First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0115

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS MELANIE HOWARD AND STEPHEN SHAW

Between

Michael Gunnell

Appellant

- and -

The Information Commissioner

Respondent

Decision and Reasons

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

1. This is the appeal by Mr Michael Gunnell against the rejection by the Information Commissioner (the Commissioner) on 26 April 2017 of his complaint that North Yorkshire County Council (the Council) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA) pursuant to two requests he made in July 2016. The Commissioner agreed with the

Council that the requests were vexatious within section 14(1) FOIA. [1] There had been earlier requests and considerable correspondence between Mr Gunnell and the Council.

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) (the Rules). [2] The Council was not a party but has cooperated with directions issued by the Tribunal.

Factual background

3. The case concerns direct payment assessments made by the Council relating to Mr Gunnell's sister, Mrs Kathleen Ripley, who was blind and suffered from dementia and who was therefore in need of care and assistance. Mrs Ripley died in January 2015. Local authorities have to offer direct payments to eligible people, provided the recipient is capable of managing them. Direct payments enable service users to buy community care services. They are means-tested and a service user may have to make a contribution. A local authority can ask for repayment if the service user has not used it for the intended purpose. Repayment can be sought from an estate where a service user dies before buying services with relevant payments.

4. Mrs Ripley was entitled to direct payments. Initially, in 2012, the Council determined that she did not have to make a contribution. However, in March 2014, it informed her that she did now need to do so and in fact that she owed some £875 in respect of the period 11 February 2013 to 7 April 2014. She was told that she needed to set up a direct debit for ongoing contributions. Shortly afterwards, the Council told her that she did not have to make contributions with effect from 7 April 2014. It changed its mind once more the following month. Mr Gunnell's view was that no contributions were ever payable.

5. He managed the account into which the direct payments were made. He had several discussions with the Council and attended meetings at its behest. He was not, however, his sister's attorney nor, after her death, her executor.

6. Mr Gunnell has been trying for some time to ascertain whether the various assessments were correctly made. It is fair to say that it has been a frustrating process for him, although also fair to say that he has made many demands of the Council, borne in part of an apparent, if understandable, incomplete understanding of how contributions are assessed. After his sister's death, he made complaints to the social services department and the local government ombudsman (LGO). Each was unsuccessful.

[1] 'Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious'
[2] SI 2009 No 1976

7. At one stage, the Council sought repayment of £1,543.99 in respect of unspent direct payments paid into the account. It threatened legal proceedings. The claim was later reduced to £1,308.00 after Mr Gunnell paid the amount he considered due. He accused the Council of running a 'scam'. The Council eventually decided, in September 2015, not to pursue its claim, because it doubted that recovery was in practice likely: it wished to avoid wasting council taxpayers' money. Its legal advice was that it could not pursue Mr Gunnell personally and there was no probate of Mrs Ripley's estate, indicating a probable lack of funds to settle the debt. Mr Gunnell suggested to the LGO that the decision showed that the Council was 'full of thieves'.

The requests

8. It has not been easy determining the scope of requests which properly fall within FOIA or to identify which information Mr Gunnell wants and that which he already has.

9. He sent two relevant letters to the Council, on 18 and 26 July 2016. The letters were long and discursive. In fact, for the most part they were not requests for information but rather requests for explanations. As the Tribunal explained in case management directions (CMD) issued on 19 December 2017, a FOIA request is not the appropriate vehicle to ask for explanations from a public authority: FOIA can only be used to obtain information held in recorded form. It is possible that a public authority holds information which constitutes an explanation but, if not, it does not under FOIA have to create information (whether in the form of an explanation or otherwise). Unfortunately, Mr Gunnell has continued to show that he does not grasp the distinction between information and explanation. He also has unrealistic expectations about what the Tribunal can do on this appeal. Its sole function is to determine whether he is entitled to information held by the Council at the time of the request. It has no power to determine whether the Council's assessments are correct.

10. It is possible to identify requests for information within the two letters. For example:

18 July 2016 request

- How many assessments did the Council carry out between 30 July 2012 and January 2015

- Copies of assessments carried out in July 2012 and just before 7 April 2015

28 July 2016 request

- The name of the person who chaired a meeting in March 2014 which decided that Mrs Ripley had to make a contribution towards her care costs

- The procedure for the meeting

- A transcript of an internal meeting with the Council's legal team [relating to the decision not to pursue recovery of the alleged debt]

- The attendees at that meeting

11. In his Notice of Appeal, Mr Gunnell appeared to narrow the request **[18]**: 'I am seeking the two letters promised to me by the NYCC regarding the reasons why there were such anomalies in the accounting of my late sister's direct debit mandates instigated by the NYCC'. He did not here specify which letters he was referring to. However, from other evidence it appears that they are those referred to in the eighth paragraph of the letter dated 7 July 2015 sent to him by Ms Toya Bastow, Direct Payments Support Service Team Manager at the Council **[157]-[159]**. [3] That paragraph reads:

> '*On 24 April 2014 you were sent an email from Ann [Davidson of the Council] to inform you that you should have received information from the Benefits and Assessment Team to advise you with effect from 7 April 2014 Kathleen's contribution was nil. However a further letter was resent from our Benefits and Assessment Team on 15 May 2014 to inform you and Hayley [Elliot, Mrs Ripley's carer] about an uplift effective from 7 April 2014, which meant that Kathleen was required to pay a weekly contribution of £11.15. We offer our apologies for any confusion caused by this*'.

12. In fact, Mr Gunnell has the letter of 24 April 2014, as he eventually accepted. However, he continues to maintain that he does not have the second letter referred to by Ms Bastow.

13. In its CMD issued on 27 February 2018, the Tribunal said (as part of the provisional view it had reached about the appeal):

> '*[The] requests are not framed with the precision one might expect of a lawyer. The Tribunal bears in mind guidance from the House of Lords in* Common Services Agency v Scottish Information Commissioner [4] *that requests should be construed liberally. Applying this approach, it seems to the Tribunal that what Mr Gunnell really seeks is (i) information to fill in the gaps in his knowledge about how direct payments were assessed for his sister: in other words, the financial assessments and communications touching on them; and (ii) information relating to the Council's decision not to take legal proceedings for recovery of money owing to them. In relation to (ii), the Council has now explained that the sole source of recorded information is an email from a Council officer to the Council's solicitor on 21 September 2015 summarising a conversation between the two of them*'.

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[3] See, for example, Mr Gunnell's letter of 22 December 2015 to Chris Philips of the Council **[82]**: 'Please see Toya Bastow's letter to me dated 07.07.2015 paragraph 8, this letter clearly states that your office was to send me two letters which referred to the period when your office stopped making my sister pay for her care'.

[4] [2008] UKHL 47

14. Neither of the parties has challenged that assessment of scope and nor has the Council.

The initial response and review request

15. The Council replied to the first request on 3 August 2016, via an email from Ms Pat Young. She answered some of Mr Gunnell's questions and purported to attach four assessments (but in fact only attached three, those dated 30 July 2012, 6 February 2013 and 7 April 2014).

16. Mr Gunnell sent an email to Ms Young on 16 August 2016 **[123]**. It was not expressed as a request for a review. Rather, he challenged the assessments. He accused Ms Young of 'bare faced dishonesty' and described something she said as 'bordering on idiocy'. He pointed out that she had attached only three assessments and said that the Council had sent the LGO five.

17. The Council did not reply to this email until, after the intervention of the Information Commissioner's Office (ICO), Mr Robert Beane, Information Governance Manager, sent Mr Gunnell a letter on 16 November 2016 **[133]**, responding both to the second request and his email of 16 August 2016. He made the point that Mr Gunnell's involvement with his sister's care arrangements was to act as the agent for her direct payments, not the overall management of her finances and estate. The Council had to take into account her wishes and feelings whilst receiving support. He noted that there had been a great deal of correspondence over a prolonged period, including the Council's decision not to pursue its claim for any outstanding debt. Mr Gunnell had pursued his concerns through the statutory social care complaints process and then the LGO. The latter had found no fault with the council's conduct. The Council was not obliged to correspond further on matters which had already been addressed. It considered his continuing correspondence and requests for information to be vexatious and unreasonably persistent. Mr Gunnell was attempting to re-open issues which had been comprehensively addressed both by the Council and the LGO. The Council therefore relied on section 14 FOIA. Any future letters would be noted and filed but not responded to.

18. Mr Beane also said that internal discussions with Legal Services were subject to legal professional privilege and so either section 42(1) FOIA [5] or paragraph 10 of schedule 7 to the Data Protection Act 1998 [6] applied.

19. Mr Gunnell nevertheless sent Mr Beane a long email on 22 November 2016 **[136]**. He finished thus: 'Please note that I will continue to do all that is necessary to obtain

[5] 'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information'

[6] 'Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings'

the information I believe I have the right to request and if you refuse to supply me this information perhaps public opinion will change your attitude'. He has also involved his MP.

Proceedings before the Commissioner

20. By the time of Mr Beane's email, Mr Gunnell had, in fact, already made a complaint under section 50 FOIA to the Commissioner, on 23 October 2016 **[129]**.

21. In his email to the ICO on 5 December 2016 **[141]**, Mr Beane said that the Council was relying on section 41 FOIA (information provided in confidence) [7] as well as section 14. A duty of confidentiality was owed to Mrs Ripley and Mr Gunnell had not shown that he was the personal representative (i.e. executor or administrator) of her estate. In hindsight, the Council should, Mr Beane said, have applied section 41 earlier in its correspondence with Mr Gunnell.

22. There followed considerable correspondence between the ICO and the parties and between Mr Gunnell and the Council. In his letter of 29 March 2017 to the ICO **[201]**, Mr Beane said he had now learnt that no meeting with Legal Services had taken place in relation to the money owed and there was therefore no transcript. Since the Council did not hold the requested information, there was no need to rely on section 42(1). In relation to section 41, Mr Gunnell had now confirmed that he was not his sister's executor. Mrs Ripley had been explicit that she did not want Mr Gunnell involved in her finances. There was no public interest trumping the *prima facie* duty of confidence the Council owed Mrs Ripley (even after her death).

The Commissioner's decision

23. The Commissioner upheld the Council's reliance on section 14(1) on the basis that the requests were likely to cause a disproportionate or unjustified level of disruption, irritation or distress. She did not, therefore, need to consider whether section 41 applied.

24. The Commissioner noted that the Council, on Mr Gunnell's social services complaint, had admitted to some inconsistencies about his sister's contributions. However, the LGO had found no fault with its actions with regard to the financial assessments. Similarly, the LGO would not criticise the Council for initially pursuing the debt.

[7] '(1) Information is exempt information if—
(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person'

25. The Commissioner said that the Council had tried to answer Mr Gunnell's questions, both under FOIA and in general correspondence. His concerns did not warrant the type of language Mr Gunnell employed (for example, he had accused the Council of 'sleight of hand') or his persistence. The Commissioner noted the overlapping nature of the correspondence, whereby a new request was made or clarification sought before the previous request was responded to or clarification provided. Given that the LGO had closed her complaint (and the time for judicial reviewing her decision had passed) and the Council was no longer pursuing the debt, the requests served no useful purpose.

The Grounds of Appeal and the Commissioner's Response

26. In his **Grounds of Appeal [17**], as well as identifying the two letters he wanted, Mr Gunnell claimed the Council had attempted to commit malfeasance against his sister. It had refused to give the LGO the information she requested.

27. In her **Response [29]**, the Commissioner set out the history in considerable and commendable detail. She gave further examples of Mr Gunnell's intemperate use of language. For example, on 12 December 2015 he wrote to the Council: 'I think I will have to go to the doctors on Monday as I believe I have injured my sides laughing at your email. I suppose every office has it's (sic) clown. If you are planning to become comedienne of the year, you will certainly get my vote …'. On 16 August 2016, he referred to the Council's 'imbecilic statement'.

28. Mr Gunnell lodged a **Reply** via his email of 30 August 2017 to the ICO. He again complained that the Council had not sent him the two letters he had identified as it had promised to do.

Discussion

The approach taken by the Tribunal to the appeal

29. As noted, the Commissioner only considered whether Mr Gunnell's requests were vexatious. That was also all the Tribunal was obliged to consider at this stage.

30. However, in *Information Commissioner and Malnick v Advisory Committee on Business Appointments*, [8] a three-judge Upper Tribunal held that, where a (first-tier) tribunal decided that the Commissioner was wrong to uphold the decision of public authority on the sole ground she considered, the tribunal would then have to consider other grounds which were in play (rather than remit them to the Commissioner). It followed that, if the Tribunal found that the requests were not vexatious, it would then need to consider whether the exemption in section 41(1) FOIA (information provided in confidence) applied. In addition, given the view it had reached on the scope of the request relating to the decision not to pursue recovery of the alleged debt, it would be fair to give the Council an opportunity of

[8] [2018] UKUT 72 (AAC) at para 109

revisiting its decision to abandon reliance on section 42(1) (legal professional privilege).

31. Having formed the provisional view that the requests were not vexatious and bearing in mind its duty under the Rules to deal with appeals in a proportionate manner and by avoiding delay, the Tribunal therefore decided to explore with the Council its current position with regard to sections 41(1) and 42(1).

Findings of fact

32. The Council's administration of Mrs Ripley's direct payments and the explanations it has proffered Mr Gunnell has at times been chaotic. There has been considerable confusion about (amongst other things) which assessments have been carried out and when, and which letters and assessments Mr Gunnell has and has not seen. The Council has referred to some letters by the incorrect date and misdescribed enclosures or failed to attach them (in full or in part). This has encouraged a suspicion on Mr Gunnell's part that there is more than incompetence at play and that Council officers have been guilty of dishonesty, perhaps of corruption. It is important to say that the Tribunal has seen no evidence of malpractice. Nevertheless, the Council has not helped itself by failing to take numerous opportunities of setting the record straight in a clear and accessible manner, even if imprecision on Mr Gunnell's part has also contributed to the general confusion. It should not have required the active engagement of the Tribunal to cajole the Council into sorting out the mess.

33. It is not profitable to go through all the twists and turns in a long-running saga. The position has eventually become clearer, following the various CMDs. The Council's response to the CMD issued on 19 December 2017 was incomplete but it provided a much fuller response in its response on 16 February 2018 to the CMD issued on 1 February 2018.

34. From this it emerged that, Mr Gunnell had only been sent assessments dated 30 July 2012, 6 February 2013 and 7 April 2014. In total, six assessments had been carried out. The first, dated 11 April 2011 (with an effective date of 31 December 2010), had not been sent because it was outside the scope of the first request. There were two assessments dated 6 February 2013, one with an effective date of 19 November 2012 and the other an effective date of 11 February 2013. The Council had not sent the first because the calculation and the contribution expected from Mrs Ripley were the same. Similarly, there were two assessments dated 7 April 2014, with the same effective date (of 7 April 2014). The first had not been sent to Mr Gunnell because it contained an incorrect Supporting People Charge.

35. Mr Gunnell says, in response to the CMD issued on 27 February 2018, that he is still missing one letter (one of those identified in his appeal), that which Ms Bastow said in her 7 July 2015 letter had been resent to him on 15 May 2014. The Council has explained that the resent letter was dated 14 April 2014. It was the second letter

bearing that date. The Council purported to attach a letter bearing this date to its email to the Tribunal dated 12 January 2018 (in response to the first CMD). In fact, the attachment is of a letter dated 7 April 2014. This, unfortunately, is characteristic of the sloppiness which has beset this case. However, the Tribunal accepts that it was the letter to which Ms Bastow was referring. Mr Gunnell has therefore received the two letters he identified in his Notice of Appeal.

36. The documents Mr Gunnell has not seen are the first assessment dated 6 February 2013, the first assessment dated 7 April 2014 and the internal email about not bringing legal proceedings dated 21 September 2015.

Section 14(1) FOIA (vexatiousness): the correct approach

37. Having established the factual position, the Tribunal needs to consider whether the requests were vexatious.

38. The Court of Appeal decision in *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another* (collectively *Dransfield*) [9] is the leading authority on section 14(1) FOIA. The leading judgment was given by Arden LJ. She cited, [10] with apparent approval, 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'.*

39. 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*

[9] [2015] EWCA Civ 454 (14 May 2015)
[10] Paras 18 and 19

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.

…

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.*

40. 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 of distress caused to staff. On the other side is the value of the information to the requester or the public at large. However it is not a simple weighing of the two sides of the equation. Where information has value, that is likely to be a particularly important factor, because of the need to promote the aims of FOIA to facilitate transparency in public affairs, accountability of decision-making and so forth.

41. The Tribunal considers that the requests are not vexatious. There are certainly indicia of vexatiousness – for example, Mr Gunnell's intemperate use of language, the overlapping requests for information and explanation and his imputation of improper motives without the evidence to substantiate it. However, in the Tribunal's judgment, the requested information has sufficient value to offset those indicia. Information about his sister's affairs is important to Mr Gunnell, so that he can satisfy himself that everything was done properly. In addition, there is a wider public interest in ensuring that local authorities properly administer direct payments for clients who are almost by definition vulnerable. The Council's administration of Ms Ripley's direct payments and its communication with Mr

Gunnell has left a great deal to be desired. Only following persistent attempts by Mr Gunnell and a second set of directions from the Tribunal has the picture become reasonably clear. The fact that one of the outstanding assessments is a duplicate and the other contained an error (later corrected) does not matter: they remain part of the narrative. Although the Tribunal has not seen any evidence of deliberate wrongdoing by the Council, confusion caused by inefficiency is sufficient to give the requests value.

42. Similarly, the decision not to bring proceedings is important to Mr Gunnell but North Yorkshire taxpayers also have an interest in knowing precisely why the Council decided not to seek recovery of money said to be owing.

Exemptions therefore in play

i. Section 41(1) (information provided in confidence)

43. In its CMD issued on 19 December 2017, the Tribunal said:

> *'… the Council should indicate, by the same deadline, whether it still contends, in the event that the Tribunal finds the requests not to be vexatious, that some or all of the information which Mr Gunnell has requested falls within section 41 FOIA (information provided in confidence). It should bear in mind that, whilst Mr Gunnell's formal role may have been limited to managing the account the Council asked him to set up, he appears to have been closely involved in the direct payments made to Mrs Ripley, including attending meetings at the Council, and therefore inevitably had access to information about her finances*'

44. The Council eventually responded on 16 February 2018, as follows:

> '*Mr Gunnell has stated that he is not the executor of the estate. By his own admission, Mr Gunnell stated that Mrs Ripley did not want him involved in her finances. Mr Gunnell made it clear to the LGO that his sister did not want him involved in her finances. This was acknowledged in a letter from the LGO dated 20.07.2016 "You say your sister did not wish you to be involved in her finances …" Mr Gunnell also send an email to Toya Bastow, NYCC on 15.07.2015 which states that "I can assure you that my sister* ***would not*** *allow me access to her finances". In the circumstances, as such, the council considers that the remaining information would certain be exempt from disclosure under section 41 FOIA if the Tribunal decides that Mr Gunnell's requests are not vexatious.*
> *The information requested is confidential and confidentiality extends beyond death. ICO decided cases have confirmed that such duty of confidence survives death and that disclosure of such information to the public would be "unconscionable" and that there is generally no public interest in disclosing such information which outweighs the public interest in maintaining the duty of confidence. Individuals enter into social services care arrangements with the expectation that the information they provide willingly be used in connection with the provision of that care and will not otherwise be disclosed to third parties without their consent*' (emphasis in original).

45. The Tribunal accepts that confidentiality can survive death, though whether it does so depends on the particular circumstances. In the present case, however, there is the prior question whether the information has ever been confidential. Mr Gunnell's statement to Ms Bastow is equivocal: he could easily have been saying that his sister would not allow him to *use* her money, not that she did not want him to know anything about her finances. The latter would be inconsistent with his managing the direct payments account, presumably with her knowledge and consent (since direct payments can only be made where the service user is capable of managing them and therefore has sufficient capacity). The Council closely involved Mr Gunnell in his sister's affairs, sending him (some) assessments, corresponding with him and calling him in for meetings. It cannot selectively rely on confidentiality.

46. The Tribunal has concluded that the requested information (as construed) was never confidential and that section 41(1) therefore does not apply.

47. In any event, although section 41(1) is technically an absolute exemption (such that there is no public interest test to apply), a public interest test is already built into the law of confidence. Any confidentiality might therefore have to give way to public interest in the requested information; in that regard, there is considerable overlap with the concept of value for the purposes of section 14. The Tribunal would have held that the information was not confidential for this additional reason.

ii. Section 42(1) FOIA (legal professional privilege)

48. In CMD issued on 19 December 2017, the Tribunal said:

> '*In his Notice of Appeal, Mr Gunnell also said that he wished to receive a 'transcript of this tribunal meeting', by which he appears to mean the note of an internal Council meeting which he assumes took place to consider whether to bring legal proceedings against him. It is arguable that the request should be construed as extending to legal advice (whether proffered at a meeting or in some other way) about the question of legal proceedings. For the eventuality that that is the way the Tribunal construes the request,* ***the Council*** *should inform HMCTS … whether it wishes to rely once more on section 42 FOIA (legal professional privilege), in case the Tribunal should find the requests not to be vexatious. The Council should bear in mind that, according to paragraph 47 of the LGO's initial decision* ***[208]****, the Council told her (inter alia) that it felt it would be unlikely to recover the debt from Mrs Ripley's estate because no grant of probate had been made: the Council has thereby appeared to have revealed at least part of the content of the legal advice*' (emphasis in original).

49. As explained above, the Tribunal has construed the relevant request in the way postulated.

50. When the Council responded on 16 February 2018, it said that there was an internal email on 21 September 2015 from a Council officer to a Council lawyer seemingly summarising a conversation between the two. The Council said that the email was in similar terms to the passage in the LGO's report. It therefore did not intend to rely on section 42(1) in relation to that email, the only one containing a record of legal advice.

51. That email is within scope.

Communication of the Tribunal's provisional view

52. By its CMD issued on 27 February 2018, the Tribunal expressed its provisional view along the lines set out above. It gave the Council an opportunity of saying that it disagreed, in which case it would need to be added as a party. The Council has not taken that opportunity and must, therefore, be taken to accept the provisional view or at least not to be opposed to it. The Commissioner has not responded either.

53. Mr Gunnell has responded, at considerable length. However, he has not engaged with the issues, except to disagree with the Tribunal's assessment that there was no evidence of deliberate wrongdoing by the Council. He disputes having received the resent letter, but the Tribunal has found that he has received it.

Conclusion

54. The Tribunal therefore allows Mr Gunnell's appeal. The Council must within 28 days disclose to him the two assessments dated 6 February 2013 and 7 April 2014 he has not seen along with the internal email of 21 September 2015. Although outside the scope of the requests (on any basis), the Council may for completeness wish to disclose to Mr Gunnell on a voluntary basis the assessment dated 11 April 2011.

55. It is important to make some concluding remarks. Although it has found that, in the particular circumstances, the requests (as it has construed them) are not vexatious, Mr Gunnell should not take this as a green light to continue directing further long FOIA requests and demands for explanation to the Council. The Council has previously said, after Mr Gunnell exhausted the social services complaints and the LGO complaints processes, that it would not answer any further requests for explanation. It has in fact done so but has the option now of reverting to that policy. Similarly, if Mr Gunnell makes further requests for new information on the same subject-matter, the Council should consider carefully whether, in light of the history and any value in the information, they are vexatious. The Tribunal cannot, of course, anticipate whether any future requests would properly be regarded as vexatious.

56. Mr Gunnell should also bear in mind section 14(2) FOIA:

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

57. In any future use of FOIA, he would be well-advised, too, to temper his language and in particular deployment of sarcasm and to desist from imputing bad motives (or worse) unless he has clear evidence and they are relevant. If he does not, that can only increase the prospect of a finding of vexatiousness.

Signed

Judge of the First-tier Tribunal
Date: 18 June 2018
Promulgated: 21 June 2018