



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Appeal No. EA/2016/0010

BETWEEN:

AHMED HERSI

Appellant

-and-

INFORMATION COMMISSIONER

First Respondent

- and -

MINISTRY OF JUSTICE

Second Respondent

Before

Brian Kennedy QC

John Randall

Narendra Makanji

Date of Hearing: 8 June 2016, at Field House, London.

DECISION

Subject matter: Application of section 14(1) (applies if a request is deemed to be vexatious), of the Freedom of Information Act 2000 (“FOIA”).

The Tribunal dismisses the appeal.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 14 December 2015 (reference FS50595496), which is a matter of public record.
2. In the DN the Commissioner held that the Public Authority, in this case the Legal Aid Authority (“LAA”), formerly the Legal Services Commission (“the LSC”), had correctly withheld requested information from the appellant pursuant to s 14(1).
3. The Tribunal Judge and lay members sat to consider this case on 8 June 2016.

Factual Background to this Appeal:

4. Full details of the background to this appeal, Mr Hersi’s request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether or not Mr Hersi’s requests for information relating to a tender bid process for legal aid work were vexatious.

History and Chronology:

- 2010 Appellant's law practice submits unsuccessful tender bid for legal aid work
- 2010-11 Appellant submits 6 requests for information re tender process
- 21 May 2011 Request for information re legal aid immigration tender
LSC refusal under s14 on basis of a repeated request.
 - Complaint to Commissioner 9 Nov 2011. Commissioner holds not vexatious as those exact questions not previously asked and returned request to LSC
 - 21 Dec 2011 LSC discloses some information and withheld some on s12 cost basis
 - 2011-12 Further 15 requests re various aspects of the tender process
 - 5 Feb 2013 Appellant requests copy of LSC's skeleton argument from High Court and Court of Appeal litigation in *Azam v LSC* – refused under s32 (court records). Appellant also requests information on another firm's tender bid.
 - 22 Feb 2013 Appellant submits another request
 - 22 March 2013 Request for information on applicants who missed deadlines or submitted defective Pre-Qualification Questionnaires (PQPs)
 - 28 March 2013 Re 5 Feb request, LSC makes partial summary disclosure and relies on s43(2) (commercial interests)
 - 30 March 2013 Complaint to Commissioner re 21 Dec 2011 disclosure, indicating that the Appellant became aware on 1 May 2012 that the LSC held further information.
 - 5 April 2013 Further requests for information on PQPs. LSC refused to respond, citing s14

- 15 April 2013 Commissioner responds to Appellant re 30 March complaint indicating no action to be taken given delay in raising complaint.
- 19 April 2013 Request for copies of pre-action letters. Refusal under s14
- Appellant repeats request of 5 Feb, alleging disclosure deficient
- 20 May 2013 LSC informs Appellant it shall not reply to further requests as they overlap with his litigation against LSC/MoJ. Appellant complains to the Commissioner
- 18 Dec 2013 Commissioner's DN FS50505670 holding that not all requests were the same, and some were clarifications re 5 Feb request.
- 24 Jan 2014 Request to MoJ for information on a named firm of solicitors
- 10 Feb 2014 Request to MoJ re changing of answers in a tender bid application
- 7 May 2015 MoJ applied s14 and refused disclosure.
- 4 June 2015 Appellant requested internal review, claiming the MoJ had made a misleading or false statement to the High Court
- 2 July 2015 MoJ maintains characterisation of requests as vexatious
- 1 Sept 2015 Complaint to Commissioner re 24 Jan and 10 Feb requests, specifically alleging dishonesty in the handling of the tender process
- 14 Dec 2015 Commissioner upholds s14 refusal in the DN.

Relevant Law:

s1 FOIA General right of access to information held by public authorities.

- (1) 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.

S14 Vexatious or repeated requests:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

Commissioner's Decision:

5. The Commissioner, applying the *Dransfield* and *Craven* recommended considerations, in his DN applied the following reasoning:

Burden:

The Appellant made 32 requests regarding the tender bid/legal proceedings before December 2013, and a further six between January 2014 and February 2014 on the same subject in an “obsessive and repetitive” manner. The MoJ considered that the “industrial volume” and “erratic sequencing” of the requests was designed to cause disruption, annoyance and harassment of MoJ staff, and believed that the requests would be unlikely to end with one request about the matter, and when taken alongside the litigation launched by the Appellant, would contribute to the burden on MoJ staff and resources. The Commissioner considered it likely that the Appellant would submit further requests.

Motive:

The Commissioner accepts that there is a genuine underlying issue to the Appellant's requests and does not consider that they were intended to disrupt the main functions of the MoJ.

Value/Purpose:

The Commissioner accepts that there is a serious purpose, but the value of the requests is diminished by the passage of time and sheer volume of correspondence.

Harassment/ Distress:

Whilst not arguing harassment or distress *per se*, the MoJ notes that staff has felt irritated and distracted by the campaign of requests. The Commissioner accepts that the burden of dealing with so many requests over five years has proved a distraction to staff, despite there not being any inappropriate or disparaging language.

Additionally the MoJ argued that the requests showed unreasonable persistence and intransigence in the face of advice to limit correspondence or change an approach, were overlapping and futile in their nature and required a disproportionate effort on the part of the MoJ. The Commissioner concluded that the MoJ was entitled to rely upon s14.

6. The Commissioner accepts that there is a genuine underlying issue to the Appellant's requests and does not consider that they were intended to disrupt the main functions of the MoJ.

7. Appellant's Notice of Appeal:

Ground 1

The Commissioner did not consider that the reason for the request was a "false statement" given to the High Court by the MoJ, and noted that no one denied that the statement was false.

Ground 2

A request cannot be vexatious if its purpose is to ensure the prompt correction of a false statement given to a court of law.

Ground 3

The Commissioner was biased and wished to shield the MoJ from an embarrassing decision i.e. that the statement made to the High Court was false.

Ground 4

The Commissioner failed to exercise his powers under s54 and ensure the MoJ complied with his previous decision in 2011.

Ground 5

The Appellant has not made as many requests as the MoJ alleges.

Ground 6

The Commissioner's decision was disproportionate, perverse and contains factual errors.

Ground 7

The Commissioner mis-applied *Dransfield* and in particular the high threshold for a vexatious request. The underlying issue is a claim for £3.4m against the MoJ.

Ground 8

The Commissioner's refusal to view the requested material is clear evidence of bias and an attempt to avoid making an adverse decision against the MoJ.

8. The Commissioner's Response:

Ground 1

On 2 July 2015 in a letter to the Appellant the MoJ refuted the allegation that it had made a false statement to the Court. It is not within the remit of the Commissioner or the Tribunal to make a finding of fact on the underlying complaint. It is unclear whether the Appellant raised this issue before the Administrative Court in the on-going litigation, but if he failed to pursue these points in his litigation then this casts doubt on the motives behind his request. In any event, the Commissioner did acknowledge the serious purpose behind the requests.

Ground 2

The Commissioner considers that he applied *Dransfield* appropriately.

Ground 3

The Commissioner's power under s54 is discretionary, and his decision not to use it is not a matter for this Tribunal, but rather (as the Appellant is aware) a matter for a judicial review. In any event the Commissioner could not have anticipated that the Appellant would wait ten months to resubmit any request for information, much less that in those ten months the Appellant would engage in further requests and correspondence with the MoJ to the extent that the MoJ would refuse to comply in reliance with ss14 and 17(6). Indeed, the MoJ was relying on s14 as far back as 2011, and so it cannot be said that this arose as a result of the Commissioner's initial decision.

Ground 4

The Commissioner now accepts that, instead of 32 requests, he can only verify 29 but that does not disturb his conclusion regarding the burden. The fact that the Appellant has only submitted one request since February 2014 is irrelevant as the burden must be assessed at the time of the request and it was not unreasonable to assume at that time that further requests would be forthcoming.

Ground 5

It is not the remit of the Commissioner or the Tribunal to adjudicate on the validity of the allegation that the MoJ misled the Court. It would defeat the purpose of s14 if the public authority or Commissioner were required to assess the requested information before refusing to disclose it. In *Stuart v ICO and DWP* ([EA/2008/0040](#)) at para.38 “the Tribunal is not required to determine the issues of reasonableness or unfairness on the part of the Commissioner, as it has the ability to hear fresh evidence. The Tribunal is not conducting a judicial review”. (We note, this is not what Para 38 of Stuart V ICO says. However it is quoted in JA V ICO & Arts Council England.) (Our emphasis)

9. The MoJ Response:

MoJ explains that the 24 January 2014 request in 9 parts relates to how a named firm ('Firm A') came to be awarded a contract by the LSC, and states that the Appellant has been told that Firm A was awarded the contract after another firm ('Firm B') had its contract withdrawn. It appears that the Appellant believes this to be a lie, and disputes the existence of Firm B. The MoJ asserts that the statement is true, and that Firm A was awarded the contract after Firm B's contract was withdrawn. The 10 February 2014 request relates to accusations that the Appellant was unfairly treated as the LSC allowed bidders to clarify or amend their applications but denied the Appellant this opportunity.

Request History:

The Appellant asked 14 questions in his first request about the tendering process in August 2010. There followed a further 30 requests regarding the tendering process between January 2011 and April 2013. In applying s14 the LSC/MoJ correctly saw the requests of January and February 2014 as the “latest in a series of connected requests” and confirms that further requests followed these.

Other Requests:

The MoJ considers that the Appellant has collaborated with other requesters in similar or related requests:

- The January 2014 request had already been made in December 2013 by two other seemingly separate requesters, Mohamed Abdalla and Ranjan Nadarajah, who unsuccessfully appealed the LSC's refusal to the First Tier Tribunal ([EA/2014/0226 & 0228](#)).
- Abdalla and Nadarajah reformulated the requests from the aforementioned but sought essentially the same information, and again unsuccessfully appealed the LSC's refusal (EA/2015/0149 and 0150). The Appellant provided a supporting witness statement to Abdalla and Nadarajah.
- Mr Sharif has also made a request for aspects of the Appellant's January 2014 request, of which the refusal is currently before the First-Tier Tribunal at EA/2015/0264. The MoJ does not know whether the Appellant has any involvement with those proceedings.

Distress/Harassment:

From January 2014 to October 2015, the Appellant commenced a campaign of correspondence with lawyers employed by LAA in which he accused them of breaching their duty of candour and of making incorrect statements regarding Firm A's situation. This course of correspondence was in motion at the time of MoJ's responses to the instant requests; indeed, on 17 January 2014 the LAA disclosed to the Appellant a letter explaining to Firm A the circumstances by which its contract came to be offered, thereby addressing the underlying issue of his request. Nevertheless, further correspondence followed, and culminated in a complaint by the Appellant to the Bar Standards Board in October 2015. The LAA has not heard anything further regarding this complaint. The Appellants accusations, inextricably bound up with his requests, are, the MOJ argue, harassing and distressing to LAA employees.

10. DISCUSSION:

Judicial Review Litigation:

The Appellant's judicial review of the decision not to award his firm an LAA contract was live at the time of the Jan/Feb 2014 requests, and the most recent hearing in the High Court took place on 25 February 2016. In the course of this litigation the Appellant made an application for discovery as to how Firm A came to be awarded the contract (i.e. basically the same information as the January 2014 request) but discontinued that application in February 2016 on the basis that even if Firm A had received different treatment this was not sufficient to ground an award of damages.. In an *ex tempore* judgement on 25 February 2016 Mr Justice Kerr noted that the Appellant had all documentation necessary to progress his claim. There is therefore a concession by the Appellant that the January 2014 information is *not* relevant to his litigation, contrary to his assertion at Ground 7 that they are relevant to a £3.4m claim for damages.

It appears that the Appellant had the documentation referred to by virtue of an Order made by the Administrative Court at an earlier stage of the judicial review proceedings in which Mr Hersi was the Claimant. At paragraph 6 of the Order of 17 July 2013 (Bundle, p.236) it was provided that: *'The material disclosed by the Defendant to the Claimant concerning third party firms of solicitors or organisations bidding in the 2009/2010 civil tender round shall not be used by the Claimants other than in the course of this litigation under CPR 31.22(2).'* Material disclosed by virtue of this Order is essentially the same as the material sought in Mr Hersi's January 2014 request. To meet the request would be to disclose to the world at large information, which the Administrative Court had ordered, be used only in the course of the judicial review litigation. That Court order, which binds both Mr Hersi and the LAA, means that the information is in any event exempt under s.44(1) FOIA. The application of that Court Order and section 44(1) was explained by the Tribunal in relation to earlier similar applications

pertaining to the same issues as in the subject matter of this appeal. Those decisions (EA/2014/0226 AND 0228) are before this Tribunal at this appeal. The earlier decision in relation to s. 44(1) was upheld on appeal to the Upper Tribunal by virtue of its decision refusing permission to appeal on 27 May 2016. This means that the Tribunal's analysis in EA/2014/0226 and 0228 is binding. In the view of this Tribunal, for Mr Hersi to continue to seek disclosure in the face of the Court Order and the Upper Tribunal Decision is an action that falls within the *Dransfield* test of a '*manifestly ... improper use of a formal procedure*'.

As for the February 2014 request (the unfair denial of permission to amend a bid), the more appropriate forum for seeking discovery is the judicial review litigation and the respective applications made by the Appellant. Whether or not that avenue was available to Mr Hersi, this Tribunal find that the very wide and open-ended nature of the questions within the subject requests, the likelihood that a manual search of records would be required, and the overlap with other requests and correspondence on the same issues, satisfy the test that the request imposes an unreasonable burden on the public authority.

11. This Tribunal find as a fact that the nature of the requests was likely to, or did have a distressing and harassing effect on employees of the LAA.

- a) In the correspondence within the OB before us he does not just say, "I don't believe you". He goes further and accuses the LAA officers of lying and of misfeasance in public office. See correspondence in the OB at Page 168. This is the culmination of a long chain of e-mails with accusations against individuals at or about the time of the January request.
- b) See also pps 164, 165 & 166 OB wherein he is seen to be badgering the Lawyers within the LAA, referred to as officers of the court, being made at the time of the requests.
- c) See also page 246 OB - allegation of fraud.

- d) At the time these FOIA requests were made there was a course of correspondence alleging serious professional misconduct against lawyers employed by the LA.

12. This Tribunal are not persuaded that the Commissioner erred in his DN and we accept and adopt his reasoning both in his DN and in his response to the Grounds of Appeal. In particular we find that an objective assessment of the request, and all the information now before us, leads us to conclude there 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. We take this view having regard to the holistic circumstances of the background and history pertaining to the facts herein, and without prejudice to the generality of the arguments before us. We have taken into consideration the series of the Appellant's requests between 2010 and 2014. All were related to the procurement exercise in which he had been involved.

13. We further accept the MoJ's submission that the effect of the Appellant's series of requests and related correspondence has resulted in distressing and harassing effects on employees within the MoJ, on our consideration of the evidence before us.

14. Accordingly we dismiss the appeal.

Brian Kennedy QC

15 September 2016.