



**Amendments made pursuant to the slip rule on 30 April 2018**

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2017/0165**

**Decided without a hearing**

**Before**

**JUDGE DAVID THOMAS**

**TRIBUNAL MEMBERS DAVE SIVERS AND MIKE JONES**

**Between**

**NEIL GILLIATT**

**and**

**THE INFORMATION COMMISSIONER**

Appellant

Respondent

**DECISION AND REASONS**

*NB Numbers in [square brackets] refer to the bundle*

1. This is the appeal by Mr Neil Gilliatt against the rejection by the Information Commissioner (the Commissioner) on 26 July 2017 of his complaint that the Judicial Appointments and Conduct Ombudsman (the Ombudsman) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA). The Ombudsman was not a party to the appeal.
2. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule

32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).<sup>1</sup>

### **Factual background**

3. The genesis of the appeal is a case brought by North East Lincolnshire Council (the Council) in Grimsby and Cleethorpes Magistrates' Court (the Magistrates' Court) against Mr Gilliatt for non-payment of an instalment of council tax. Those proceedings have spawned a number of other proceedings and complaints by Mr Gilliatt, to the extent that the present case is connected to the original dispute only indirectly. Nevertheless, all roads do lead back to that dispute.
4. Mr Gilliatt paid the outstanding amount prior to the hearing (held in November 2012) and £10 costs. He thought that that disposed of the proceedings.<sup>2</sup> However, the Magistrates made a liability order requiring him to pay further costs of £60.
5. This is a brief chronology of what has happened since:
  - Mr Gilliatt set in motion the procedure for appealing the liability order to the High Court by way of case stated. This required the Magistrates' Court to draft and then finalise a case setting out the legal issues for the High Court. Mr Gilliatt was initially asked to enter into a recognizance of £500 but that was later abandoned
  - **31 May 2013**: Mr Gilliatt applied for permission to bring a judicial review in the High Court over the Magistrates' Court failure to state a case. The Magistrates' Court later undertook to serve a draft case within 14 days and Mr Gilliatt withdrew his application for judicial review
  - In **August 2013**, Mr Gilliatt received the draft case and commented on it but did not receive the final case. In fact, the Magistrates' Court claim to have sent him the final case in **December 2013** with a copy in **February 2014**, but he says he did not receive either covering letter.
  - On **6 March 2014**, the Clerk to the Justices at the Magistrates' Court (the justices' clerk) (whom the Tribunal will refer to as Ms W) sent him an email [40] after he had telephoned her office. She promised to send him a written communication (as he did not wish to receive telephone calls) either that day or the next bringing him up-to-date but failed to do so
  - On **2 September 2014**, Mr Gilliatt made a complaint to the Central Secretariat Office, Doncaster Magistrates' Court, against the two Magistrates who had

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<sup>1</sup> SI 2009 No 1976

<sup>2</sup> In paragraph 17 of his Appeal [21], Mr Gilliatt says: '... it was evidently misunderstood [by the Ombudsman] that the Council had come to an agreement with the Appellant which rendered a legal remedy which had been instituted no longer necessary'

dealt with the council tax case, accusing them of attempting to pervert the course of justice [43]. He referred to the failure (as he saw it) of the Magistrates to state a final case and attached a chronology

- On **16 September 2014**, Ms W, in her capacity as secretary to the Humberside Advisory Committee (HAC), to whom it seems the complaint had been forwarded, sent (or purported to send) Mr Gilliatt a letter explaining that the Deputy Chairman of the HAC had dismissed his complaint against the Magistrates. This was on two grounds: <sup>3</sup> (i) the complaint related to a judicial decision in proceedings which did not raise a question of misconduct by the Magistrates; and (ii) the actions the subject of the complaint [presumably the failure to state a case] were not done or caused to be done by the Magistrates. Ms W informed Mr Gilliatt that he could complain to the Ombudsman if he felt that the HAC had not handled his case properly. Mr Gilliatt says he did not receive the letter.
- Ms W sent (or purported to send) a copy of her 16 September letter on **29 May 2015**. Again, Mr Gilliatt says he did not receive the letter
- On **25 June 2015**, Mr Gilliatt wrote to the Judicial Conduct Investigations Office (JCIO) with his concerns that his complaint to the HAC was (as he thought) being deliberately ignored. He noted Ms W's dual role. <sup>4</sup>
- On **29 June 2015**, the JCIO told Mr Gilliatt it had been in touch with Ms W (who was currently away). He could complain to the Ombudsman if he wished
- On **6 July 2015**, Ms W sent (or purported to send) a letter to Mr Gilliatt enclosing a further copy of her letter of 16 September 2014. Mr Gilliatt says he did not receive the letter
- Not having heard anything from the HAC, on **8 August 2015** Mr Gilliatt escalated his complaint to the Ombudsman and asked him to consider the process by which the HAC had handled the complaint. In particular, he wanted to know why the Magistrates' Court had never replied to several communications chasing the final case stated
- On **15 April 2016**, Ms W, in her capacity as justices' clerk, sent (or purported to send) Mr Gilliatt a letter with a further copy of the final case stated. She noted that there had been a number of attempts to send Mr Gilliatt the correspondence and that none of the letters had been returned undelivered. Mr Gilliatt says he did not receive the letter

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<sup>3</sup> See The Judicial Conduct (Magistrates) Rules 2014, quoted in the Ombudsman's report of 23 May 2016 at [231]

<sup>4</sup> In an email to the Magistrates HR team at the Royal Courts of Justice in London on 14 May 2015 [44], he said that he had become aware of Ms W's dual role. It is not clear how he found this out. He said, wrongly, that his complaint was addressed to the HAC

- On **23 May 2016**, the Ombudsman concluded in his report that (i) he did not have jurisdiction to consider the missing case stated (because it did not concern the actions of a judicial officer holder) and (ii) there had been no maladministration by the HAC with regard to misaddressing letters to Mr Gilliatt: it transpired during the course of the Ombudsman's investigation that three letters from the HAC, each containing the same single-digit error in the postcode in Mr Gilliatt's address, had been sent to him but not received. The HAC did not, the Ombudsman explained, have jurisdiction to investigate complaints about criminal behaviour such as perverting the course of justice
- The Ombudsman maintained his decision on review
- On **25 May 2016**, Mr Gilliatt made a complaint to Her Majesty's Courts and Tribunals Service (HMCTS) about the way the Magistrates' Court had dealt with him, in particular in relation to the non-receipt of the final case stated
- On **22 July 2016**, Ms W, in her capacity as justices' clerk, sent (or purported to send) Mr Gilliatt a letter in which she (i) apologised for the initial delay in processing his application for a case stated (caused by the departure of the then Deputy Clerk); (ii) explained why Mr Gilliatt had not in the end had to enter a recognizance; and (iii) addressed the missing correspondence from the Magistrates' Court and the HAC, apologising for the slight error in the address in the HAC letters (which would not, she said, have prevented delivery). She informed Mr Gilliatt that he could make a complaint to HMCTS. Mr Gilliatt says he did not receive the letter
- On **28 November 2016**, Ms W sent (or purported to send) him a copy of the letter, following a message from Mr Gilliatt on **17 November 2016**. Mr Gilliatt says he did not receive this letter either
- On **13 December 2016**, Ms W, as justices' clerk, sent Mr Gilliatt a letter explaining in general terms about the options of judicial review, a complaint to the JCIO about a judge's conduct (for example, if he or she was rude) and appeal to the Crown Court or High Court etc against a judicial ruling. Mr Gilliatt says he did not receive the letter
- On **3 January 2017**, HMCTS revealed that a total of seven letters had been sent to Mr Gilliatt but not received
- On **6 April 2017 [311]**, HMCTS upheld Mr Gilliatt's complaint against the Magistrates' Court. He had received a 'very poor level of service due to the way your correspondence had been handled'. HMCTS accepted that letters had been sent but not received. It offered Mr Gilliatt £750 by way of compensation

- On **26 Apr 17**, Mr Gilliatt reluctantly accepted the offer. In reality, the inconvenience he had suffered at the hand of the Magistrates' Court would, he said, amount to thousands of pounds if it could be quantified, with the figure increased tenfold if all the public authorities he had had to involve were factored in
6. Mr Gilliatt also involved Humberside Police (the Police), alleging criminality arising out of the missing correspondence. When the Police decided not to investigate, he lodged a complaint, initially with the Police and then with the Independent Police Complaints Commission (IPCC). On **28 July 2017 [115]**, the IPCC ruled in his favour. It directed the Police to record the complaint he had made against it and told Mr Gilliatt the Police would contact him in due course about the complaint. On **9 August 2017 [120]**, the Police wrote to Mr Gilliatt, informing him that a caseworker would do some initial evidence-gathering in relation to his complaint before it was forwarded to an investigating officer. A summary of the complaint is at **[121]**. It is not clear from the papers whether it has been investigated by the Police and, if so, with what result.
  7. Mr Gilliatt has also made complaints to the Ministry of Justice (MoJ) and the Parliamentary and Health Services Ombudsman, but there is little information about these in the papers.
  8. He has also made a number of other FOIA requests of the MoJ and the Ombudsman (see below).

#### **The Ombudsman's remit and that of Magistrates' Advisory Committees (MACs)**

9. In his letter to the Commissioner on 24 April 2017 **[161]**, the Ombudsman explained that MACs consider whether magistrates' personal conduct might warrant disciplinary intervention by the Lord Chancellor or the Lord Chief Justice and, if so, a reference to the JCIO for further consideration. MACs could not review judicial decisions or case management.
10. The same letter explained that the Ombudsman's office was an 'arm's length body' of the MoJ. The Ombudsman received assistance from the ministry in respect of a number of matters, including funding, accommodation and assistance in handling information and information security. However, he was statutorily independent of it. His judicial conduct remit allowed him to consider complaints about the process by which concerns about judicial officer holders' personal conduct had been considered. He could consider whether those who dealt with a complaint had complied with established criteria and whether there had indeed been an investigation. However, he could not rule on whether a judicial officer holder was guilty of misconduct and could not comment on any issues arising in a court case.

11. The Ombudsman explained that he followed a three-stage process: (i) a preliminary investigation to determine whether there was a prospect of a finding of maladministration; (ii) if so, a full investigation; and (iii) a review of a decision following full investigation if requested. As it seems he does in a number of cases, in Mr Gilliatt's case the Ombudsman conducted a hybrid of stages (i) and (ii).

### **The Ombudsman's role following Mr Gilliatt's complaint to him**

12. The Ombudsman began to conduct a full investigation given that Mr Gilliatt had not received a response to his complaint to the HAC. However, he concluded that non-receipt of three letters from the HAC (including one enclosing its decision on the complaint) was because of the single-digit error in the postcode in Mr Gilliatt's address: that could not amount to maladministration. The complaint was therefore dismissed.

### **The requests**

13. On 29 October 2016, Mr Gilliatt made his requests for information of the Ombudsman [159]. He referred to the Ombudsman's Annual Report for 2015/6. The report contained a number of case studies. Case Study 5 [221] related to an unnamed MAC and referred to the fact that the complainant had not received the MAC's letter dismissing his complaint. Mr Gilliatt wanted to know (i) the identity of the MAC and (ii) any other instances where a complainant had not received correspondence from the MAC (identifying the MAC(s)).

### **The initial response and review**

14. The Ombudsman responded by letter dated November 2016 [147]. He said that the requests were vexatious within section 14(1) FOIA, which provides: 'Section 1(1) [subsection (b) of which *prima facie* entitles a requester to information held by a public authority] does not oblige a public authority to comply with a request for information if the request is vexatious'. The Ombudsman believed that Mr Gilliatt was impermissibly using FOIA to reopen his complaint to him. He pointed to the fact that the requests were made just five days after fFaudwatch (a name used by Mr Gilliatt for some of his communications and FOI requests) questioned the Ombudsman's conclusions about the complaint. There was, in fact, no prospect of the Ombudsman reopening the complaint. Mr Gilliatt, either in his own name or through fFaudwatch, had made a number of requests for information over the previous few months and also had made several requests to the Ministry of Justice, HM Courts and Tribunals Service, North East Lincolnshire District Council and others about matters arising from the council tax case. He had suggested in an email of 26 May 2016 that the Ombudsman was biased. Mr Gilliatt was, in the Ombudsman's view, imposing an unreasonable burden on his office.
15. In addition, in relation to the second part of the request (for information about how many times people had not received letters from MACs), the Ombudsman

said that he did not keep records of this and it would take more than the 'appropriate limit' of 24 hours, under section 12 FOIA and The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations), to collate the information.

16. Mr Gilliatt asked for an internal review on 2 December 2016 [175]. He began the email thus:

*'It is a reasonable assumption that the [Ombudsman] simply doesn't want to disclose the information perhaps because it might raise questions about the honesty of staff employed within HM Courts & Tribunal Service. I suspect the extra time to provide a response has been needed to justify applying the vexatious tag. The elaborate response is in my mind a series of spurious statements ...'*

17. Mr Gilliatt denied that the purpose of the requests was to gather evidence to reopen the complaint to the Ombudsman: 'The "establishment Vs the public" mentality was all too obvious with the Ombudsman implying he could not care less about altering his view because he considers himself in the clear as "the time limit for seeking a Judicial Review has passed". Incidentally, the threat of crippling litigation costs to anyone who disagrees with a government watchdog has become standard practice for so long that the wrong in it is no longer seen by officials'. Judicial review was, in any event, not a viable option even apart from the time issue. The Ombudsman was wrong in assuming that any action which Mr Gilliatt might or might not intend taking would have to involve him. In any event, the Commissioner's guidance on which the Ombudsman relied in relation to section 14 referred to wrongdoing and the finding of no wrongdoing (by the MAC) in this case had not been substantiated. Mr Gilliatt added that, for the Ombudsman to know about requests for information to other bodies, he must have been straying beyond his jurisdiction; in the case of the Ministry of Justice and HMCTS, this suggested he was not independent of government.
18. Mr Gilliatt also argued that the time taken to deal with the first request would be negligible (considerably less than making out a case of vexatiousness); conclusions could be drawn 'as to why the Ombudsman refused to disclose this information and if those conclusions are wrong it is possible that the Ombudsman himself might be deliberately causing annoyance and/or wasting my time with it being needed to escalate the matter unnecessarily'. The accusation of bias had been made in separate correspondence. He concluded: 'For what it's worth, the reason for asking for the information is as far away from being vexatious as it could possibly be'. He did not, however, explain there what his reason was.
19. Mr Gilliatt did not challenge the Ombudsman's reliance on section 12 and the fees regulations in relation to the second request. Nor has he challenged it subsequently.

20. The Ombudsman provided his review on 30 January 2017 [143]. He said that he had seen no evidence of a pattern of dishonest behaviour by HMCTS staff. His initial decision (prepared by a different member of his own staff) was not designed to protect HMCTS staff but was simply based on an assessment of the request, including the likely administrative burden. Mr Gilliatt's raising the question of the honesty of HMCTS staff fortified the Ombudsman in his conclusion that Mr Gilliatt did wish to reopen the complaint against the MAC. The requests dealing with related matters to other government bodies – submitted via the What Do They Know (WDTK) website as Neil Gilliatt, the real Neil Gilliatt and fFaudwatch – were relevant to the Ombudsman's assessment of vexation.
21. The Ombudsman acknowledged that the time for dealing with the first part of the request would be less than that spent justifying an assessment of vexatiousness (though that was not the case with the second part). However, Commissioner guidance said 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]'. The previous requests of the Ombudsman and of other public bodies on related matters were relevant to the question of disproportionate burden. Moreover, the Ombudsman noted that the webpage for 'the Real Neil Gilliatt' included a logo promising 'massive waste of time ahead' and a strapline 'I love wasting people's time and money'. Although the page had not been used since 2014 and his WDTK account was currently suspended, Mr Gilliatt would have had an opportunity to remove the logo and strapline if they did not reflect his attitude to using FOIA.
22. The tone of requests was also relevant. In addition to the bias allegation, in his email of 23 May 2016 Mr Gilliatt asked '[h]ow has the Ministry of Justice managed to deteriorate to such a state that it is staffed by dishonest people and even worse the governing bodies in place to tackle complaints actual encourage it?'; and on 27 May 2016, he said that the Ombudsman was there, at taxpayers' expense, to give the appearance that holders of judicial office were accountable. The Ombudsman said that the language Mr Gilliatt had employed and the allegations he made would not by themselves be sufficient for a finding of vexatiousness but were a factor.

### **Proceedings before the Commissioner**

23. Mr Gilliatt made a complaint to the Commissioner on 17 February 2017 [137]. After recounting the history of the requests, he suggested that it was implied (it is not clear by whom) that the Ombudsman applied section 14(1) because it would cause embarrassment to Ms W, the HAC secretary, if the information was disclosed. The Ombudsman's conclusion about the three undelivered letters from her was indefensible and a further complaint to HMCTS had uncovered a further seven undelivered letters between December 2013 and December 2016. The chances of 10 items of correspondence (correctly addressed except for a single mistake in the postcode in the three HAC letters) going astray were virtually nil.



He listed the letters. Mr Gilliatt repeated his assertion that the Ombudsman's real function was to protect judicial office-holders facing allegations of misconduct. The victims were aggrieved, taxpaying members of the public who had expended time and effort presenting all relevant material in the expectation that their concerns would be properly addressed when in fact there was no chance whatsoever of that happening. Mr Gilliatt described that as 'fraud by misrepresentation'.

24. Finally, Mr Gilliatt said that he had no idea who 'the Real Neil Gilliatt' was. He was, he suggested, clearly a spoof contributor to the WDTK website, someone probably aggrieved by the nature of the requests he was submitting. The Ombudsman subsequently accepted that the Real Neil Gilliatt was not Mr Gilliatt.
25. The Ombudsman sent a nine-page letter to the Commissioner on 24 April 2017 explaining his decision on the requests [161]. He said that he was aware that Mr Gilliatt had complained unsuccessfully to the Commissioner against a finding by the MoJ that a request he had made was vexatious. The ministry was concerned about the number of requests made to it. Mr Gilliatt had made three complaints to the Commissioner against the MoJ.<sup>5</sup> It had also described Mr Gilliatt's correspondence as 'confrontational and littered with accusations of wrongdoing by Officials and the Judiciary', suggesting that this was the rationale for the suspension of his fFaudwach account on the WDTK website. The Ombudsman repeated his concern about the number of requests and other communications received from Mr Gilliatt and about the accusations of improper conduct.
26. The Ombudsman summarised the basis for his finding of vexatiousness as (i) burden on both this office and the wider public sector; (ii) unfounded allegations; and (iii) unreasonable persistence and using FOIA to pursue and prolong correspondence in respect to issues which were closed, using his own name and at least one other. He acknowledged the importance of giving requesters the opportunity of changing their behaviour, as advised by Commissioner guidance, but endorsed the MoJ's assessment that a response to Mr Gilliatt's requests would not meet his objectives; rather, it would keep public authorities in long and protracted correspondence over matters which had been addressed elsewhere. On this basis, the Ombudsman suggested that the identity of individual MACs would be exempt under section 36(2)(c) FOIA (disclosure prejudicial to the conduct of public affairs). Mr Gilliatt had a pattern of abusing the right of access to information, causing a disproportionate burden on a number of public authorities, and would continue to do so. The information was not of wider public importance.
27. The Ombudsman also suggested that the exemption in section 36(2)(b)(ii)<sup>6</sup> applied. In addition, he was concerned that disclosing the identity of the MAC,

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<sup>5</sup> FS50643992, FS50646503 and FS50650451

<sup>6</sup> 'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

and therefore its chairman, in Case Study 5 would breach section 139 Constitutional Reform Act 2005 <sup>7</sup> and that therefore the exemption in section 44 FOIA (prohibitions on disclosure) would apply. Finally, he explained why he had concluded that the appropriate limit would be exceeded with the second request. But for the vexatiousness finding, he would have suggested, bearing in mind his duty to advise and assist requesters under section 16 FOIA, that Mr Gilliatt refocus his second request, for example by confining it to a six-month period.

28. On 5 July 2017, a senior case officer at the ICO sent Mr Gilliatt an email [305] stating that he was minded to agree that the requests were vexatious. He suggested this way forward:

*'... I note that you have recently had a section 14 FOIA appeal to the Tribunal on a related matter turned down and understand that you have at least one other section 14 FOIA matter pending there. In the circumstances I would like to invite you to agree that we resolve this matter informally for now by letting it rest here but with the proviso that, if the Tribunal find for you on another section 14 FOIA matter, we will revisit this matter'.*

29. Mr Gilliatt was not prepared to accept that offer.

### **The Commissioner's Decision Notice**

30. The Commissioner summarised the dealings between Mr Gilliatt and the Ombudsman and recorded <sup>8</sup> Mr Gilliatt's contention that the focus should be on whether he had submitted the request solely to cause annoyance or whether he perceived a serious purpose behind it. The production of evidence to support his allegations was of secondary importance: what mattered was his belief that there was dishonesty.

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...  
(b) would, or would be likely to, inhibit—

...  
(ii) the free and frank exchange of views for the purposes of deliberation'

<sup>7</sup> '(4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies –

(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));

(b) the disclosure is for (and is necessary for) the exercise by any person of functions under a relevant provision;

(c) the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 or a decision whether to exercise them;

(d) the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;

(e) the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description

(5) An opinion or other information given by one identified or identifiable individual (A) about another (B) –

(a) is information that relates to both;

(b) must not be disclosed to B without A's consent'

<sup>8</sup> Para 16

31. The Commissioner had seen no evidence supporting Mr Gilliatt's accusations of dishonesty and malicious intent by the Ombudsman and other officials or of production by court staff of correspondence after the event. Nor had she seen any evidence that the Ombudsman lacked independence or that he had not approached Mr Gilliatt's complaint independently. She noted the well-established pattern of FOI requests made of the Ombudsman and other public authorities, both in Mr Gilliatt's own name and using an alias. There was no serious purpose to the requests. Rather, they were an attempt to use FOIA to reopen and prolong correspondence about matters which had been properly concluded by the Ombudsman personally; she considered this an abuse of FOIA.
32. Given her finding of vexatiousness, the Commissioner did not need to consider whether the second part of the request fell foul of the fees regulations or whether any of the exemptions on which the Ombudsman had relied applied.
33. The Commissioner did find the Ombudsman in breach of section 1 FOIA by failing to deal with the requests promptly and in any event no later than 20 working days from receipt, but did not require him to take any action in respect of the breach.

### **The Grounds of Appeal and the Commissioner's Response**

34. In his Appeal [17], Mr Gilliatt suggested <sup>9</sup> that paragraphs 17 to 25 of the Commissioner's decision (where she summarised the Ombudsman's case) were a 'complete and utter contrivance'. He set out the background at some length and annexed another chronology and a number of other documents. He referred to his email to the Ombudsman of 27 May 2016, in which he had suggested that the 'deliberate post code error' (in three letters from the HAC) was 'an obvious and half-hearted attempt at a red herring, but did serve as something on which the Ombudsman could base his report'. He sought to demonstrate why the Commissioner was wrong to conclude that there was no evidence that letters from the Magistrates' Court had been created after the event, by pointing to alleged inconsistencies only explicable on that basis. <sup>10</sup> His request did have a serious purpose and, in accordance with the Commissioner's guidance, it was therefore irrelevant whether it would cause disruption, irritation or distress.
35. In her Response [92], the Commissioner maintained her view that the request was vexatious. The Ombudsman had considered but rejected the possibility that the request sought to explore an issue that might point to a systematic failing capable of wider public value. <sup>11</sup> It was not the Commissioner's role to carry out a detailed investigation into whether the 10 items of post were sent to Mr Gilliatt nor whether he had received them but the Ombudsman and the HMCTS had considered this question in detail and had concluded that the three HAC letters

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<sup>9</sup> Para 5

<sup>10</sup> Para 21

<sup>11</sup> para 28

and the seven Magistrates' Court letters, respectively, had been sent. The Commissioner had now, for the purposes of the appeal, considered the alleged inconsistencies in the Magistrates' Court letters: in her view, the errors highlighted by Mr Gilliatt suggested poor service but not fraud. The HMCTS had agreed that Mr Gilliatt had experienced a very poor level of service. In fact, Mr Gilliatt had provided no analysis in relation to the three HAC letters: it was those letters which were directly relevant to the request.

36. The Commissioner maintained her position that the request had little value, principally because the Ombudsman would not reopen his investigation into Mr Gilliatt's complaint. Despite his denial, Mr Gilliatt did wish to reopen that complaint and prolong his correspondence with the Ombudsman about this conclusion that the three HAC letters had been sent to him.

37. In his Reply [109], Mr Gilliatt said that he had asked for the information 'simply ... in case it would be considered relevant to a criminal investigation'. He exhibited the letter dated 28 July 2017 from the IPCC adjudicating his complaint about the Police [115] and subsequent letters from the Police [120] - [122].

#### **Previous FOIA requests, complaints and appeals by Mr Gilliatt**

38. As indicated above, Mr Gilliatt has made a number of other FOIA requests arising out of, however indirectly, disputes about council tax and has challenged refusals to disclose. He has made a number of complaints to the Commissioner;<sup>12</sup> some he has taken to the Tribunal.<sup>13</sup> All have been rejected. He has another appeal pending before the Tribunal<sup>14</sup> and recently tried unsuccessfully to bring a yet further appeal. It is not necessary to set out the detail of those cases but the following is worthy of note:

- In FS505439992, FS50646503 and FS5065040451 (adjudicated together), the MoJ told the Commissioner that Mr Gilliatt had submitted 24 requests in the previous 12 month period. Nearly every one had been followed by a challenge to refusal. Some requests had been submitted within hours of one another or on consecutive days
- In FS50656398/FS50658389/FS50667388 (adjudicated together), the Police provided the Commissioner with a schedule demonstrating that, in a recent 12 month period, Mr Gilliatt had sent it 90 pieces of correspondence, all relating to his council tax matters. In EA/2017/0161, the Police said it had received 76 requests that it knew emanated from Mr Gilliatt, directly or indirectly
- The Commissioner had commented on the inappropriate tone and language used by Mr Gilliatt. For example, the request at issue in EA/2013/0002

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<sup>12</sup> FS50558542, FS50603302, FS505439992/FS50646503/FS50650451, FS50656398/FS50658389/FS50667388, FS50630924

<sup>13</sup> EA/2012/0050, EA/2013/0002, EA/2013/0285, EA/2017/0062, EA/2017/1061

<sup>14</sup> FS50630924

asserted that the Council had a policy to lie about bailiffs recovering tax arrears and was 'no better than a mafia organisation'. In EA/2017/0062 (an appeal from five Decision Notices), the Police operated 'through a process of lies and obfuscations'

- There was a pattern of serious unsubstantiated allegations. In FS50656398/FS50658389/FS50667388, the Commissioner considered that Mr Gilliatt had used FOIA requests to pursue personal grudges against individuals and had made groundless accusations. The request in EA/2017/0062 asked for the authority's policies with respect to 'fabricating evidence turning a blind eye to false witness statements'; and how much taxpayer's money was paid to the force's solicitor for the purposes of perverting the course of justice
- The Tribunal in EA/2017/0161 considered that the request (of the Police) would impose a considerable burden, serve no useful purpose and do 'no more than enable [Mr Gilliatt] to feed an apparent desire to challenge, by any means available to him, those who had been involved in the criminal proceedings brought against him [in 2015], and his subsequent complaint about the conduct of those proceedings'
- A number of requests were found to be vexatious

39. Mr Gilliatt has made other requests of the Ombudsman, either in his own name or fFaudwatch. For example, on 9 November 2015 [269], after referring to two website links, he asked for 'the number of complaints which [the Ombudsman] has similarly completed ignored and the reason for doing so'. On 12 June 2016 [254], he asked (*inter alia*) how many times the Ombudsman had been threatened with legal action by another public body in the years 2012/13 to 2105/16. On 2 September 2016 [247], he asked for the job roles, grades and pay scales of Ombudsman staff.

40. At [270] is a table compiled by the MoJ of some 28 FOI requests made by Mr Gilliatt of the MoJ and the Ombudsman between January and October 2016. Several were taken to internal review.

41. The fact that previous FOI requests have been found to be vexatious does not necessarily mean that a new request is, but the history can nevertheless be relevant and is in the present case.

## **Discussion**

42. The leading authority on section 14(1) FOIA is the Court of Appeal decision in *Dransfield*.<sup>15</sup> The only substantive judgment was given by Arden LJ. She cited<sup>16</sup> this passage from the Upper Tribunal decision:

*'27. ... I agree with the overall conclusion that the [Tribunal] in Lee [Lee v Information Commissioner and King's College Cambridge] reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".*

*28. Such misuse of the FOIA procedure may be evidenced in a number of different ways. 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". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms'.*

43. Arden LJ then said::

*68. In my judgment, the UT [Upper Tribunal] was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the 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 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 requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross [Counsel for the Commissioner] to accept that proposition, which of course promotes the aims of FOIA.*

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<sup>15</sup> *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another* [2015] EWCA Civ 454

<sup>16</sup> Paras 18 and 19

72. *Before I leave this appeal I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy [Kennedy v Charity Commission [2014] 2 WLR 808] (para. 2 above), been carefully calibrated'.*

44. There is, therefore, a high hurdle for a public authority to cross before it may rely on section 14(1). All the circumstances of the case have to be considered. On one side of the equation, these include the burden on the public authority, the motive of the requester and any harassment or distress caused to staff. On the other side is the value of the information to the requester or the public. Value is likely to be a particularly important factor, because of the need to promote the constitutional aims of FOIA to facilitate transparency in public affairs, the accountability of decision-making and so forth.
45. Viewed in isolation, the request does not appear to be vexatious. It is politely expressed. As the Ombudsman conceded, the first part would impose negligible burden on his office. In fact, it would take no more than a few minutes to deal with. He knows where the annual report is and can easily identify the MAC. The second part, which is not confined to a particular period, would take longer, the Ombudsman says more than the 24 hours which represents the appropriate limit under the fees regulation for central government departments (in fact, around 45 hours<sup>17</sup>). Mr Gilliatt does not challenge that assessment. He therefore appears to accept that he is not entitled to that information. As a result, the focus should be on the first part in applying section 14(1).
46. Caselaw is clear that, in assessing whether a request is vexatious, it is permissible to look at the whole history. The narrative set out above shows that Mr Gilliatt has imposed a huge burden on a number of public authorities through the very large number of FOIA requests and complaints. He has taken several of the requests not only to the Commissioner but to the Tribunal. He has lost on each occasion. He has another appeal pending before the Tribunal and tried to bring a further appeal. The cost to the public purse arising from all these related matters must run into thousands, perhaps tens of thousands, of pounds. It is worth reiterating that the amount of costs which led to the cascade of legal proceedings, FOIA requests and complaints was £60. Mr Gilliatt appears to have been unemployed at the time so £60 was not an insignificant sum for him. In addition, the importance of ensuring competent and honest public administration transcends the money at stake in a particular case. Mr Gilliatt is entitled to highlight what he regards as bad practice and worse. It is of the first importance that public officials are held properly to account and any inefficient or corrupt practice rooted out.

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<sup>17</sup> See the internal memo to the Ombudsman dated 30 January 2017 [177, 184]

47. But there has to be a sense of proportion, too, especially where (as here) a citizen is unable to make good his allegations of corruption. It is not enough to suspect wrongdoing or even sincerely to believe it: there has to be evidence to support it, and the more serious the charge the more cogent the evidence has to be. FOIA requests cannot be sprayed far and wide over an extended period in an increasingly desperate attempt to make good a hypothesis of systemic corruption -- as opposed to poor administration -- which previous requests and various complaints have failed to establish.
48. Mr Gilliatt, as the Commissioner justifiably found, displays obsessive traits. As well as making serious allegations against a host of public officials, he regularly imputes bad motives. His language is at times inappropriate. There is every reason to believe that he intends to continue to make use of FOIA for his campaign against various public authorities drawn, however tangentially, into his campaign about council tax administration and the failure of the criminal justice system to address allegedly criminal conduct in that administration. FOIA requests, if answered positively, inevitably give rise to an opportunity for further requests. Whichever the MAC involved in Case Study 5, Mr Gilliatt could fashion further requests of the Ombudsman as well as of other public authorities and there is every reason to suppose that he would.
49. Given that Mr Gilliatt's actions over a long period display the classic indicia of vexatiousness, the question is whether the request is saved by having sufficient value either for Mr Gilliatt or the public at large (or a section of it). In the words of Arden LJ in *Dransfield*, is the request made without reasonable foundation?
50. There are certainly elements of the relevant history giving cause for concern. Mr Gilliatt is much exercised by the ten letters which he says he did not receive, seven from the Magistrates' Court and three from the HAC. Both the Ombudsman and the HMCTS concluded that the letters each was considering were, first, sent but, second, not received. Those conclusions are not inconsistent as a matter of logic but they do not sit easily together. These would seem to be the main possibilities (in relation to either most or all of the letters): (i) the letters were not prepared at the times in question but created after the event to cover up the failure to reply to Mr Gilliatt timeously; (ii) the letters were prepared but for some reason not sent; (iii) the letters all went missing in the post, whether through the carelessness or the deliberate action of postal workers; (iv) they were delivered to Mr Gilliatt's address but intercepted by someone else; and (v) he received them but is falsely claiming that he did not.
51. Possibility (iii) can be discounted. As Mr Gilliatt says, it is not credible that 10 letters should go astray in the post, even allowing for the minor error in the address of the three HAC letters. There is no evidence to support either possibility (ii) or (iv). Possibility (v) seems unlikely: that would be inconsistent with all the efforts expended by Mr Gilliatt in pursuing the complaints predicated on the letters not being sent, and with the indignation and incredulity he has consistently



expressed. That leaves possibility (i). The Tribunal agrees with the Commissioner that Mr Gilliatt's analysis for the HMCTS does not prove that any of the letters were created after the event. In particular, the fact that the same typographical error – an errant 'the' – appears in a standard paragraph about pursuing a case stated in a number of the letters from the Magistrates' Court does not prove that the letters were created after the event: it is just as plausible that there was an error in the template used by the Court for cases stated. Ultimately, the Tribunal does not need to decide whether the letters (or particular letters) were sent on the dates they bear, because it has concluded that the first part of the request has little or no value irrespective of whether they were (see below). But it does accept that Mr Gilliatt is entitled to be concerned that so many letters apparently written to him did not arrive.

52. He is also entitled to be concerned that Ms W, the justices' clerk, is also secretary to the HAC. In her latter capacity, she was not the decision-maker on Mr Gilliatt's complaint. However, as secretary she would have some influence on the conduct of the investigation. Even if there was no actual bias on her part against Mr Gilliatt, there is the appearance of bias and that is sufficient to raise concerns.<sup>18</sup>

53. Despite these legitimate concerns, the Tribunal has concluded that the request has insufficient value to set against the indicia of vexatiousness. As noted above, the primary focus has to be on the first part, since Mr Gilliatt does not dispute that he is not entitled to the information in the second part (because of section 12 FOIA and the fees regulations). The Tribunal decided not to direct the Ombudsman to disclose, as closed material, the identity of the MAC in Case Study 5 because it wanted to assess value on the basis that it *might* be the HAC. Mr Gilliatt has made it clear that the information would only be of interest if it were the HAC. If it were, it could conceivably demonstrate a pattern of behaviour by this particular MAC, although it is very difficult to understand what benefit there could be to any MAC from systematically failing to send correspondence it claims to have sent. In that case study, the Ombudsman noted that the complainant had not received the MAC's letter dismissing the complaint. Unlike Mr Gilliatt's case, the MAC had communicated progress of the complaint. Non-receipt of the dismissal letter appears to have formed only a small part of complaint. The main complaint was that the MAC had failed properly to investigate the complainant's allegation that a magistrate had used his judicial role to gain influence in a private dispute. There was no suggestion in the case study that the Magistrates' Court in question, as opposed to the MAC, had claimed to have sent letters which did not reach the complainant (the situation in Mr Gilliatt's case). It is inherently unlikely that the HAC, or any MAC, systematically claims falsely to send letters to complainants.

54. However, even if the MAC was the HAC and this suggested a pattern of errant behaviour on its part, the Tribunal considers that this would not give the request more than negligible value. In his Reply, Mr Gilliatt says this [110]:<sup>19</sup>

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<sup>18</sup> See *Porter v Magill* [2002] 2 WLR 37 (House of Lords)

<sup>19</sup> Para 3

*'The [Commissioner's Response] does not, and cannot, rebut the evidence put forward by the Appellant in his Grounds of Appeal that the FOI Request was not made for the purposes of reopening and prolong (sic) correspondence with the Ombudsman ... The information has simply been asked for by the Appellant in case it could be considered relevant to a criminal investigation [Exhibit A-1]' (Mr Gilliatt's emphasis).*

55. On his case, therefore, Mr Gilliatt wishes to have the information in the first part of his request so that, if it is the HAC, he can tell the Police, whom he has involved in relation to the missing letters. The Tribunal accepts that this is Mr Gilliatt's motivation. Importantly, however, the Police can *already* find out the identity of the MAC in Case Study 5. Mr Gilliatt will no doubt have informed it about the case study, or could easily do so. Should the Police consider that the possibility that the MAC in that case study was the HAC would support Mr Gilliatt's belief that there is systemic criminality by the Magistrates' Court, it has throughout had the statutory powers to obtain the information from the Ombudsman.
56. In short: the first part of the FOI request is not needed to advance Mr Gilliatt's wish that the Magistrates' Court and the HAC be subject to criminal investigation because of the missing letters. It therefore has little or no value to set against the numerous, weighty indicia of serious vexatiousness.
57. Even if the second part were relevant despite the fact that Mr Gilliatt is not entitled to the information because of the fees regulations, it is very difficult to see how it could be of any real value, either. It is inherently unlikely that there is a systemic pattern of the HAC and/or other MACs up and down the country falsely claiming to have sent correspondence to complainants and then creating letters after the event to cover their tracks. But, again, the Police has throughout had the powers to obtain that information from the Ombudsman should it consider it potentially relevant. And, of course, if, contrary to the Tribunal's view, the value of the second part is relevant, despite the appropriate limit being reached, so must the burden which it would represent (at least 45 hours' work according to the Ombudsman). That would negate any slight value.

## **Conclusion**

58. For these reasons, the appeal is dismissed. The decision is unanimous.
59. Mr Gilliatt has considerable forensic ability. He is able to assess evidence, dissect the arguments of his opponents and articulate his case with some skill. He has identified what he sees as problems with local government as revenue authority, and with the criminal justice system in holding it to account, in his locality and perhaps further afield. He has exposed poor administration and the inappropriateness of the same official being both Clerk to the Justices and secretary to the relevant MAC. FOIA is a key tool in exposing bad practice (and worse) by public officials. The process for complaining about judicial office

holders and court officials is labyrinthine and Mr Gilliatt deserves sympathy in trying to navigate it.

60. However, it is impossible to avoid the conclusion that he has lost all sense of proportion. He believes he has been the victim of, and has witnessed, a large, perhaps coordinated, criminal conspiracy, but without the evidence to support his belief. His use of FOIA has become abuse and there is every reason to believe that the abuse would continue if unrestrained. The missing correspondence is a matter for the Police.

Signed

Judge David Thomas

Judge of the First-tier Tribunal

Date: 9 April 2018 [corrections 30 April 2018]