Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case Nos. EA/2017/0260**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50661825

Dated: 4 October 2017

Appellant: Simon Price

Respondent: Information Commissioner

Heard at: Thames Magistrates Court, London

Date of hearing: 19 February 2018

Date of decision: 28 March 2018 revised 26 April 2018

Before

Angus Hamilton

Judge

and

David Wilkinson

and

Roger Creedon

Subject matter: s 14 Freedom of Information Act 2000

Cases considered:

Dransfield v IC and Devon County Council [2015] EWCA Civ 454 ('Dransfield')

The Information Commissioner v Mr Edward Malnick & The Advisory Committee on Business Appointments GIA/447/2017 ('Malnick')

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that the exemption provided by s.14(1) FOIA is not engaged. The appeal is therefore allowed. The Ministry of Justice is required to respond to Mr Price's enquiry within 28 days of the publication of this decision. This judgment stands as the substituted Decision Notice.

REASONS FOR DECISION

Introduction

1 Section 1 (1) of FOIA provides that:

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.

2 Section 14 (1) of FOIA provides that:

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

Request by the Appellant and Complaint to the Commissioner

3 The Information Commissioner in his Decision Notice (DN) of 4 October 2017 has correctly set out the background to this appeal and the Tribunal has adopted that description:

4 The Appellant wrote to the Ministry of Justice (MOJ) and requested information in the following terms:

> On 18 August 2016 (request 1) he asked:
>
> *"1. Please provide full details of the pay scale/attendance rate for sessional prison Chaplains;*
>
> *2. What funding - if any and or what purposes does the MOJ/ NOMS*

provide to Jewish Visiting?

3. *Where in NOMS financial accounts are the figures for funding religious organisations to be found?*

4. *Are such figures available in respect of each individual faith organisation?"*

On 29 August 2016 (request 2) he asked:

"1. Please provide me with a copy of the PSO/PSI that details the remuneration rates and travelling expenses paid to sessional chaplains of all religious dominations.

2. Please provide the data that explains why

a) only chapter 15 of PSI [Prison Service Instruction] *37/2013 is available in the prison library at HMP Wakefield*

b) who authorised the restriction."

On 19 September 2016 he made a request (request 3), asking:

"Please provide me with copies - not summaries - of all recorded information detailing the duties and responsibilities of sessional prison chaplains."

Also, on 19 September 2016 (request 4), he requested:

"Monies distributed by the Ministry of Justice to Religious Organisations Ministry of Justice: Financial Accounts for 2013/14 and 2014/15

Please provide me with a list of the religious organisations which the Ministry of Justice funds - to any extent - through disbursements, grants or financial contributions of any kind.

Please provide me with a record of the amounts received by such religious organisations during the financial year 2013 / 14 and 2014/ 15."

5 On 18 October 2016 MOJ responded. MOJ said that it had aggregated the requests as they all related to the funding and work of religious organisations within MOJ facilities and those of the then National Offender Management Service (NOMS). MOJ refused the request relying on the

s.12(1) FOIA exemption (costs of compliance). MOJ said, outside of FOIA and on a discretionary basis, that copies of all PSIs should be held in the prison library and could be accessed there.

6 On 22 October 2016 the complainant wrote to MOJ accepting that Requests 1 and 3 were substantially similar and that they sought the same recorded information which, he said, must be readily available. He said that MOJ had delayed responding to request 1 so he had been obliged to write again. He said that request 4, which was one of two FOIA requests submitted on the same day, should not have been conflated with requests 1 and 3.

7 Following an internal review the MOJ wrote to the complainant on 19 December 2016. The MOJ maintained its reliance on section 12(1) FOIA to refuse the request and additionally relied on the section 14(1) FOIA (vexatious requests) exemption. The internal review did, however, overlook the MOJ's breaches of section 10(1) FOIA (time for compliance) time limit in its late responses to requests 1 and 2. It also referred the complainant to website links which are available to members of the general public who have internet access but not to prisoners who do not have internet access.

8 The complainant contacted the Commissioner on 27 December 2016 with concerns about the way his request for information had been handled. He said that MOJ had conflated three separate requests and that this conflated request was the fourth in a sequence of requests to MOJ on chaplaincy matters. The previous three requests had been denied by MOJ, decisions upheld by the Commissioner but his appeals to the First Tier Tribunal (Information Rights) had all been upheld. He said that MOJ had been pre-disposed wrongly to refuse this request. He denied that the tone of his correspondence with MOJ had been aggressive or abusive. He said that MOJ had a vested and predetermined interest in claiming that the tone of his correspondence, which was a subjective opinion, was offensive - which he denied.

9 After carrying out an investigation the Commissioner found that the MOJ was entitled to rely on the s.14(1) exemption. Because of this finding the Commissioner did not reach a conclusion in relation to the claimed s.12(1) FOIA exemption.

The Appeal to the Tribunal

10 On 23 October 2017 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal challenged the Commissioner's Decision Notice on grounds that the Commissioner erred in finding that section 14(1) of the Act was applicable.

The Question for the Tribunal

11 The Tribunal judged that the sole question for them was to consider whether the requests were, on the balance of probabilities, 'vexatious' within the meaning of s14(1) FOIA.

Evidence & Submissions

12 The Ministry of Justice did not seek to be joined as a party to these proceedings and therefore provided no written or oral submissions. The Commissioner relied only upon written submissions. Only the Appellant appeared before the Tribunal and provided both written and oral submissions. This matter was considered at the same time as Mr. Price's appeal under reference EA/2017/0190.

13 On the issue of the meaning of 'vexatious' the Commissioner relied, in her Response to Appeal, upon *Dransfield* in which the Court of Appeal held that there is no comprehensive and exhaustive definition of what is vexatious the purpose of section 14(1), but provided the following

guidance as to the provision:

> *I consider that the emphasis should be on an objective standard and that the starting point is that the 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 requester, 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 that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated, but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the request, if the request was aimed at the disclosure of important information which ought to be made publicly available.*

14 The Commissioner also quoted extracts from the Upper Tribunal's judgement in *Dransfield:*

a) In *Dransfield*, the UT confirmed that the:

> "*purpose of section 14 … must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*". [para 10] "*the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus, the context and history of the particular request, in terms of previous dealings*

between the individual requester and the public authority must be considered in assessing whether it is properly to be characterised as vexatious" [Para 29] emphasis added.

b) The UT said:

"It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). *However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious" … an inherently flexible concept which can take many different forms*." [para 28] (emphasis added)

c) On how to decide whether a request is vexatious, the UT stated:

"there is … no magic formula – all the circumstances need to be considered in reaching what is ultimately *a value judgment as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA*." [para 43] (emphasis added)

15 The Commissioner also quoted the following part of the Court of Appeal's Dransfield judgement:

"If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his

actions were improperly motivated, but it may also be that his request was without any reasonable foundation". [Para 68]

Because a rounded approach is required, in my view what I have termed the instinctive approach of the FTT must be wrong. It involved drawing bright lines between requests which spring from some common underlying grievance and those which, for example, relate to the same subject matter although there is no underlying grievance in common. This distinction is difficult to justify in logic and there is no statutory mandate for it. If the FTT were right, the decision maker may have to disregard other evidence which may throw light on whether a request is vexatious, Just as the FTT left out of account the evidence in relation to prior requests that had led abuse and unsubstantiated allegations, of which the authority had first-hand knowledge because they had been directed to the authority's staff (FTT, Dransfield, Judgment, para. 42: para.14 above). That evidence was clearly capable of throwing light on whether the current request directed to the same matter was not an inquiry into health and safety but (say) a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority." [paragraph 69]

16 Applying the principles set out in *Dransfield* the Commissioner contended that she was right to assert that these requests were vexatious because:

- Of the history of a long series of overlapping requests or other correspondence from the Appellant to the MOJ
- Of the failure of the Appellant to consider other methods for obtaining the information he sought – for example asking for a copy of the relevant PSI
- Of the likelihood of responding to these requests simply generating further requests
- Of the disproportionate burden that had and would be

placed on the MOJ in responding to such requests

- Of the 'abrasive remarks' made towards a member of MOJ staff by the Appellant in his correspondence.

17 Mr Price also accepted that *Dransfield* was the governing authority in relation to the issue of 'vexatious'. Mr Price relied in particular on the following passage from the Court of Appeal's judgment:

> *I consider that the emphasis should be on an objective standard and that the starting point is that the 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 requester, 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 that is consistent with the constitutional nature of the right.*

18 As in appeal ref EA/2017/0190, Mr. Price accepted that there had been a significant amount of correspondence between himself and the MOJ. Some of this correspondence flowed from a declaration in the High Court in 2015 that Mr. Price was a practicing orthodox Jew and must be treated as such – including in relation to the provision of kosher food. Other correspondence flowed from the fact that through distance learning, approved by the MOJ, Mr. Price had undertaken a PhD and the MOJ was a source of information for his research. The particular requests in this appeal were all to do with his PhD research. His thesis was entitled 'Control and Restraint – the Category A Prisoner in the High Security Estate'. Mr. Price provided the Tribunal with information about the lead University and his supervisors. The Tribunal noted that Mr. Price had provided details about his doctoral research in his 'Skeleton Argument' which was filed and served prior to the appeal hearing and is dated 4 October 2017. The Tribunal noted that there had been no response from the Commissioner in relation to this particular assertion.

19 Mr Price further explained that as a prisoner he had no access to the internet and the requests had also occurred at a time when the Secretary of State had placed a ban on prisoners having books sent in. His FOIA requests were, in his submission, a vital tool for his research. In response to questions from the Tribunal as to why he had not prefaced his requests with an explanation that they related to his research Mr Price stated that his understanding was that FOIA requests were 'purpose blind' and that there should be no obligation on him to explain why he wanted the information. The MOJ had also only sought to rely on 'vexatious' – which might have warranted him explaining why he wanted the information – at quite a late stage.

20 Mr Price explained that there was an element of repetition in the requests because the MOJ had failed to comply with the statutory time limit for responding and he had therefore repeated a request. The Commissioner had found in the DN that the MOJ had breached the time limit. There was some confusion on Mr Price's part as to which request was repeated. The Tribunal formed the view that it was most likely to be requests 1 and 4 although Mr Price had asserted to the Commissioner that it was 1 and 3. Mr Price also explained that the 4 requests had not all been made at the same time as his need for information developed as his thesis developed.

21 In relation to the suggestion that he had been abusive towards a member of MOJ staff and the role this might play in assessing whether his request was vexatious – Mr Price asserted that his language had been robust but not offensive. He had accused the MOJ member of staff of being incompetent and stubborn and he felt that he was right to do so, The language used was a reflection of his frustration at constantly being stonewalled by the MOJ. He considered that the MOJ's almost immediate response to a request from him was to find an exemption to rely on rather than to consider the merit of any request. Past claimed exemptions had been rejected by the Commissioner or the FTT. Mr Price made reference

to the cases that had been referred to in EA/2017/0190 to demonstrate a history of poor behaviour on the part of the MOJ. Mr Price also pointed to the breach of time limits for answering requests that had occurred in relation to these requests as another source of frustration. He had not made use of swear or 'four-letter' words.

22 Mr Price drew the Tribunal's attention to what he considered to be an unexplained 'U-turn' on the part of the Commissioner during the course of her investigation. The Commissioner's staff had initially been supportive of his position but there appeared to have been a change of mind in the DN. Mr Price made reference to correspondence between the investigating officer and the MOJ:

> On 31 July 2017 the Commissioner's investigator emailed the contact at the MOJ in the following terms:
> *Mr Price may be a bit of a pain at times, but this is not in itself a sufficient reason to refuse a request from him that is not otherwise unreasonable.*
>
> On 31 July 2017 the MOJ responded in these terms:
> *I have spent the weekend digesting "Dransfield" which we intend to rely on in the revised response to you..... we will now rely on causing harassment or distress".*
>
> And on the same date the Commissioner's investigator responded*:*
>
> *I take the point about the language but do not see this request as overly burdensome in the circumstances - and please bear in mind the MOJ have been at fault here which is a point in the complainant's favour and gives the MOJ some kind of a hill to climb, i.e. there is a real possibility that we will find against you.*

Conclusion

23 The Tribunal first considered its approach towards the term 'vexatious'. All the members of the Tribunal embraced the guidance from *Dransfield* set out at paragraphs 13-15 above.

24 The Tribunal found the Appellant's claim that he had made these particular requests in relation to his PhD research to be credible. The Tribunal noted that neither the Commissioner nor the MOJ had produced any material that contradicted this assertion. The Tribunal did consider that the Appellant clearly could have assisted the situation by making it clear, either at the time of making the requests or subsequently, that this was the reason why he was making the requests. Whilst requests under FOIA were ordinarily 'purpose-blind' this was clearly not the case when 'vexatious' was claimed. Mr. Price could and should have made the reason for seeking the information clear either at the time of making the requests or as soon as possible after it became clear that the MOJ were relying on the 'vexatious' exemption.

25 Applying the principles set out by the Court of Appeal in Dransfield and quoted at paragraph 17 above The Tribunal considered that their conclusion on this point was largely determinative of the appeal since the Tribunal had thereby concluded that there was on balance a '*reasonable foundation for thinking that the information sought would be of value to the requester'.* However, the Tribunal also noted that, although the Commissioner sought to rely on the history of requests and correspondence between the Appellant and the MOJ, no written material of such a history had been provided to the Tribunal in this case. Without such material it was effectively impossible for the Tribunal to reach conclusions based on the history of correspondence or in relation to the likelihood of further requests being generated or the overall burden placed on the MOJ. The Tribunal also considered, on balance, that although the Appellant could have moderated his language in correspondence he had not 'crossed the line' into abuse. Finally, the Tribunal considered that

there was considerable merit in Mr. Price's assertion that the Commissioner had executed an 'unexplained U turn' (paragraph 22 above) during the course of the investigation.

26 Thus, the Tribunal concluded, on the balance of probabilities, that the request was not vexatious.

27 The Tribunal's decision to allow this appeal was unanimous

Appendix to Judgment – the impact of the Upper Tribunal's decision in *Malnick* GIA/447/2017.

28 The Tribunal in this case reached its decision on 19 February 2018. The decision in *Malnick* was only published on 1 March 2018 and had this judgment been prepared more quickly it might have justifiably made no reference to *Malnick* at all. However since that is not the case it would seem prudent for the Tribunal to consider the impact of *Malnick* on this current case. The important part of the decision in *Malnick* is at para 109:

> *We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact. It is a matter for the FTT as to how it approaches such matters, taking into account all relevant considerations including the overriding objective. On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider*

whether E2 applies and substitute a decision notice accordingly.

29 Thus in this present appeal *Malnick* places an obligation on the FTT to reach a decision as to the exemption claimed by the MOJ under s.12 FOIA (the costs limit exemption) which was not considered by the Commissioner in her DN in this case. Unfortunately *Malnick* is devoid of guidance on how to give effect to this obligation in practice. This Tribunal agreed that it was impossible to reach a conclusion on the costs limit exemption immediately since the MOJ were not a party to the proceedings and the Commissioner had not investigated the issue – thus there was virtually nothing before the Tribunal by way of evidence on the costs limit exemption. In the Tribunal's view there are two principal potential ways forward:

1. The Tribunal conveys its decision re 'vexatious' and then sets a timetable for the submissions on the 'costs limit' exemption leading ultimately to a further hearing before an identically constituted FTT. The MOJ could be joined as a party and invited to submit representations in accordance with the timetable. The Tribunal took the view that the disadvantage of following this course is that it effectively prevents the Commissioner from conducting an investigation into the costs limit exemption or participating effectively in the appeal process since the costs limit exemption does not appear to have been properly investigated so far.
2. The judgment stands as it is but it would now be open to the MOJ to claim (again) the s.12 exemption in relation to the information which is the subject matter of this appeal. Mr Price would presumably then appeal to the Commissioner and the Commissioner would then be obliged to investigate the s.12 claimed exemption and issue a new DN. This may then result in a further appeal to the FTT. This is undeniably cumbersome and depends heavily on the co-operation of all parties but has the advantage of allowing an investigation by the Commissioner and her full participation in the appeal process.

30 Ultimately this Tribunal preferred course 2 above. The Tribunal acknowledges that this may well not be what the UT had in mind in *Malnick* (though if the UT judges envisaged a particular course of action they could have said so) but it has the clear advantage of allowing an investigation and proper participation in any appeal process by the Commissioner. This means that the main part of this appeal judgment and the substituted DN stand as they are.

31 If any party to the present appeal proceedings believes that this conclusion on the impact of *Malnick* is incorrect then they may make written submissions to the Tribunal within 21 days of the publication of this judgment. If necessary the Tribunal will then give consideration to exercising its power to review a decision under Rule 44(1)(b) of the 2009 Tribunal Rules:

> ***Review of a decision***
>
> *44.—(1) The Tribunal may only undertake a review of a decision—*
>
> 1. *(a) pursuant to rule 43(1) (review on an application for permission to appeal); and*
> 2. *(b) if it is satisfied that there was an error of law in the decision.*
>
> *(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.*
>
> *(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.*

Signed:

Angus Hamilton DJ(MC) Tribunal Judge Date: 30 May 2018

(Revised 26 April 2018)