Appeal Number: EA/2021/0022

Between:

CABINET OFFICE

Appellant:

and

(1)THE INFORMATION COMMISSIONER

First Respondent:

(2)GABRIEL KANTER-WEBBER

Second Respondent:

DECISION OF THE FIRST TIER TRIBUNAL

Brian Kennedy QC, Kate Gapllevskaja and Emma Yates

Date of Hearing on the papers: 1 October 2021.

Decision: The Tribunal allows the Appeal.

REASONS

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 23 December 2020 (reference IC-38217-L4P4), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant'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 Appellant's reliance on section 14(1) FOIA was incorrect.

History and Chronology:

11 March 2020	The complainant made a new request in reply to the Appellant.
8 April 2020	The Appellant replied to the complainant inviting them to narrow their request.
8 April 2020	The complainant wrote to the Appellant requesting that the Appellant proceed to issue a response.
12 May 2020	The Appellant issued a substantive response stating, amongst other things, that section 14 FOIA applies.
12 May 2020	The complainant asked the Appellant to review its decision.
10 June 2020	The Appellant informed the complainant that it upheld its decision.

Relevant Law:

S1 FOIA 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.

S14 FOIA 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.

COMMISSIONER'S DECISION NOTICE:

[3] The Commissioner considered that section14 (1) FOIA is designed to protect public authorities by allowing them to refuse any requests, which have the potential to cause a disproportionate or unjustified level of disruption, irritation, or distress.

[4] The Appellant adopted the Upper Tribunal's definition of section 14 FOIA in *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) which states at paragraph 10;

"Section 14…is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)…The purpose of Section

14…must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…"

[5] The Commissioner in her reasoning referred to the Court of Appeal case of *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015), where Lady Judge Arden observed at paragraph 68,

"…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."

The Court went on to say;

"The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious."

[7] The Appellant stated that meeting the request would give the Cabinet Office an unduly onerous task, however, the Commissioner could not find with proper certainty that it amounted to a grossly disproportionate utilisation of the Appellant's time and resources. Therefore, section 14 FOIA was not engaged, and the Appellant should meet the complainant's request for information or rely on another exemption or exemptions to meet the request.

GROUNDS OF APPEAL:

[8] In response to the Commissioner's conclusions, the Appellant argued that the finding of section 14 engagement did not consider each aspect within the proportionality assessment. Further, the Commissioner failed to consider whether the substantial resource burden was justified. The Appellant stated that the request is an example of a disparate fishing exercise, requiring a wholly disproportionate call upon scarce public resources. The Appellant highlighted that the timing at the peak of the first pandemic wave was particularly unfortunate.

[9] The Appellant asserted that the Commissioner was wrong to conclude that the request, and the slow and painstaking work required to meet it, did not engage section 14. The Appellant commented that it was noteworthy that the Commissioner made no criticism of the methodology and scope of the representative sampling exercise and accepted that the review would be a "slow and painstaking process". Secondly, that the jurisprudence and guidance of the Commissioner requires a holistic approach.

[10] The Appellant contended that had a proper balancing exercise been performed, the Commissioner would have placed the following in the scales:

i. Her assessment that the request for a large number of disparate know how documents was more consistent with a fishing expedition than a genuine line of inquiry;
ii. Her finding that it was less than likely that the requester was pursuing a genuine line of inquiry;
iii. The inherent public interest in guidance touching on the drafting of written laws and regulations binding the public;
iv. The extent to which material on the work of drafters was already available on the OPC's internet publications page;
v. The extent to which the pamphlets and guidance sought added to that material/public understanding of the OPC's role and Parliamentary process; and
vi. The CO's estimation of the time required for compliance, after making allowance for the limitations of that exercise.

[11] The Appellant contended that the Commissioner failed to address whether any of the requested information would be likely to assist the public's understanding of the process of drafting and passing legislation. The Appellant submitted that section 14 FOIA was clearly engaged in this instance.

Commissioner's Response:

[12] The Commissioner maintained that the Request falls far short of the high threshold for vexatiousness. The Commissioner denied that the time estimate was disregarded without a proper basis. The Commissioner stated that estimate is not strongly suggestive of vexatiousness when *OFGEM v Information Commissioner & Crisp* (EA/2020/0036) is applied. Further, the Commissioner reminded herself that the balance of probabilities is to be applied when considering the inherent uncertainty in the estimate as it is not a standalone, binary issue.

[13] In response to the assertion that the Commissioner applied a sequential analysis, the Commissioner invites the Tribunal to apply the authority of *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015) in this instance.

[14] The Commissioner reminded the Appellant that the Commissioner's decision making is not in issue in this Appeal. However, all relevant considerations were taken into account.

Second Respondent's Response:

[15] The Second Respondent supported the Commissioner's submissions and approach, stating if the Appellant seeks to rely on section 42 FOIA then a refusal notice providing an explanation of why the exemption applies should be issued. The Second Respondent citied the authorities of *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015) and *OFGEM v Information Commissioner & Crisp* (EA/2020/0036) relied upon by the Commissioner in her response.

Appellant's Reply

[16] The Appellant noted that the Second Respondent was invited to narrow his request in April 2020 but failed to do so. The Appellant stated that the Appeal concerned whether the disparate terms of the most recent request justified the resources required. The Appellant asserted that a round assessment of section 14 FOIA would consider the limited extent to which, if any, the information requested would further assist public understanding of the process of drafting and passing legislation.

[17] The Appellant distinguished *OFGEM v Information Commissioner & Crisp* (EA/2020/0036) from the Appeal as the Second Respondent, the Appellant contended, dismissed the Appellant's approach out of hand.

Witness Statement:

ALISON MARY BERTLIN – Parliamentary Counsel:

[18] Miss Bertlin provided a statement in support of the appeal against the Information Commissioner's Decision Notice of 23 December 2020.

[19] Miss Bertlin, by way of context, characterised the three stages of the review as follows-

A. an initial review of the documents requested
B. obtaining legal advice or carrying out further work arising from the initial review
C. a further review, in the light of stage B, to determine which material in the documents was exempt from disclosure under the FOIA, and where appropriate redact it.

[20] Miss Bertlin explained that stage A involved an initial review. The documents covered by the Request fell into three categories: advice about drafting; notes dealing with legal issues on particular matters likely to arise in drafting; and office pamphlets, which provide guidance to drafters in the Office of the Parliamentary Counsel ("OPC"). Miss Bertlin calculated a sampling exercise, of just over 25 hours for the initial review stage of the process for all the material covered by the Request (other than the single exempt document).

[21] Miss Bertlin commented that, even if a reliable assessment of the time required for legal advice on the stage A sample material could be achieved, it would not be possible to extrapolate from that to reach a reliable assessment of the overall time needed for legal advice on all the documents covered by the Request. Miss Bertlin believed that the time involved for OPC and the Appellant would be very considerable.

[22] Miss Bertlln contended further work would be required at stage C to decide whether exemptions applied in light of the advice obtained and work carried out at stage B. Whilst the overall process would not necessarily follow the formal steps described at stages A, B and C. The stages would be likely to overlap and there may be economies in the process.

[23] Miss Bertlin concluded that whilst it is difficult to arrive at an exact figure of how long the overall process would take, she would not be surprised if the review process took over 100 hours of both OPC and the Appellant's time. Miss Bertlin reiterated that the material, which is the subject of the request, comprises a large quantity of information.

TRIBUNAL FINDINGS:

[24] Section 14 FOIA is in essence the provision of a protection for public authorities. We remind ourselves of the four broad themes identified in Dransfield v Information Commissioner and Devon County Council [2015] EWCA Civ 454 (14 May 2015), and that vexatiousness in a request is a flexible concept. The broad themes to be considered are:

i. The burden (including cost) on the authority of the request
ii. The motive of the requester
iii. The value or serious purpose of the request
iv. Any harassment of or distress to staff

[25] The Tribunal concurs with the reasoning of Lady Judge Arden in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015) at paragraph 68,

"…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." The Court continued: *"The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious."*

[27] The context of the case is essential for the consideration of these four themes. The Appellant argued that the Commissioner should adopt a holistic approach in line with her own guidance. The Commissioner issued Guidance on Dealing with Vexatious Requests ("The Guidance"). The Guidance, which is not binding on the Tribunal, inter-alia, suggests that section 14(1) FOIA may be applied in instances where the burden on the OPC and the Appellant required to disclosure of the information requested would amount to "*grossly oppressive".*

[28] We commend the Appellant for distinguishing the present case from *OFGEM v Information Commissioner & Crisp* (EA/2020/0036) on the grounds that:

"Mr Crisp was able, the FTT found in Ofgem, to provide a clear rationale and/or purpose for this requests: the obtaining of a unique snapshot of the operation of a major regulator accountable to consumers over the course of three days in late February 2019, when a number of energy companies were in significant financial difficulties (Ofgem, supra, at 47). When requested, Mr Crisp (1) engaged with Ofgem in narrowing his request and (2) reduced the scope of his request from an initial one- month period sought to just three days (supra, at 64). The FTT considered both his cooperation, and his readiness of narrow the request to be of significance and went on to find that, in all the relevant circumstances, the request was not manifestly unjustified (66)."

[29] We refer to the detailed witness statement of Miss Bertlln, which was perhaps the defining piece of evidence in this case. This evidence was in our view crucial in determining the full nature and extent of the request in relation to the resulting "*grossly oppressive*" burden it would have on the Appellant. In essence that it amounted to a grossly disproportionate utilisation of the Appellant's time and resources. We find in this regard we are in agreement with the Commissioner, who has since withdrawn her opposition to the appeal herein – see Page 265 of the Open Bundle.

[30] We of course accept that there is a general motive and purpose in the request as to the transparency and accountability in the process and workings of the OPC, however taking into consideration all of the above arguments, and applying the holistic approach recommended in Dransfield, we are persuaded on the evidence before us that the appeal should succeed.

[31] The Tribunal therefore finds that points i) to iii) inclusive, as outlined in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015), (see Paragraph [24] above) are engaged in this appeal and that section 14 FOIA is engaged. Accordingly in the circumstances and for the reasons referred to above we allow the Appeal.

Brian Kennedy QC

(First Tier Tribunal Judge)

Date of Decision: 11 October 2021

Date Promulgated: 12 October 2021