IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

APPEAL: EA/2018/0088

BETWEEN:

PHILIP SWIFT

OBO CLAIMS MANAGEMENT & ADJUSTING LIMITED

APPELLANT

and

THE INFORMATION COMMISSIONER

FIRST RESPONDENT

and

HIGHWAYS ENGLAND COMPANY LTD

SECOND RESPONDENT

Before

JUDGE BRIAN KENNEDY

ROSALIND TATAM and NARENDRA MAKANJI

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 28 March 2018 (reference FS50703446), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 3 December 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Swift's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Public Authority, Highways England ("HE") was correct to determine that the Appellant's request was vexatious under s14 (1) FOIA.

Chronology:

1 Jan 2016 -	Appellant makes a number of requests to HE and lodges 8 appeals.
24 July 2017	HE provides some information outside FOIA framework
25 July 2017	Present request for information about charges payable to contracted companies re repairs to infrastructure following an accident.
23 Aug 2017	Highways England refuses request, citing s14 FOIA
Aug 2017	Appellant requests internal review and HE does not respond.
29 Sept 2017	Appellant complains to Commissioner
14 Oct 2017 - 14 Nov 2017	Commissioner writes twice to HE and requests them to carry out internal review, to no response
8 March 2018	Commissioner sends HE information notice requesting information
12 March 2018	HE sends Commissioner explanation and details Appellant's history of requests.
28 March 2018	DN upholding the refusal.

Relevant Legislation:

Freedom of Information Act 2000

14 Vexatious Requests

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

(2) 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.

Commissioner's Decision Notice:

[4] In his profession, the Appellant handles insurance claims for insurance companies and members of the public who have been billed by contractors for Highways England for the repairs to infrastructure following accidents. He described his motivation as a concern regarding the lack of transparency in the level of fees and the actual costs to Highways England of the repairs it has paid for. His concerns relate to suspected collusion and potential fraud.

[5] HE provided evidence to the Commissioner that from January 2016, the Appellant submitted 24 requests for information or for internal reviews, the majority of which related to the same overall costs issue as this request, or discrete aspects of that issue. HE claims that it has struggled to manage the volume of queries that the Appellant has submitted, and he has contacted numerous different individual staff members with requests. He was also encouraging members of the public to press for more information on this issue on the website "WhatDoTheyKnow.com".

[6] The Commissioner did not consider the Appellant's requests to be 'scattergun', but she did find that they could be characterised as "frequent or overlapping", which can be an indicator of vexatiousness. It is evident that the Appellant encouraged other requesters to persist with similar enquiries to HE. The Commissioner was also aware that, prior to this request, the Appellant set up a website which draws attention to the alleged disparity in costs payable to contractors and posts comments from dissatisfied persons who have made information requests.

[7] While a high volume of correspondence may weaken the justification for continued requests, this must be taken in context of the seriousness and complexity of the dispute itself. Where the requests have a genuine purpose for gathering information, the Commissioner would only consider them to be vexatious if the aggregated impact of dealing with the requests would cause disproportionate or unjustified disruption, irritation or distress. In this case, it is clear that HE has dealt with a "very large" volume of similar requests from both the Appellant and others in an 18-month period. In some instances, information was provided on the foot of those requests. While the information in question relates to a matter of interest to the motoring public and wider issues of apparent collusion and potential fraud, the burden on the authority in complying is, she found, disproportionate, and as such the request was deemed vexatious. She did however criticise HE for failure to abide by best practice in responding to the Appellant and to her requests for clarification.

Grounds of Appeal:

[8] The Appellant initially requested that his appeal be considered in conjunction with this request "and one I am about to make". He stated that his intention was to seek to "put an end to the illegality, to have claims priced correctly, to stop the profiteering". The Appellant claimed that certain individuals within HE had indicated that they might provide some of the requested information. He provided evidence of what he deemed to be unfair charging practices, referred to legal proceedings challenging the determinations of damage, and argued that the scale of a named contractor's malfeasance was so gross, especially as he viewed it was assisted by HE, that it justified the requests. The Appellant accepted that he was annotating relevant requests on WhatDoTheyKnow.com and stated that he could not see how this would prejudice any requests.

Commissioner's Response:

[9] The Commissioner accepted that there was a legitimate interest in the issue that were the subject of the request, but considered that this had lessened by virtue of his receiving some information on these issues from the authority. Over his three-year engagement with HE, each response to a request has led to successive further requests on the same or similar issues. Requests persisted through the period when the Appellant had requested internal reviews of decisions. HE corresponded at length with the Appellant informally by telephone

and email, and requests were made to various different members of staff, making it difficult for HE to manage, monitor and respond to his requests.

[10] Furthermore, the Commissioner saw this as "patently a classic case of Appellant acting in concert", as he accepts that he operates a website whereby he circulates information in relation to these issues, and comments on FOIA requests on this subject on the "WhatDoTheyKnow" website. Aside from the Appellant, there have been 80 other requests on this issue from 8 other individuals. The Commissioner does not consider that it is necessary that the Appellant and these individuals have "hatched a plan", but the fact that he is encouraging others to make such requests and engage in correspondence with HE has the same effect on the authority. HE "was entitled to conserve its resources by drawing a line under its correspondence with the Appellant". Insofar as any HE employees allegedly indicated that they would provide the information, the Commissioner does not consider that it impacts on HE's duty under FOIA.

Public Authority's Response:

[11] HE did not consider that there were any grounds raised to justify the Tribunal ruling that the Commissioner was incorrect in her decision. HE did not accept that the Appellant's motivation was necessarily good, but in any event motive alone is not determinative of vexatiousness. The history and context of this request are relevant, and HE referred the Tribunal to the principles elucidated in *IC v Devon CC and Dransfield* GIA/3037/2011 and *Carpenter v IC and Stevenage BC* EA/2008/0046: (*This Tribunal found this case of little assistance as it was pre- Dransfield and part FOIA and part EIR.)*

i) **Frequency** – the 24 requests in 18 months on the same subject are clearly vexatious. Since November 2013 the Appellant made 57 requests for information or review, and these have increased in frequency over time;

ii) **Information provided** – similar previous requests have been answered and the Appellant has been provided with the information;

iii) **Obsession** – Sian Jones, lead Information Rights Officer at HE, provided a witness statement, which claims that the Appellant's requests are "opaque" and require "at least some degree of clarification". He refused to abide by the single point of contact address to which he was directed, and was telephoning and emailing one particular HE employee several times a day (up to six times on one particular date), recording all calls without permission (*this Tribunal notes his e-mails contain a reference that all*

calls will be recorded), and ringing from a private number so that the individual could not screen his call. HE determined this to be harassment and informed the Appellant accordingly in March 2018. (*This Tribunal notes the PA had first used s.14 on 23 August 2017 but were inconsistent thereafter*). Ms Jones also described an "inappropriate and aggressive" email exchange with the Appellant, causing her "an undue level of personal distress";

iv) **Disproportionate burden** – Ms Jones considered that the repeated, overlapping requests made by or associated with the Appellant have taken up a disproportionate amount of HE's resources. His requests, she claims "are often "*buried*" in lengthy communications sent directly to the business units". HE has identified at least 9 other requesters that it suspects to be associated with the Appellant, totalling 175 requests since November 2013. One of the individuals in question is an employee of the Appellant's. HE stated that the Appellant had made 126 annotations on other requests, acted as a representative of other requesters and provided information to named requesters through his website.

Tribunal Deliberations:

S 14(1) Vexatious Request

[12] Guidance on applying s 14 is given in the decisions of the Upper Tribunal and the Court of Appeal in **Dransfield** ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454). The tribunal has adapted the following summary of the principles in **Dransfield** from the judgment of the Upper Tribunal in **CP v Information Commissioner** [2016] UKUT 427 (AAC):

[13] The Upper Tribunal held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA (para 10). That formulation was approved by the Court of Appeal subject to the qualification that this was an aim, which could only be realised if 'the high standard set by vexatiousness is satisfied' (para 72 of the CA judgment).

[14] The test under section 14 is whether the request is vexatious not whether the requester is vexatious (para 19). The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA (para 24). As a starting point, a request, which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main

purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account (para 25). The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve considering whether or not there is an adequate or proper justification for the request (para 26).

[15] Four broad issues, or themes, were identified by the Upper Tribunal as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations are not exhaustive and are not intended to create a formulaic checklist.

[16] In relation to the issue of Burden, we accept there was a burden on the Public Authority in terms of the number of requests and phone calls from the Appellant. However this must be considered in the context of the nature of the background as explained by the requestor in his submission to this Tribunal and the size and import of the Public Authority who had the responsibility of a Government–owned company responsible for operating, maintaining and improving England's motorway and major "A" road network, employing 5,000 people in locations around the UK and responsible for delivering £11 billion of committed capital funding from 2015 – 2020 (see paragraphs 5 & 6 of the witness statement of Sian Jones).

[17] While we accept there was a burden on the Public Authority in terms of the number of requests and phone calls from the Appellant, this must be also be considered in the context of the overall responsibilities of the Public Authority. We have the benefit of the witness statements provided in this appeal and refer in particular to that of Sian Jones wherein at Paragraphs 11 – 15 she describes the dimensions and functions of HE, a UK wide Public Authority of major import. Together with the other evidence before us, we do not accept that they were faced with an unduly burdensome task in dealing with the Appellant's requests. This is particularly so in the context where we find they have not addressed the issues apart from 1 audit they provided to the Appellant. We find HE has failed to properly identify the issues raised and dealt with them adequately or at all.

[18] We have considered the motive of the requestor and in particular his detailed Reply and

exhibits commencing at Page 29 of the Hearing Bundle before us. These submissions supported by the documents provided and annexed have persuaded us not only that the Motive of the requestor had a serious purpose and arose from genuine and informed concern but had significant value with a high degree of Public Interest. On the evidence before us we could not find the request were manifestly unjustified, inappropriate or an improper use of FOIA.

[19] Again looking at the evidence before us we do not accept that there could or should have been any harassment or distress (of and to staff) in an organisation of the size and import of the second respondent in this appeal. They were of such a scale that the important information sought by the Appellant should have been within their capacity to process without causing harassment or distress. We find that the failure to recognise and process the requests was principally caused by inadequate or inaccurate responses by the personnel within Public Authority. We find this to be the cause of what came to be described as "Obsessive behaviour" on the part of the requestor, which in our view, in all the circumstances was not manifestly unreasonable.

[20] As to burden, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. Ultimately the question is whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach, which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests. This Tribunal is sympathetic to HE in relation to their need to address the number of requests and the number of phone calls from the Appellant.

[21] The public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

Discussion and conclusions:

Value and purpose of request and motive:

[22] The Tribunal considers the four factors identified by the Upper Tribunal to be a helpful framework to structure its consideration of whether the request was vexatious but has had

regard to the fact that it is not intended to be an exhaustive definition or a checklist for determination of this issue and that a holistic approach must be taken, with no one factor acting as a trump card.

[23] We accept that the purpose of the request was to obtain information to support a proposed claim of misfeasance in public office and that there was an adequate and proper justification for the request. On the evidence before us we accept that the request is serious and justified in that it related to suspected gross overcharging of Third Parties which was alleged to have been enabled and assisted by the Public Authority. If he was correct in his concerns the Requestor was attempting to identify Fraud.

[24] This Tribunal do not find the frequency or overlap, where it does exist, mean the requests caused a disproportionate impact or unjustified level of disruption to HE in the circumstances and on the evidence before us. The Appellant is not asking for information on the same points on each occasion. Even if some are overlapping they are still, in our view potentially relevant. Nor do we accept that because the Requestor encouraged other requestors to make their own inquiries that he was acting in concert with them or such other requests should be taken into account when considering the purpose of his own requests. On the facts it is clear that the Appellant set up his Company to assist others. Each person has their own specific right to make their own requests on the important matters raised.

[25] We do not think that the fact that Mr. Swift might have been able to obtain some of the information he has requested weakens his legitimate interest. We have been persuaded that he has received erroneous information. Amongst other issues he requested information on three issues with which his business is concerned which include; a) One of the contractors was inflating their costs on a scale arguably amounting to fraud; b) Costs are different according to Third Parties being billed directly on the basis that the costs of the works fall below the procedural threshold and c) Transparency and an inability to check costs e.g. on Staff overtime and using false registration VRN number plates. We are satisfied his requests on these issues would have taken forward these matters which were worthy of investigation.

[26] We acknowledge that there is overlap in some requests however the Public authority has not answered many of the requests that have not overlapped and on occasions inexcusably delayed in responding. E.g. at page 199 of the second hearing bundle before us a promise to provide a response to a request made on 22nd September 2017 within 15 working days was not met until 8th January 2018.

[27] The requests are of clear value to Mr. Swift and we find that his motive in pursuing them in the circumstances was not obsessive or disproportionate as is clearly demonstrated in his comprehensive 82-page Response to the Commissioners Response. Further we find that the exposure of potential misfeasance in public office is a matter of objective public interest. So too, is the exposure, inter-alia of evidence of alleged overcharging, withholding information from the public alleged systematic overcharging and fraud by a contractor. We find that the request had an adequate and proper justification.

[28] We do not think that these are significant indicators of this request being vexatious or, taken as a whole, an inappropriate use of FOIA.

Harassment and distress:

[29] We accept that Mr. Swift's requests cause some stress and annoyance to HE staff. This is not only through the volume of the requests over the entire course of dealings, but also because of Mr. Swift's tendency to be quick to make allegations of untruthfulness or make threats of police action against individuals. We do not accept that the mentioning of individual's names would cause harassment or distress. The requests do not use intemperate language. Nor could they be described as offensive. We do not find that the request would or should cause harassment or distress to staff.

Conclusion:

[30] Taking all the above into account, we have asked ourselves whether the request was vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of the FOIA. We have taken a holistic and broad approach and have looked at the entire course of dealings. We have considered the number and pattern of requests made, but have also taken account of the burden on HE from all the requests made by Mr. Swift. We do not think that his is a request that has no reasonable foundation. The information requested has value for Mr. Swift and objective public interest. We have balanced his request against the resource implications of the request and all the other relevant factors. Taking all this into account, and our reasons as set out in the preceding paragraphs, we conclude that the request is not vexatious.

[31] The Public Authority should reconsider the request and provide the information sought or a response relying on exemptions in Part 2 of FOIA in accordance with the FOIA principles.

Signed

Brian Kennedy QC

Date: 13 December 2018