IN THE FIRST-TIER TRIBUNAL **EA/2015/ 0278**
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50575948
Dated: 5 November 2015

Appellant: ELIAS RAHMAN
Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 14 September 2016
Date of Decision: 19 September 2016
Date of Promulgation 19th September 2016

Before
Pieter De Waal
Narendra Makanji
Annabel Pilling (Judge)

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

Representation:
For the Appellant: Elias Rahman
For the Respondent: Jenny Roe

Decision

For the reasons given below, the Tribunal considers that the Decision Notice of 5 November 2015 was not in accordance with the law as the request is not vexatious and E-ACT 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 5 November 2015.

2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to E-ACT for information relating to any complaints or investigations made in respect of three named individuals at The Oldham Academy North (TOAN).

3. E-ACT 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.

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

The appeal to the Tribunal

5. The parties agreed that this was a matter that could be dealt with by way of a paper hearing. E-ACT was not joined as a party and although it has been provided with the Appellant's grounds of appeal, has taken no part in this appeal.

6. The Tribunal was provided in advance of the hearing with an agreed bundle of material, which contains 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

7. 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.

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

9. 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.

10. 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.

11. 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.

12. 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*

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

emphasis should be on an objective standard and that 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".

13. 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 E-ACT.

14. There is no dispute that the Appellant has made 5 previous requests for information from E-ACT in the period from June to December 2014. We have not been provided with copies of these requests and are not able to ascertain from the papers before us the subject matter of each of these requests; in the bundle there is the response (spread over several separate documents) from E-ACT to a request dated 15 June 2014, which requested 8 separate items of information, and there is a brief of summary of the subject matter of two further requests, those dated 1 October 2014 and 19 November 2014, in the schedule provide by E-ACT to the Commissioner during his investigation.

15. It was not clear to us from the Commissioner's Decision Notice whether he had, in fact, been provided with, seen and considered these previous requests. On our analysis of the Decision Notice, it appears to us that the Commissioner has repeated references and assertions made by E-ACT in a letter to him dated 12 October 2015, and there is no indication in the Decision Notice that the Commissioner considered the supporting evidence referred to in that letter. Our analysis is supported by the fact that the relevant material was not included in the bundle prepared by the Commissioner or addressed in his Reply filed in this appeal.

16. The Commissioner makes it clear in the Decision Notice that the application of section 14(1) in this case is finely balanced.

17. We disagree with a number of the Commissioner's conclusions in his Decision Notice.

18. Firstly in respect of the burden on E-ACT from what he refers to as the *"campaign"* on the part of the Appellant.

19. The Commissioner appears to have accepted E-ACT's assertion that it has spent approximately 30 hours dealing with the Appellant's requests, spending £4,300 of its resources, which it considers a conservative estimate. We have not seen any evidence to support this calculation and, as mentioned above, we have not been provided with details of the Appellant's requests or E-ACT's responses over the relevant period. The calculations appearing in the bundle before us also do not suggest anywhere near such figures. In these circumstances, and in the absence of any real evidence, 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 a burden on a public authority. We are also not persuaded that dealing with this request would result in a particularly onerous or costly burden on E-ACT.

20. Secondly, in respect of harassment to the public authority, the Commissioner was satisfied that the *"evidence provided by E-ACT demonstrates that the complainant does hold a personal grudge against current and former members of the leadership team as a result of their role in the restructure, and his subsequent redundancy. The Commissioner considers that the complainant is using the FOIA and raising complaints to disrupt TOAN and E-ACT and cause harassment to the staff named in the request."*

21. We do not consider that there is evidence provided by E-ACT to support this conclusion. There is no direct evidence of any impact or harassment of the three named individuals who are the subject of this

request for information. It appears to us that the Commissioner has again taken what E-ACT says in its letter of 12 October 2015 at face value.

22. Thirdly, the Commissioner has failed to consider in sufficient detail the subject matter of the previous requests made by the Appellant and those who he concludes *"appear to be acting in unison to disrupt and harass the public authority"* in reaching the conclusion that the request in question had no serious purpose or value. The Commissioner does not identify the basis on which he is satisfied that there is *"sufficient evidence to suggest that individuals are working in unison in a deliberate attempt to cause disruption and harassment to TOAN and the individuals in question."* Although E-ACT has provided to the Commissioner a schedule of what it considers to be "evidence" to support the view that individuals are acting in unison in a deliberate attempt to cause disruption, a closer analysis would suggest the link is tenuous.

23. Although the Commissioner indicated that he had *"considered that the disproportionate amount of information requests and complaints E-ACT has received in relation to TOAN could be because of genuine concerns about its performance and that of senior employees"*, he does not go on to explain why he rejected this possibility. He does not indicate why he has concluded that the requests in relation to TOAN were disproportionate. He does not identify what *"evidence provided by E-ACT does show that the complainant is using the FOIA to deliberately cause harassment."*

24. Fourthly, we disagree with the Commissioner's conclusion that *"the fact that complainant [sic] had submitted 6 FOIA requests over a period of 6 months demonstrates that the requests are excessive, if not obsessive…."*

25. We do not accept that the fact that the Appellant made six requests for information in a six month period does, by itself, demonstrate that the

requests are excessive. Nor do we understand the basis for the Commissioner concluding that this rate of requests can properly be categorised as obsessive, particularly when the subject matter and responses received to previous requests are unclear. The Commissioner has not addressed the Appellant's submission that the basis for making these requests over this period of time was to avoid his requests being refused because, on aggregate, the cost of complying would exceed the appropriate limit.

26. We also disagree with the Commissioner's conclusion that *"there is nothing to suggest that requests are likely to stop, irrespective of the amount of information disclosed*." This seems unsubstantiated in circumstances where it is unclear what information has been provided to the Commissioner relating to the Appellant's previous requests and the information he had been provided with by E-ACT in response.

27. 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 E-ACT was entitled to rely on section 14(1) of FOIA and not comply with its duty under section 1(1).

28. We therefore allow this appeal.

29. E-ACT must now consider the Appellant's request for information. We cannot order that the information be provided as E-ACT 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.

30. Our decision is unanimous

19 September 2016