



Neutral Citation Number:

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

**Appeal No: EA/2016/0247**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50628017**  
**Dated: 22 September 2016**

**Appellant: Owen Murphy**

**Respondent: The Information Commissioner**

**Heard on the papers: Field House, London EC4**

**Date of Hearing: 10 March 2017**

**Before**

**Chris Hughes**

**Judge**

**and**

**Michael Hake and Narendra Makanji**

**Tribunal Members**

**Date of Decision: 16 March 2017**

**Date of Promulgation 17 March 2017**

**Subject matter:**

Freedom of Information Act 2000

**Cases:**

Information Commissioner v Devon CC and Dransfield

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 22 September 2016 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. An individual employed by Richmond Borough Council was given written guidance following an interview on 10 July 2012 about standards of behaviour. The letter (contained in the Appellant's bundle) stated:-

“ ...

*I reminded you all staff had been given a copy of the standards of behaviour that is expected of them. These standards were discussed with you during our meeting and I enclose a copy for your reference.*

... ”

2. The same member of staff was observed by a member of the public carrying out what he suspected were unauthorised tarmac works on the highway on 18 September 2013. There was an investigation during which the Council obtained photographic evidence (partially from the member of the public, in addition Council staff took photographs) relevant to the allegation. Following a Disciplinary Hearing at which the employee was assisted by a union representative held on 17 October 2013 the individual was dismissed. An appeal was held on 28 November and the previous decision confirmed by a letter of 3 December.
3. The Appellant in these proceedings wrote to the Council on 19 December 2013 asking about surveillance of Council staff and further wrote on 24 January 2014 asking about covert surveillance of staff and authorisation under RIPA – the Council informed him that there had been no photographic surveillance of staff “since at least 2009”. The Appellant again contacted the Council on 25 March 2015. He stated that he was authorised by the dismissed employee, he had raised the issues with the Council's CEO, who had passed the matter onto the Council's Director of Environment who:-

*“..has declined to reopen the matter or to respond to any further correspondence from me about it, on the surprising grounds that, though he was not present at either of the hearings and was aware of our specific concerns, he is satisfied that matters were conducted entirely properly.”* (bundle page 94)

4. The Appellant stated that he was seeking information arising out of his concerns about the dismissal – there were 12 requests for specific information and 17 paragraphs dealing with the content of the disciplinary interview. The Council responded explaining the subject access provisions of the Data Protection Act, and commenting that “There are appropriate channels to deal with unfair dismissal claims and the FOI/SAR provisions cannot be used to circumvent these provisions”, the Council subsequently clarified the scope for FOI requests dealing with general council information resulting in a request of 2 April 2015 in seven parts dealing with issues arising from the dismissal. The Council responded on 22 April providing answers and documents. The Appellant requested four more items and making further queries. The Council responded on 21 May. The Appellant wrote seeking clarification on 29 May and the Council responded the same day. The dismissed worker also made a subject access request. On 3 September the Appellant again wrote:-

*“(a) Are newly-recruited Highway Workers given written instructions on how to conduct themselves in contacts with members of the public during the course of their work? If so, may I please have a copy of the same?”*

*(b) What written instructions, if any, do managers receive regarding how they should respond to complaints from members of the public about its Highway Workers? If there such instructions, may I please have a copy?”*

*(c) Why did the Council conduct covert photographic and video surveillance of a Highway Worker or workers in 2013 while not in possession of the required licence or authority from the OSC?”*

5. The Council responded on 25 September refusing the request on the grounds that the request was considered to fall within s14 (1) of FOIA and be vexatious. The refusal notice indicated that there was some burden and noted the some requests asked for comments on or additional analysis of previous answers. The latest requests could be seen as persistent and obsessive and that in alleging illegality by the Council and

implying lack of competence of specific individuals to perform their jobs could be seen as harassment of them.

6. The Appellant made a detailed request for an internal review setting out his views of the law and arguing that responses to his requests had been inadequate triggering further requests (bundle pages 46-53), he set the start of the correspondence as the 25 March requests. On internal review (conducted by the Council's solicitors) the solicitor noted that he had not seen the correspondence with the Director of Environment, but he relied on the correspondence with the FOIA team and on the letter of 19 December 2013 as the start. He was not convinced by the Appellant's claims that the requests of 3 September were the final FOIA requests he would make, nor did he consider that further requests were a result of incomplete responses to previous requests. They could have been asked earlier and were not dependent on earlier responses. He noted that the purpose of the requests was "righting a serious injustice" to the dismissed member of staff and that the Appellant had also written that "if this does not change I shall continue the campaign for justice". He pointed out that the proper way to pursue such issues was through an application to the Employment Tribunal. He considered that the Appellant was showing unreasonable persistence in "attempting to reopen an issue which has already been comprehensively addressed by the public authority or otherwise subjected to some form of independent scrutiny." He concluded that the request lacked a serious purpose and maintained the Council's position. The Appellant complained to the Respondent Information Commissioner (ICO) who investigated to determine whether the Council was entitled to rely on section 14.
7. The ICO considered the history of requests and considered the issue in the light of the guidance provided by *Information Commissioner v Devon CC and Dransfield* and the need to have regard to issues of proportionality and justification in deciding the question.
8. In his notice of appeal the Appellant stressed his own stature, the merits of the dismissed worker's case and his reason for not pursuing an Employment Tribunal application (costs). His requests for information did range widely as "it was left for later decision exactly how the information gathered could be best deployed in a campaign for justice". He argued that as (in his view) the Council had not operated to a professional standard in conducting the dismissal and there had been no independent

scrutiny (via the Employment Tribunal) he was justified in re-opening the issue via FOIA. He argued that the shortcomings of the Council were a matter of public interest, that the burden was not substantial, that the Council should have avoided using s14, that there was no pattern of behaviour on his part and that his assurances that these were his last requests should have been accepted.

9. The ICO resisted the appeal. She maintained her position that FOIA was being used with an aim of reopening the employment issue. The Council's conclusion that further requests would follow was justified since all the requests so far related to the dismissal and the ICO had correctly accepted the evidence that responses led to further requests (decision notice, paragraph 37). While acknowledging that there was a public interest in the accountability and transparency of the Council's processes there was limited public interest in what was sought which was for the purpose of reopening a specific dismissal case – important to the individual but it did not follow that it was of wider public interest. The ICO noted that in the context of the previous requests the disproportionate and unjustified request would create a significant burden on the Council, even if the cost limit under s.12 FOIA was not reached. The ICO had critically scrutinised the Council's position and made her decision according to the facts and evidence. She had decided the case in accordance with the law as laid down by the decision in *Dransfield*.
10. In further submissions the Appellant sought to refute the ICO's position, saying she ought to have obtained more data from the Council, the request was of public interest since it affected many of the Council's employees and repeating arguments already advanced.

#### Consideration

11. The tribunal reminded itself that the issue it had to decide was laid down by s58 of FOIA and was whether the decision notice was not in accordance with the law and that in considering this, the tribunal considered the factual background.
12. The tribunal noted that of the three part request, the first two parts were answered by the copy of the letter of 12 June 2012 (or the enclosures to it) which the Appellant supplied to the tribunal. The Council had also in January 2014 made clear that it did not accept the assertion of illegal conduct embodied in the third part of the request.

13. It was apparent to the tribunal that the Appellant had been pursuing the cause of the former employee from a date nine weeks after the hearing at which he was dismissed. The tribunal notes that an application to the Employment Tribunal was a route potentially open to the former employee (who was represented by his trade union in the hearing). That is usually the appropriate route for the resolution of employment disputes. The Appellant has chosen to pursue the Council through the route of FOIA requests. He has made it pellucidly clear (paragraph 6 above) that the motivation for the requests is the resolution of the dismissal on a basis which is more favourable to the former employee. The ICO has correctly characterised the information requested as not having a value for the wider public (dn paragraph 38).
14. Although the Appellant has disputed the burden on the Council, it is clear that responding to a series of multipart requests for information, providing documents and answering questions is a burden and involves a shift of the Council's resources from other tasks which may be more productive – there is an opportunity cost to the Council is responding to these queries; whether it be in the correspondence with the FOIA team or with the Environment Director (not included in the consideration by the ICO or the solicitor conducting the internal review). An inappropriate amount of time has been spent on these queries.
15. The tribunal reminded itself that it is a significant step to conclude that a request is vexatious and that is a high standard. It is an objective standard – is it reasonable to conclude that the information sought would be of no value to the requester, or the public or a section of the public. The function of FOIA is to provide access to information held by public authorities, this is very different from being used to allow individuals to continue to vent dissatisfaction over issues which have already been dealt with. The request was one of a series of requests and other challenges to the Council's decision, many routes have been pursued apart from the correct one. The request was an abuse of the statutory right which is for information and not a right to keep the dying embers of an employment dispute lingering pointlessly.
16. The tribunal is satisfied that the ICO's decision was correct in law and dismisses the appeal.
17. decision is unanimous

Judge Hughes

[Signed on original]

Date: 17 March 2017