First-Tier Tribunal
General Regulatory Chamber
(Information Rights)

Appeal Reference: EA/2018/0077 (V)

Heard remotely via CVP
On 29 October 2020
At Field House

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

RICHARD DAVIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: not in attendance and not represented
For the Respondent: not in attendance and not represented

DECISION AND REASONS

Introduction

1. This an appeal against a decision of the Information Commissioner's Office ("ICO") dated as long ago as 28 March 2018, in which the Commissioner concluded that the public authority (Kent County Council, hereinafter referred to as "KCC") had correctly applied Section 14(1) of the Freedom of Information Act 2000 (vexatious request). The Commissioner did not require KCC to take any steps.

2. Pursuant to paragraph 6a of the "*Amended Pilot Practice Direction: Panel Composition in the First-tier Tribunal and the Upper Tribunal*" of 14 September 2020, a decision was made that the appeal should be heard by a judge sitting alone.

Determination in the Absence of the Parties' Attendance at the Hearing

3. The proceedings before the First-tier Tribunal have been unduly protracted, despite the matter having been initially listed for substantive hearing as long ago as the 6 September 2018. That hearing was adjourned, the panel having considered a written application filed by the appellant at 00.10 on the day of the hearing. Correspondence ensued between the Tribunal and the parties, and directions were issued by the Registrar on 2 October 2018 directing, *inter alia*, that the appellant file his evidence and witness statements by 14 December 2018. The appellant did not comply with this direction.

4. Thereafter, numerous attempts were made by the Tribunal to contact the appellant (by email and telephone) without success, until the 31 January 2019 when the appellant emailed the Tribunal indicating that he was unwell. By way of a direction of 7 March 2019 the parties were required to provide dates to avoid for the substantive hearing, the hearing date window being between 13 May and 30 August 2019. A date of 2 July 2019 was set for the hearing. On 27 June 2019, the appellant successfully applied for an adjournment, asserting ill health. By an Order of the Registrar of 28 June 2019, the appeal was thereafter stayed until such time as the appellant either informed the Tribunal of his ability to attend an oral hearing or consented to a determination on the papers.

5. The Tribunal subsequently wrote to the appellant on several occasions, by email and post, without response. On 23 September 2020, the Tribunal sent notice of a Case Management Hearing before Judge Macmillan on 2 October 2020. That Notice was sent to the appellant by post and was signed for at the appellant's address. The appellant did not attend the hearing, or otherwise respond to the notice of hearing. Judge Macmillan directed that the appeal should be determined on the papers in accordance with the Tribunal's Triage System, varied accordingly to permit such an approach in an 'Information Rights case'.

6. The appeal was listed to come before me for determination on the papers on 13 October 2020. Upon consideration of the papers, I concluded that it was not appropriate for the Tribunal to rely upon the application of the 'Triage system' to infer consent to the matter being determined on the papers from the appellant's silence, given the particular circumstances of this case in which the appellant's silence has loomed large throughout. I therefore directed the matter be listed for oral hearing.

7. I am satisfied from the papers that notice of the hearing on 29 October 2020 was properly sent to all parties by email. The Information Commissioner did not attend the hearing, but that was not unexpected given her previous position in this matter and her convention of not unduly directing resources to hearings relating to the application of section 14 of the Freedom of Information Act 2000 ("FOIA").

8. The appellant did not attend the hearing. In addition to the hearing notice being sent to the appellant by email, it was also sent to him by Special Delivery to the last address provided by him to the Tribunal. An interrogation of the Post Office track and trace service confirms that the envelope containing the hearing notice (with the relevant assigned tracking number) was signed for by '*Davis*' at the address provided. There has been no subsequent correspondence from the appellant seeking an adjournment of the hearing, nor indeed in relation to any other matter. In all the circumstances, I am content that the appellant has been provided with details of the date, time, and details for joining the hearing.

9. Having carefully considered the First-tier Tribunal (General Regulatory Chamber) Rules 2009 ("2009 Rules") and, in particular although not exhaustively, rules 2, 5, 13 and 32 to 34, I conclude that it would not impinge upon the two leading tenets of the overriding objective, fairness and justice, to determine this appeal in the absence of the parties.

Factual Background

10. This appeal concerns a request for information made by the appellant to KCC, regarding Simon Langton Girls' Grammar School in Canterbury ("SLGGS").

11. SLGGS is a Voluntary Controlled school, for which KCC has delegated management to the school's Governing Body. In 2015, the Head and Governing Body of SLGGS conducted a consultation with parents and staff on the possibility, amongst other things, of converting the school to an academy. It is said that concerns were raised by parents and staff during the consultation process, which led the Chair of Governors to commission an independent investigation. This investigation became known as the 'Craig enquiry'. During the course of the Craig enquiry, the Chair of the Governors resigned, and shortly after the conclusion of the investigation the Head resigned.

12. On 11 July 2017, the appellant wrote, as follows, to KCC requesting information relating to SLGGS (the redactions being mine):

> *"Please provide copies of all email correspondence involving the following Kent County Staff (whether inbound or outbound):*
>
> [8 names redacted]
>
> *and any additional external individuals (whether inbound or outbound):*
>
> [name redacted] (Former Chair of SLGGS)
>
> [name redacted] (Current Chair of SLGGS)
>
> [name redacted] (Former Clerk of SLGGS)
>
> [name redacted] (Current Clerk of SLGGS)

In relation specifically to the Simon Langton Girls Grammar School (SLGGS) in Canterbury, which may or may not include topics such as the Craig Report and/or [name redacted] and/or disciplinary investigation and/or legal agreements and/or financial settlements and/or compromise agreements under non-disclosure agreements. Please ensure that any searches include archive/cloud back-ups in case any emails have been deleted on local machines.

To ensure absolute clarity in the request, I am requesting all emails relating to the topics in the paragraph immediately above, but am seeking to restrict the search to any correspondence that includes any/all of the named individuals, to keep the request manageable, precise and focussed.

I should state, that this search should also included all internal emails from within KCC sent from one staff to another (or many as the case may be), as well as any inbound/outbound emails (from anyone) relating to the same topics.

Please further advise whether any member of staff within KCC legal services, or Invicta Law, have drafted any contracts or agreements for any member of staff at SLGGS since January 2017 onwards."

13. On the same day, the appellant wrote to KCC requesting that the former Head Teacher of SLGGS be added to the list of individuals named in his request.

14. KCC replied on 12 July 2017, advising the appellant that it considered the request to be too broad and inviting him to indentify a specific time period which the request should cover. The appellant responded on the same day, refining his request to cover the period from 1 January 2017 onwards.

15. KCC provided its substantive response to the request on 8 August 2017. It refused to provide the requested information, relying on the exemptions provided by section 12(1) and section 14(1) FOIA. On 9 August 2017, the appellant requested KCC to conduct an internal review. KCC provided the outcome of its review on 7 September 2017, maintaining its original position.

16. On 12 September 2017, the appellant made a complaint to the ICO about KCC's handling of his request. On 26 January 2018, the ICO wrote to KCC, requesting explanation and details relating to its handling of the request, to which a response was received on 23 February 2018.

The ICO's Decision

17. By its undated Decision Notice (ref: FS50700503), the ICO concluded that KCC had correctly applied section 14(1) FOIA. The reasons for the ICO's decision are summarised thus, at paragraph 12 of its Response to these proceedings:

    "a. Section 14(1) FOIA provides that a public authority is not obliged to comply with a request for information if the request is vexatious. 'Vexatious' is not defined in FOIA; in *Information Commissioner v Devon CC & Dransfield*, the Upper Tribunal observed it could be defined as the '*manifestly unjustified, inappropriate or improper use of a formal*

procedure'. It found 4 broad issues were helpful when determining whether a request is vexatious: (1) the burden imposed by the request; (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) harassment or distress of, and to, staff. However, these considerations are not exhaustive, and all the circumstances of the case must be considered: Decision Notice [23]-[28].

b. The Commissioner considered the submissions made by the Council and the appellant. The Council had explained that the appellant had made 12 FOIA requests to it since 2010, including 6 between January and July 2017, all concerning matters linked to SLGGS. The Council stated that the volume of requests and correspondence placed an unreasonable burden and disproportionate drain on its resources. It provided details of the previous requests, and its responses, and explained that parts of the request now in issue appeared to be an attempt to obtain answers to requests the appellant had previously submitted. In light of the history of its dealings with the appellant, the Council considered that any response to the request was unlikely to be sufficient, and would be likely to result in further correspondence. The Council stated that while the tone of instant request was not accusatory in nature, other correspondence had included aggressive language. It considered the number of requests made showed a pattern of behaviour, which it described as a campaign to put pressure on the Council and SLGGS, from both the appellant and others, which campaign was also playing out on social media. Further, it considered the appellant's request suggested his motive was to attain information about the former head teacher's departure from the school, and that he was using FOIA to vent his anger at decisions taken by that teacher and the Governing Body leading to the Craig enquiry. The Council stated that it believed the request had no special value, and that if the information were received it believed much of it would be exempt from disclosure under FOIA exemptions. The Council referred to a similar request for information which had been the subject of a decision by the Commissioner: Decision Notice [29]-[51].

c. The appellant disputed that the Council had responded substantially to his previous information requests, and argued the Council had attempted to find grounds to withhold information. The appellant submitted that providing a response to the request would not have led to more correspondence, although he submitted it may have resulted in court proceedings, depending on the disclosures made. He raised concerns about the accuracy of the information provided by the Council in response to information requests, and stated that any comments he had made about the conduct of the Council could be substantiated by evidence. In particular, he contended that actions taken by SLGGS and/or the Council were unlawful: Decision Notice [52]-[60].

d. In making her assessment, the Commissioner considered whether the impact of dealing with the request was justified and proportionate. She considered the effort involved in dealing with the request, and the purpose and value of the request. First, as to the effort in responding to the request, the Commissioner noted that a number of requests had been made and concerns raised about SLGGS, regarding decisions about the school which were likely to have been of great interest to parents and others. There was insufficient evidence to conclude, as the Council suggested, that this was a campaign to place a disproportionate amount of pressure on the school. Rather, the Commissioner found the requests indicated a genuine effort to try to obtain greater understanding of the Craig enquiry and its findings. The Commissioner accepted, however, that this may have placed pressure on the school and the Council: Decision Notice [62]-[68].

e. It was important to consider the history of the appellant's communications with the Council. Considering this correspondence, it appeared the Appellant had not been satisfied with any response the Council had provided, and this had prompted further requests to be made. There was no evidence the Council had failed to respond properly to past requests and the Commissioner therefore did not agree with the appellant's claim that the Council had previously failed to provide information he was entitled to receive. The Commissioner accepted the Council's submission that, in light of the history of communications, the appellant was unlikely to be satisfied with the outcome of any information provided, and would continue to ask questions: Decision Notice [69]-[76].

f. As to the purpose and value of the request, the Commissioner found it was clear there was public interest around the Craig enquiry, and it could be argued there was a strong public interest in transparency and accountability as to the issues to which the request related. The Commissioner took into account what information regarding the Craig enquiry was in the public domain, noting that while the details of the report have not been published, a summary providing the outcome of the enquiry and the actions taken by the school as a result have been placed in the public domain. This information went some way to meeting the public interest in the topic. The Commissioner also noted that the information the Council holds relating to SLGGS is likely to be limited: Decision Notice [77]-[91].

g. Taking these considerations into account, the Commissioner found it finely balanced as to whether there was an additional public interest in the information requested. While is could provide further openness and transparency, it was possible no new information would result from the requests, which would continue on the same theme. The Council had made attempts to provide information to the appellant in response to previous requests, and the appellant had not been satisfied. While the request themselves had not been particularly burdensome, the Council had demonstrated a persistence on the part of the appellant, to the point where it was no longer reasonable for the Council to expend further resources. Applying the holistic approach described in *Dransfield*, the Commissioner was satisfied the effort involved in dealing with the request would be disproportionate. The Commissioner therefore concluded s.14(1) had been applied correctly: Decision Notice [92]-[99]."

The Grounds of Appeal

18. By way of a Notice of Appeal dated 10 April 2018, the appellant appeals the ICO's decision to this Tribunal. The Grounds of Appeal relied upon, as contained within section 5 of the Notice of Appeal, are as follows:

> "In short, the Council that have made the decision have attempted to deny providing the information requested as "vexatious".
>
> This is because I have found information that the Council does not wish to release as it compromises their lawful handling of the affairs at the school in question. I am already aware of part of the information that has been requested from Council staff that are unhappy with the Council's handling and consequent cover-up of the affairs at the school, and most notably a secret contractual arrangement that was drawn up between the Council and its former Head Teacher … for which members of the

school's Governing Body have been threatened with legal action by the Council were they to make public its very existence.

This cover-up must stop. Transparency must be brought to this public information, and it is not right that the Council should be permitted to claim "vexatiousness" where citizens pursue the publication of the truth.

It is not fair, just or right, that a public body that does not wish compromising or embarrassing information to see the light of day, is allowed to abuse the Freedom of Information Act to block its publication."

Documentation

19. For the purposes of determining the substance of the appeal (as opposed to the procedural matters), I have considered those documents contained within the "*Open Bundle of Documents*", which runs to three sections containing 151 folios. The bundle includes, amongst other things, emails from the appellant of 5 April 2017, 9 May 2017 (to KCC), 6 September 2017 (to KCC), 9 September 2017 (to KCC) and 26 January 2018 and attachment dated at the top in written script "3.2.18" (to ICO). I have taken full account of the information contained therein.

The Legal Framework

20. By section 1 FOIA, public authorities are under a general duty to disclose information they hold where it is requested:

> **"1. General right of access to information held by public authorities**
>
> (1) Any person making a request for information to a public authority is entitled –
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> …
>
> (4) The information –
> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
> (b) which is to be communicated under subsection (1)(b).
>
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

21. Pursuant to section 14, a public authority is not obliged to comply with an information request under s.1(1) if the request is a 'vexatious or repeated' request:

> **"14. Vexatious or repeated 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.

22. The leading decision on the application of section 14 FOIA is Dransfield & Craven v Information Commissioner [2015] EWCA Civ 454. In CP v Information Commissioner [2016] UKUT 427 (AAC) Upper Tribunal Judge Knowles (as she then was) summarised the judicial learning on section 14(1) as follows:

"FOIA: Section 14(1)

21. The right to request information under section 1 of FOIA is subject to section 14. 'Section 14(1) provides that Section 1(1) *does not oblige a public authority to comply with a request for information if the request is vexatious*'. There is no statutory definition of what constitutes a vexatious request within FOIA.

(i) The Upper Tribunal in Dransfield

22. In the Upper Tribunal decision of *Dransfield*, the Upper Tribunal gave some general guidance on the issue of vexatious requests. It 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 [paragraph 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*'.

23. The test under section 14 is whether the request is vexatious not whether the requester is vexatious [paragraph 19]. The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA [paragraph 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 [paragraph 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 consideration of whether or not there is an adequate proper justification for the request [paragraph 26].

24. Four broad issues of themes were identified by Upper Tribunal Judge Wikeley 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 were not exhaustive and were not intended to create a formulaic check-list [paragraph 28]. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.

25. As to burden, which is of relevance in this appeal, 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. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor [paragraph 29]. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. However if the public authority has failed to deal with those earlier requests appropriately, that may well militate against holding the most recent request to be vexatious [paragraph 30]. Equally a single well-focussed request for information is, all things being equal, less likely to run the risk of being found to be vexatious. Wide-ranging requests may be better dealt with by the public authority providing guidance and advice on how to narrow the request to a more manageable scope, failing which the costs limit under section 12 might be invoked [paragraph 31].

26. A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request [paragraph 32]. The Upper Tribunal considered the extensive course of dealings between Mr Dransfield and Devon Country Council which, in the relevant period, comprised some 40 letters and several FOIA requests when coming to the conclusion that his request was vexatious [see paragraphs 67-70].

27. Ultimately the question was 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 [paragraphs 43 and 45].

(ii) The Court of Appeal in Dransfield

28. There was no challenge to the guidance given by the Upper Tribunal in the Court of Appeal. In the Court of Appeal, the only issue relevant to this appeal was the relevance of past requests. Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the *Dransfield* case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority [paragraph 69, judgment].

29. Arden LJ gave some additional guidance in paragraph 68:

> *"In my judgment the 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. …"*
>
> 30. Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor."

Discussion

Section 14 FOIA

23. I have looked at the particular circumstances of this case and considered those circumstances holistically when reaching my conclusion on the application of section 14(1). I must, however, start somewhere in my assessment and a consideration of the terms of the request for information is as good a place as any to start.

24. The appellant's request to KCC of 11 July 2017 named eight KCC staff members ("the KCC eight") and, ultimately, five persons connected to SLGGS ("the external SLGGS five") - see paragraphs 12 and 13 above. Although the appellant's request lacks clarity, despite its assertions to the contrary, when duly analysed it can be seen that a request was made for copies of all email correspondence since January 2017 relating specifically to SLGGS, whether inbound or outbound, between:

    (a) One or more of the KCC eight and (to/from) one of more of the external SLGGS five i.e. a potential of 40 separate inbound email communication channels and 40 outbound separate email communication channels.

    (b) One or more of the KCC eight to another of the KCC eight.

    (c) *"from anyone"*, (inbound/outbound), where the email also relates to "*topics such as the Craig Report and/or [name redacted] and/or disciplinary investigation and/or legal agreements and/or financial settlements and/or compromise agreements*

under non-disclosure agreements." It is far from clear if by "*anyone*" the appellant intended the search to be restricted to correspondence in which one of the parties is a member of the KCC eight or the external SLGGS five, but I proceed on the basis that this was the intention;

25. It is also difficult to ascertain from the request whether the search of the email communication channels identified in paragraphs 24(a) and (b) above was additionally required to have had as a search parameter one of the seven "*topics*" identified in the request i.e. "*the Craig Report and/or (name redacted) and/or disciplinary investigation and/or legal agreements and/or financial settlements and/or compromised agreements and/or non-disclosure agreements.*" The request internally conflicts on this issue in that it initially requests email correspondence relating to SLGGS "*which may or may not*" include one of the seven specified topics, however in the following paragraph, and in order "*to ensure absolute clarity in the request*" it states that the request is limited to the seven topics. I cannot reconcile these two positions but have resolved this conundrum by reading the request in the most favourable light to the appellant i.e. one or more of the seven topics must always feature as a search parameter.

26. It is further relevant to observe that letter of 11 July also included the following additional request: "*please further advise whether any member of staff within KCC legal services, or Invicta Law, have drafted any contracts or agreements for any member of staff at SLGGS since January 2017 onwards*".

27. Having identified the scope of the request, I turn next to consider the value of the information it seeks to obtain.

28. There is undoubtedly a strong public interest in transparency and accountability relating to the events at SLGGS. The evidence before me demonstrates that there were a significant number of complaints (207 according to the appellant), concerns and grievances relating to the management of the school at the time the Craig enquiry was set up and, more significantly, at the time the enquiry was developing. The ICO correctly observes that the public interest relating to the material events at SLGGS is not confined to only a small number of individuals. It includes the interests of, amongst others, the students at and potential future students of the school, the parents of the students at (and potential future students of) the school and the staff (and potential future staff) of the school. I further note that the request for information was made at a time when the relevant issues relating to SLGGS were live.

29. It is said by the ICO that the value of the request is diminished because there is already some information in the public domain relating to the material events at SLGGS, including a summary of the outcome of the Craig enquiry and the actions taken by SLGGS as a result. It is difficult, however, to analyse the relevance of this publicly available information in the absence of it being put before the Tribunal. As a consequence, I have concluded that it is appropriate to attach no weight to any information that may be available in the public domain. In my view there is still

likely to be significant value and public interest in the information held by KCC, the disclosure of such information furthering the public interest in openness and transparency in relation to how SLGGS was managed and enabling a greater public understanding of the potential failings at SLGGS and how they have been addressed.

30. I turn next to consider the burden placed on KCC by the request. The scale of the appellant's multifaceted request is laid bare above, but that does not necessarily mean that responding to it would create a significant burden on KCC. For example, it may have been that only one of the KCC eight and one of the external SLGGS five had access to email accounts, and that this was known the KCC. Unsurprisingly, this turns out not to be the case.

31. Evidence as to the potential burden that would be borne by KCC if it were to respond in full to the request of 11 July 2017 is to be found in KCC's response to the ICO of 23 February 2018. The relevant section of the response is not that dealing with section 14 FOIA but that seeking to provide support to KCC's decision under section 12 FOIA i.e. that the cost of complying with the appellant's request of 11 July 2017 exceeded the appropriate cost limit. There is nothing in the papers before me which undermines KCC's assertions on this matter, and I accept the terms of the evidence given.

32. KCC explain that the search parameters identified in the request of 11 July 2017 would need to be run against the complete KCC mail store *"of approximately 14,677 mailboxes"*. A search with the parameters of SLGGS or Simon Langton or Langton Girls Grammar, and one or more of the seven topics referred to in the request, took place on 16 and 17 July 2017. The results were then refined to include only emails sent to or received from the KCC eight and the external SLGGS five. This produced 5,000 *"hits"*, totalling 1.18GB of data. This process took 6.5 hours. It is said that in order to ensure adherence to the request, a manual analysis of the "hits" would be required. It was estimated that this manual analysis would take 15 hours, which amounts to approximately 10.5 seconds of manual analysis per hit. This being KCC's analysis of cost under section 12 FOIA it does not include activities that would not fall for consideration under that section, for example, the application of redactions and consideration of potential exemptions. It also (i) does not include consideration of that part of the request set out at paragraph 26 above and (ii) applies the same restrictive reading of the request that I have identified as the least burdensome on KCC and thus the best case scenario for the appellant in this appeal.

33. In my conclusion, it is plain that responding to the request of 11 July 2017 and all its constituent parts with sufficient rigour and robustness to identify all relevant material, which is what FOIA requires (Reuben Kirkham v Information Commissioner (Section 12 of FOIA) [2018] UKUT 126 (AAC)), would create a significant burden on KCC.

34. Given the wide ranging consideration that I must undertake when determining an appeal in which the public authority has raised section 14(1) FOIA, it is right for me

to also take account of the historic interactions between the appellant and KCC, and in particular those relating to the common theme of the events at SLGGS.

35. In its decision notice the ICO references KCC's assertion that the appellant had made twelve FOIA requests of KCC since 2010. The history of the most recent communications between the appellant and KCC, from September 2016 onwards, is set out at [70] of the ICO's decision notice, as follows:

> "70. …These have been summarised as follows:
>
> 11 September 2016. The complainant requested the former head teacher's qualifications. The council responded on 20 September 2016 to advise that the information was not held as the school does not use its HR services. It went on to provide the relevant contact details at the school.
>
> 20 September 2016. The complainant contacted the council commenting that it was his understanding that the council was the former head teacher's contractual employer. He requested further details relating to previous positions held by the former head teacher and her qualifications. This council responded to confirm that it had carried out a search of its 'human resources system' and 'schools personnel service information system' and confirmed that it does not hold information relating to the former head teacher. It also provided further explanation as to why it does not hold details relating to the former head teacher's school, describing itself to be the 'second employer' with the Governing Body of the school the 'first employer' (with the latter thereby responsible for checking qualifications of staff etc.).
>
> 13 October 2016. The complainant requested certain details of what posts the former head teacher had previously held within any Kent County Council schools. The council again confirmed it held no records relating to the former head teacher.
>
> 18 October 2016. The complainant contacted the council again expressing his surprise that it did not hold details of all head teachers within the county of Kent, regardless of whether they were Academies.
>
> 18 October 2016. The complainant requested certain information held about himself from the council which was dealt with as a request for personal data under section 7 of the Data Protection Act 1998 (DPA).
>
> 14 March 2017. The complainant requested a copy of the Craig Report which was subsequently withheld under sections 40(2), 41(1) and 36(2).
>
> 5 April 2017. The complainant requested an internal review and included 19 points which he requested that the council provide a response to. The council then confirmed that it would respond to some of these points as part of its internal review. It went on to say that it viewed the remaining points to be a new FOIA request, providing information in response to this on 19 May 2017.
>
> 16 April 2017. The complainant made an additional request to the council for '*copies of all correspondence or other communication contact that passed between* ***any***

*member of staff at Kent County Council and **any** member of staff at Simon Langton Girls Grammar School (which should include **any** current or former member of the SLGGS Governing Body) in Canterbury from 1st June 2015 onwards to the present day*.' The complainant went on to set out what types of information his request was intended to cover. He also provided a list of 22 individuals whom he believed would be 'potential participants' in relation to the information that he had requested. The council responded to advise that it viewed his request to be too broad and asked him to consider narrowing the time period he had specified that he wished his request to cover.

9 May 2017. The council confirmed the outcome of its internal review in relation to the complainant's request of 5 April 2017. It maintained its previous decision that the Craig Report should be withheld in its entirety.

9 May 2017. The complainant responded to the council stating that '*I may reject your findings in their entirety*'. He then provided some comment to explain why he was dissatisfied and asked the council to provide clarification/information on 22 separate points. The council then provided answers to the complainant's additional points on 7 June 2017.

30 June 2017. The complainant requested information relating to contracts that may have been held by two named individuals. The council subsequently provided information in response to the complainant.

30 June 2017. The complainant requested information relating to a further individual who was involved in matters relating to the Craig enquiry. The council subsequently provided information in response to the complainant.

11 July 2017. The complainant made the request currently under consideration."

36. The following, taken from page 7 of KCC's response to the ICO, adds a little flesh to the bones of what is set out above. I accept the accuracy of the matters of fact stated therein:

"On 5th April 2017 Mr Davis responded to the Council following the receipt of his initial response to request FOI/17/0484. In his response (document 4) he posed 19 further questions. The below is an excerpt from this response.

11. *Please advise whether any contracts whatsoever exist, whether they be of a non-disclosure agreement, confidential or any other type or not, which relate (in any way) to the Craig Enquiry and its associated Report and whether any such contractual agreement exists to which Kent County Council, the SLGGS GB and/or any other 3rd party, is party to?*

12. *If the answer to Question 11 is in the affirmative [that any such contract/agreement does exist], please provide a copy of any or all such contract/s and provide details of any financial transactions that relate to it in any way?*

As most of these further questions were requests for new information they were treated as a fresh FOIA request, FOI/17/0644. Mr Davis was informed of this on 7th April 2017. The Council provided their response to FOI/17/0644 on 9th May

2017 (document 6). Against question 11 the Council stated "KCC does not hold information meeting the scope of this element of your request."

On 9th May 2017 Mr Davis further commented on the response provided by the Council for FOI/17/0644. He rejected the Council's findings entirely and asked

> *8. Please advise whether there [sic] any confidentiality agreement or non-disclosure agreement that relates, in any way, to the resignation of the investigations subject?*

The Council responded on 9th May stating that "it will neither confirm nor deny whether such agreement exists."

37. I am satisfied, having considered all of the evidence before me, that there is no support for the appellant's contention that KCC has failed to respond to his past requests appropriately. The appellant may not have received all the information he requested, but that is very different from concluding that KCC has not complied with its obligations under FOIA in regard to each such request.

38. Furthermore, I accept the contention put forward by the ICO that there is a persistence to the appellant's requests, which lacks proportionality and which are most likely to continue until he receives the information that he believes he is entitled to. That is not to say that the appellant's motivation for obtaining the information is in doubt, it is not. I concur entirely with that asserted by the ICO in her response to these proceedings [20] where she states that "*the Commissioner accepts that the appellant has a genuine motive in making the request, namely to gain further understanding of the Craig Enquiry and surrounding events*".

39. Bringing all of this together, having looked at all the material circumstances of the case holistically, and summarised above the likely burden placed on KCC by the request, the persistence with which the appellant has interacted with KCC on the same material issues and my conclusions as to the value of the information sought by the appellant and also having taken account of the high threshold required to demonstrate the vexatiousness of a request I, nevertheless, conclude that the request is vexatious. Despite the seriousness of the purpose of the request and the value in compliance, I find that such matters are outweighed by the unreasonable burden of compliance when considered in the context of the historic interactions between the appellant and KCC and the persistent and disproportionate nature of the appellant's requests.

Section 12 FOIA

40. Section 12 FOIA reads:

> "(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

> (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
>
> (3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.
>
> (4) The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—
>
> (a) by one person, or
>
> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
>
> the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.
>
> (5) The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimate"

41. The Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 set out how the appropriate limit of complying with a request should be calculated. Under regulation 3(3), read with Schedule 1 FOIA, the appropriate limit of the cost to a public authority of providing requested information is £450. Regulation 4 states that the estimated cost should be calculated based on a cost of £25 per person per hour.

42. The issue of whether it is permissible for a public authority to provide some but not all of information requested under section 1 FOIA was considered by the Upper Tribunal in Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC). The Upper Tribunal concluded that section 1 imposes a legal obligation to provide all requested information unless exempt, and that it is not open to public authorities to provide only some of the requested information as a means of avoiding the section 12 (or any other) exemption:

> "Section 1(1) confers a right for a requester to have the information sought and that right carries with it a correlative duty on the public authority to provide it. The right and the duty are subject to the other provisions of FOIA. Section 12 protects the authority from burdensome requests: McInerney v Information Commissioner and the Department of Education [2015] UKUT 47 (AAC) at [41]. The same could be said of section 14. The two sections deal with different types of burden, but the circumstances of a particular case may be such that a public authority may be entitled to rely on one or other or both of them. Just looking at those provisions, the responsibility rests with the requester to make requests that do not fall foul of sections 12 and 14. There is, however, a counterweight in section 16, which provides the power and the duty for an authority to assist a requester to make a request in appropriate terms"

43. As identified in paragraphs 31 and 32 above, KCC concluded that the cost of complying with the appellant's request for information would exceed the appropriate limit. This conclusion was reached after having considered the actual time taken to search and manually analyse a proportion of the information

requested. I have duly analysed the method and rationale deployed by KCC in this regard and accept that it has had regard to only those matters which it properly ought to have done in arriving at its estimate, save that it did not constrain the search criteria for the searches which were undertaken, and upon which such estimate was based, to the period between January and July 2017. I accept, however, the evidence from KCC at page 81 of the bundle to the effect that adding such a constraint would not have shortened the length of the primary queries carried out.

44. In my conclusion, KCC's estimate is sensible, realistic, and supported by cogent evidence and I conclude that the cost of compliance by KCC with the appellant's request would exceed the appropriate limit.

Section 16 FOIA

45. Section 16(1) FOIA imposes a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so. It is, however, subject to section 16(2), which provides that :"*Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.*"

46. Paragraph 15 of the 2004 Code of Practice (HC 33), which applies in the instant case, expressly provided that a public authority was not expected to assist if the request was vexatious. Consequently, KCC did not fall foul of the duty in section 16(1) FOIA by failing to provide advice and assistance.

Decision

The Information Commissioner's Decision Notice FS50700503, dated 28 March 2018, is in accordance with the law.

Upper Tribunal Judge O'Connor 3 November 2020

M O'Connor

Promulgated 6 November 2020