between the Police Federation Pension Advisor and the Constabulary's Medical Officer between 28 March 2014 and 9 February 2015. The Constabulary issued a refusal notice on 2 March 2015 relying on section 14(1) FOIA. It explained that its resources were being placed under significant and unjustified strain by the number of requests it had received from the Appellant and others relating to the IOD award review.

19. Mr G made 14 requests containing approximately 40 separate requests for information between 18 January 2015 and 22 February 2015, 9 of these submitted on 22 February 2015, and covering a range of topics. The Constabulary dealt with two of his requests and issued a refusal notice on 25 February 2015 in respect of the remainder, relying on section 14(1) FOIA. Similarly, it explained that its resources were

being placed under significant and unjustified strain by the number of requests it had received from the Appellant and others relating to the IOD award review. It said that it would not be responding to any further similar requests. The Appellant subsequently submitted two further requests to which the Constabulary did not respond.

The Issues for the Tribunal

20. 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.

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

22. 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.

23. It cautioned against a too rigid approach to deciding whether a request in "vexatious"; 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

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

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.

24. 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 the starting point is that vexatiousness primarily involves making a request which has no 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".*

25. 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 whether the Appellants were acting in concert, with each other and/or others, the particular burden on the Constabulary and whether there was any serious purpose or value to the requests.

26. Although not bound by earlier decisions, the Tribunal[2] has accepted in the past that the relevant circumstances can include requests of a similar nature made by other requestors where there is evidence that the requesters are acting in concert as part of a campaign, or even simply where the requestor under consideration cannot have been unaware of multiple prior requests on a similar topic.

27. The Constabulary and the Commissioner submit that each request, taken in isolation, is not vexatious; it is the cumulative effect of the requests of these Appellants acting with others that entitles the Constabulary to refuse the requests on the basis of section 14(1).

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[2] Harvey v Information Commissioner and Walberswick Parish Council EA/2013/0022; MacCarthy v Information Commissioner and Walberswick Parish Council EA/2013/0079; Walpole v Information Commissioner and Walberswick Parish Council EA/2013/0080.

28. Each appellant denies acting together with others, known or unknown, as part of a wider campaign. Each believes that the Constabulary's review was motivated by a desire to reduce expenditure on former officers and rely on comments made by the Police and Crime Commissioner that such payments are of no benefit to the local people and represent a significant part of the force's budget. They believe that the Constabulary was routinely designating any requests for information relating to the IOD award review as vexatious to impede scrutiny of the review process.

29. Mr G admits being an active member of the IODPA. His intention is not to stop the IOD award review process but *"to hold the Constabulary to account."*

30. Each Appellant submitted the requests for information to the Constabulary via the What Do They Know website. The requests were framed in almost identical terms. These requests are strikingly similar to requests from other individuals. The requests were for information not limited to or related to the individual's case, or for information behind the decision to conduct the IOD award reviews or how the sixteen individuals were selected for the first review.

31. Mr G submits that the fact the requests were the same does not demonstrate a co-ordinated approach but demonstrates the opposite, that the individuals had no idea what other people were asking as there would be no need for duplication if this was a co-ordinated campaign.

32. As well as the requests, the Grounds of Appeal have been drafted in similar ways. There would be nothing wrong with both Appellants, for example, using the same lawyer to represent them in this joint Appeal; if that was the case it would not be surprising of the Grounds were drafted identically. However, in this case, neither Appellant concedes that there has been a joint approach on Appeal and each Appellant denies acting together as part of a campaign; the fact of such similarities appears therefore to be suggested as co-incidence.

33. Mr E submits that asking relevant and sometimes repetitive questions is ingrained testing for a successful police officer. We consider it is clear from his Grounds of Appeal alone that he has been acting either in concert with others or at least with knowledge of the same or similar requests being made. In his Grounds of Appeal, he refers to a request for information in respect of a declaration of truth attached to the questionnaire which had been sent to the sixteen individuals selected for review of their IOD awards. This was in the following terms:

> *"I (print full name) declare that the information I have provided is correct to the best of my knowledge and belief and I understand that I may be liable to prosecution and/or payment of my injury award may be reduced or suspended if I have provided any information which is either misleading or inaccurate."*

34. Mr G, as well as at last one other individual who is not part of this Appeal, made a request for the Constabulary to provide the statutory basis for any prosecution as a result. We are not aware of Mr E requesting that information or asking that question himself but says that he is *"aware of many"* such requests and the Constabulary's failure to provide that information.

35. This is, as the Commissioner submits, evidence that those making requests are aware of requests made and responses received by others, and that there is no attempt to avoid duplication.

36. In respect of his request to go to a Police Medical Appeal Board regarding the decision to place him in a particular Band, Mr E submits that, *"As no satisfactory explanations or reasoning was forthcoming, myself and others asked questions which needed answering or clarifying."* Again this demonstrates that Mr E was acting either in concert with others or at least with knowledge of the same or similar requests being made.

37. The Constabulary provided the Commissioner with evidence from the IODPA Facebook account which showed that each Appellant had

viewed the relevant pages, “liking” posts and/or leaving comments. While evidence of any activity via Facebook is not determinative or, in this case, carrying any particular weight, it is relevant to note that it is illustrative of a wider campaign being orchestrated. For example, on 29 April 2015 a post on the IODPA Facebook page refers to a request to put a *“shout out to anyone from Avon and Somerset who is an IOD. Please contact us ASAP, your message will be treated in utmost confidence.”* A “thank you” post to those who had contacted the IODPA appeared later that day. Both these posts were “liked” by the Appellants. That same day, the Constabulary received 18 requests for internal reviews from four individuals. None relate to either of the Appellants but the timing of these requests, all out of time and relating to refusal notices which had been issued on or before 3 March 2015, and the similar wording of these requests is indicative of people acting in concert. Mr G makes it clear that he was in communication with others about the IOD award review from late 2014 and communicated with them via various means before the Facebook account was created, which we understand to be on or about 7 February 2015.

38. There is nothing inherently wrong with people working together and making a joint request for information to share amongst themselves. There is nothing wrong with individuals acting in concert to obtain information from the same public authority on the same topic. This may well be a useful approach in a case where the volume of material might mean the refusal of a request on the basis that the cost of complying with an individual request would exceed the relevant cost limit. The “mischief” arises when the campaign is not to obtain and share information but to cause a burden and disruption with no serious purpose behind the individual requests. It is clear in this case that the Appellants were aware of requests made by other people and the responses received to those requests from the Constabulary. If there was a genuine effort to obtain specific information to assist with preparation of an individual or a group challenge to the IOD award review, or in respect of an individual’s case, there would have been no

need to submit the repetitive requests in the way that has been done here. We reject Mr G's submission to the contrary, not least because of his use of the What Do They Know website which allows for archiving of requests and responses.

39. We were unanimous in our decision that there is evidence of each Appellant acting in concert with others. We also considered that even without this evidence, each Appellant was aware, because of their involvement in the IODPA and/or use of the What Do They Know website, of the requests made by others, including the other Appellant in this case as well as others, and of the flood of requests submitted for identical information to the Constabulary over a very short time frame.

40. The Constabulary provided evidence to the Commissioner, included in the agreed hearing bundle for the Tribunal, of the aggregated burden in dealing with requests around this time. Between June 2014 and June 2015 the Constabulary had received 207 requests related in some way to the IOD award review from approximately 40 individuals. 161 of these requests had been received since January 2015. In February 2015 the requests related to the IOD review represented 49% of all requests received by the Constabulary. This was 44% up on the same period 2014. During the previous 12 months it had received the second highest number of FOIA requests for a police force in England and Wales, with only the Metropolitan Police receiving more.

41. The Constabulary's FOIA team comprises three full time equivalent posts. The team was overwhelmed by the number of requests received during this period. As a result of this unprecedented and unexpected increase in workload, the team had to work overtime and enlist colleagues from other departments to simply keep up with logging the requests. As a result it struggled to respond to other requests, not related to the IOD award review, within the statutory time limit.

42. Using the time of colleagues from other departments had an impact on those departments also. For example, the Occupational Health Unit had to devote 30 man hours per week to dealing with the requests with negative consequences to its core services, most significantly that appointments could not be made and follow-up appointments could not take place, to the risk of detriment of the health of those in its care.

43. We are satisfied that these requests, taken as a whole, had a significant disruptive impact on the Constabulary. This distracted staff from dealing with genuine requests for information made by others. It increased the costs of the department. Most significantly, in our view, was the need for assistance from staff from other departments which had an impact upon the core work of those departments, particularly in respect of the occupational health department. The Tribunal, by majority, considered that each request, taken alone, would have had a significant disruptive impact on the Constabulary at the time at which the request was made.

44. Such a significant burden in itself would not be enough to deem a request vexatious if the information requested was of a serious purpose or value.

45. Looking at the information requested in these appeals, we are not persuaded that either Appellant had any serious purpose in seeking the information requested, or that the information sought had any particular value, either to the Appellants themselves or the wider public.

46. Mr E made it clear in his Grounds of Appeal that he requested the information which is the subject of his appeal, namely the email correspondence between the Police Federation Pension Advisor and the Force Medical Officer between 28 March 2014 and 8 February 2015 because he believes that he was deliberately placed in a lower band of IOD award on initial assessment, around 2011, and is appealing that decision to the Police Medical Appeal Board. We have not seen and cannot comment on the source material that gives rise to

that belief, but do not consider that the email correspondence sought from 20104-2015 can have any relevance to that appeal.

47. Mr G explains that he has no intention to stop the IOD award review process; his intentions are "*to hold the Constabulary to account. They are a public body, and to that end, they are supposed to be open and transparent, especially regarding matters surrounding the public purse."*

48. The Constabulary's review of IOD awards itself involved sixteen former police officers. The volume of requests for information it received was of a much more significant scale. Some of the requests concerned the Constabulary's FOIA arrangements which the Commissioner considered indicated an interest in whether that function had been disrupted. Looking at the wording of the requests, we agree with the Commissioner that they are broad and unfocussed, which we consider indicates a desire to fish for information rather than any genuine request, such as a request for "all" email correspondence between named individuals over a period of almost one year.

49. There is in our view limited value in the information requested, either to the individual requestor or the wider public.

50. Both appellants express concern that the IOD review was being pursued in an unlawful manner, particularly that it was driven by a desire to cut expenditure on IODs rather than any altruistic desire to ensure those recipients were receiving that to which they might be entitled. There was also concern that the sixteen who had been selected were, as Level 4 award holders, those whose awards could be cut to generate the most savings.

51. This is not a matter on which the Tribunal, like the Commissioner, can pass judgement. However, we agree with the Commissioner that if there was evidence of unlawfulness this would increase the public interest in disclosure of the information sought and amount to a factor against finding that the request was vexatious. The Constabulary has

a duty to review the IOD awards, to ensure that the individual receives the correct award, whether it remains the same, is increased or decreased as merited. We agree with the Commissioner that it is unobjectionable that the review be motivated by a desire to use its resources efficiently and save money where possible.

52. It is hard to see how these requests could have been expected to provide information which would further inform or support any challenge to the lawfulness of the IOD award review. The requests were not for notes of meetings at which the decision to mount the review was made, nor for information as to how the sixteen individuals had been selected. At no point has either Appellant attempted to identify how any part of his individual request would assist in making his or any other challenge against the Constabulary, or to assist in preparation should their own IOD award be reviewed in the future. Mr G, for example, requested information about the pay grades of staff working of FOI requests, whether there were age restrictions on appointment, and for how much leave they were entitled. This could have no bearing on how the IOD award review was being conducted. He also asked for "all the email traffic communication" between the Police Federation Pension Advisor and nine named individuals during a period of approximately one year specifically, but not limited to, in relation to IOD pensions or the reviews.

53. Parliament provided public authorities with limited ability to refuse to engage with those making requests for information under FOIA. The Upper Tribunal described section 14(1) *"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…."*

54. Using a different analogy, drawn from the world of football, parliament has provided public authorities with yellow cards and red cards. A yellow card allows the public authority to give a warning to a requestor

that they need to alter their request in some way, for example, where the cost of complying might exceed the appropriate limit, but is not required to provide the information. Section 14(1) however operates as a red card; to use the words of the Upper Tribunal it allows the public authority to say "enough is enough; this is such an unjustified and disproportionate misuse of the formal FOIA procedure that we do not even need to engage with you."

55. For all these reasons we agree with the Commissioner that it was reasonable for the Constabulary to refuse the requests on the basis of section 14(1).

56. We should note that we did not consider whether either Appellant was part of any orchestrated attempt, acting alone or in concert, with each other or others, with the intention to upset the IOD award review. Our decision in this case is that each Appellant was making a determined effort to abuse the FOIA procedure and overburden the Constabulary, which had the effect of distracting its staff from other important public responsibilities.

57. We therefore dismiss this appeal.

58. Our decision to do so is unanimous.

Annabel Pilling (Judge)

9 March 2016