IN THE FIRST-TIER TRIBUNAL **EA/2009/0093**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM: The Information Commissioner's Decision
No FS50142022, dated 29 September 2009

Appellant: **Alison Ward**

Respondent: **Information Commissioner**

Additional Party: **The Governing Body of Sir William Borlase's Grammer School**

Determined on the papers on: 21 & 30 April 2010

Date of decision: **25 May 2010**

Before

Anisa Dhanji
Judge

and

Anne Chafer and Michael Hake
Panel Members

Subject matter
FOIA, section 14(1) – whether requests were vexatious

Cases

Adair (EA/2009/0043)
Carpenter (EA/2008/0046)
Betts (EA/2007/0109)
Gowers (EA/2007/0114)
Coggins (EA/2007/0130)
Welsh (EA/2007/0088)
Billings (EA/2007/0076)
Hossak (EA/2007/0024)
Brown (EA/2006/0088)
Brodie MacClue (EA/2007/0029)
Ahilathirunayagam (EA/2006/0070)

IN THE FIRST-TIER TRIBUNAL **EA/2009/0093**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Information Commissioner's Decision Notice dated 29 September 2009 and dismisses the appeal.

Signed **Date: 25 May 2010**

Anisa Dhanji

Judge

IN THE FIRST-TIER TRIBUNAL **EA/2010/0083**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

REASONS FOR DECISION

Introduction

1. This is an appeal by Mrs Alison Ward (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 29 September 2009.

The Request for Information

2. Between March 1995 and September 2006, the Appellant made a number of requests for information to the Governing Body of Sir William Borlase's Grammer School ("SWBG").

3. The Appellant's son was a pupil at Sir William Borlase's Grammer School (the "School") from September 1992 to July 1996. On 17 December 1996, the Appellant made a complaint about the alleged failure of SWBG to address certain issues regarding her son, and the alleged failure of SWBG to implement policies for dealing with, amongst other things, bullying at the School. We will refer to this as the "underlying complaint" (borrowing from the Commissioner's use of the term"underlying issue"). The requests for information which are the subject of this appeal were made in relation to the underlying complaint.

The Complaint to the Commissioner

4. On 27 April 2006, the Appellant complained to the Commissioner that SWBG had failed to provide the information she had requested under the Freedom of Information Act 2000 ("FOIA"). The Commissioner contacted SWBG to investigate the complaint.

5. In response, SWBG provided the Commissioner with a detailed chronology of the Appellant's requests between the period March 1995 and September 2006. SWBG said that it considered her requests to be vexatious under section 14(1) of FOIA. It further said that it had previously provided the Appellant with all relevant information that it held.

6. The Commissioner reviewed the history of the Appellant's dealings with SWBG in connection with the underlying complaint, her requests for information, and SWBG's responses to those requests. The Commissioner took into account the Tribunal's case law in relation to section 14(1), and the Commissioner's own Awareness Guidance on the application of section 14(1). He concluded that that the requests were vexatious and that SWBG had correctly applied section 14(1).

7. However, the Commissioner found SWBG to be in breach of section 17(5) of FOIA because it had failed to inform the Appellant within 20 days of the

request, that it was relying on section 14. The Commissioner did not require any steps to be taken in respect of this breach.

The Appeal to the Tribunal

8. By a Notice of Appeal dated 25 October 2009, the Appellant appealed to the Tribunal against the Decision Notice.

9. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5), we are now constituted as a First-Tier Tribunal.

10. The procedural aspects of this appeal have been governed by the Information Tribunal (Enforcement Appeals) Rules 2005 (the "2005 Rules"), and the appeal has been determined without a hearing, pursuant to Rule 16 of those Rules. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

11. SWBG was joined as a party to these proceedings pursuant to Rule 7(2) of the 2005 Rules. However, its Reply to the Notice of Appeal has comprised only a single page stating that it relies on the Commissioner's Reply. It has submitted no evidence, nor made any further submissions.

The Tribunal's Jurisdiction

12. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

13. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

14. The Appellant's Grounds of Appeal raise a number of matters, including matters relating to the underlying complaint that are outside the jurisdiction of the Tribunal. The Tribunal can only consider matters relating to the Appellant's right of access to information held by SWBG, and in particular, whether SWBG was entitled to refuse the Appellant's requests under section 14 of FOIA. No other exemptions have been claimed. Accordingly, the Grounds of Appeal have been read as being confined to such matters.

Legislative Framework

General

15. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

16. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA, or if certain other provisions apply. In the present case, SWBG relies on section 14. This does not provide an exemption as such. Its effect is simply to render inapplicable the general right of access to information contained in section 1(1).

Section 14

17. Section 14 sets out two grounds on which a public authority may refuse a request. The first is where the request is vexatious. The second is where the request is identical or substantially similar to a previous request that the public authority has already complied with.

18. Section 14 provides as follows:

(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.

19. Where section 14 applies, the public authority does not have to provide the information requested, nor indeed is it required to inform the requester if it holds the information.

Issues for the Tribunal

20. The only issue to be determined in this appeal is whether SWBG was entitled, to refuse the Appellant's requests under section 14(1). For the reasons set out at paragraphs 66 to 69, we have not considered whether section 14(2) is also engaged.

Evidence and Findings

Section 14(1) – Principles

21. The first question we need to consider is what is meant by a request being vexatious. FOIA does not define "vexatious". However, the Tribunal has had a number of opportunities now, in other cases, to consider what the term means. Although previous decisions of the Tribunal are not binding on us, we have found the following cases, in particular, to be helpful: **Adair** (EA/2009/0043), **Carpenter** (EA/2008/0046), **Betts** (EA/2007/0109), **Gowers** (EA/2007/0114), **Coggins** (EA/2007/0130), **Welsh** (EA/2007/0088), **Billings**

(EA/2007/0076), **Hossak** (EA/2007/0024), **Brown** (EA/2006/0088), **Brodie MacClue** (EA/2007/0029), and **Ahilathirunayagam** (EA/2006/0070).

22. We have set out below some of the key principles that emerge from these cases:

- Section 14(1) is concerned with whether the request is vexatious in terms of the effect of the request on the public authority, and not whether the applicant is vexatious;

- In the absence of a definition of "vexatious" in FOIA, it must be assumed that Parliament intended the term to be given its ordinary meaning. By its ordinary meaning, the term refers to activity that "is likely to cause distress or irritation, literally to vex a person to whom it is directed";

- The focus of the question is on the likely effect of the activity or behaviour. Is the request likely to vex?

- For the request to be vexatious, there must be no proper or justified cause for it;

- It is not only the request itself that must be examined, but also its context and history. A request which, when taken in isolation, is quite benign, may show its vexatious quality only when viewed in context. That context may include other requests made by the applicant to that public authority (whether complied with or refused), the number and subject matter of the requests, as well as the history of other dealings between the applicant and the public authority. The effect a request will have may be determined as much, or indeed more, by that context as by the request itself. This is in marked contrast to other types of FOIA appeals where the Tribunal is said to be strictly applicant and motive blind;

- The standard for establishing that a request is vexatious should not be set too high.

23. We would add to this that just as the bar should not be set too high, it should equally not be set too low. The judgement that section 14(1) calls for is balancing the need to protect public authorities from genuinely vexatious requests on the one hand, without unfairly impairing the rights of individuals to access information under FOIA.

24. Although every case turns on its own facts, in the cases referred to above, the Tribunal regarded the following considerations as relevant to a finding that a request is vexatious:

- where the request forms part of an extended campaign to expose alleged improper or illegal behaviour in the context of evidence tending to indicate that the campaign is not well founded or has no reasonable prospect of success;

- where the request involves information which has already been provided to the applicant;
- where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;
- where the tone adopted in the correspondence is tendentious and/or haranguing and demonstrates that the requester's purpose is to argue and not really to obtain information that the requester does not already have;
- where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority;
- where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before, and is, in effect, the pursuit of a complaint by alternative means; and
- where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority (although where complying with the request itself imposes a significant burden on the public authority, the appropriate safeguard is section 12, not section 14).

25. The Commissioner's Awareness Guidance 22 ("AG 22") on "Vexatious and Repeated Requests" suggests a general approach to determining whether a request is vexatious. It focuses on five questions:

- Could the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

26. Although AG22 is not binding on public authorities, nor of course on the Tribunal, the considerations it identifies are a useful guide to public authorities when navigating the concept of a "vexatious" request. However, we would caution against an overly-structured approach to the application of these considerations. Every case must be viewed on its own facts.

Background to the Requests for Information

27. As with many other cases which give rise to the question of whether a request is vexatious, the evidence in the present case shows a long history of difficult encounters between the parties. The requests for information are rooted in the underlying complaint which the Appellant first set out in her letter to SWBG on 17 December 1996. Extensive further correspondence followed, but the Appellant was clearly unhappy with the responses from SWBG. In

April 1997, SWBG referred the complaint to the Local Education Authority. However, the Appellant continued to write to SWBG about the matter and continued to make requests for information. This continued until January 2003. There then appears to have been a break in the correspondence until March 2005 when the Appellant made further requests for information. This continued until the complaint to the Commissioner and indeed beyond.

28. The Appellant says that her reason for making further requests for information is to obtain additional evidence to support other steps she wishes to take in relation to the underlying complaint, including writing to the Secretary of State to seek a Serious Case Review.

The Requests Made Before FOIA

29. We turn now to the requests themselves. Many requests made by the Appellant pre-date FOIA. These requests are still relevant, however, because they provide the context for the later requests. As in **Ahilathirunayagam**, it is appropriate for the Tribunal to take these pre-FOIA requests into account when looking at whether requests made under FOIA are vexatious.

30. The Appellant first wrote to SWBG about the underlying complaint on 17 December 1996. She requested a number of documents at that time. Further requests for information followed. We have set out below some of the information requested in the course of many letters:

- Confirmation that the anti-bullying policy provided in February 1997 is an accurate copy of the complete anti-bullying policy of the School in force during the time the Appellant's son was at the School (letter dated 21 April 1999);
- Complaints procedure in force at the time of the correspondence between the parties between January to April 1997 (letter dated 1 May 1998);
- Relevant copies of procedures following the report of an incident in July 1994, July 1995, and January 1997 (letter dated 1 May 1998);
- A copy of the School's Ofsted Report of March 1997 (letter dated 1 May 1998);
- Information on statements made in the School's prospectus for the years 1991 and 1993 (letter dated 1 May 1998);
- Copies of SWBG's annual reports for the years from 1994 to 1997 (letter dated 1 May 1998);
- Copy of the minutes of SWBG's meeting with parents on 3 November 1992 (letter dated 1 May 1998);
- Copy of the School's present anti-bullying policy (letter dated 7 May 1998);
- The present "Policy of Graded Response" (letter dated 15 June 1998);

- A full copy of the School's anti-bullying policy in force at the time of the School's Ofsted Inspection in March 1997 (letter dated 15 June 1998);

- The School's anti-bullying policy and SEN policy in force at the time the Appellant's son was a pupil at the School (letter dated 14 July 1998);

- Copies of SWBG's report on the School's SEN Policy for the years 1992 to 1997;

- The School's complaints procedure (letter dated 16 December 1998);

- The School's complaints procedure covering the years 1994 to 1999 (letter dated 28 September 1999);

- Information for the years 1996 to 1999 which "fully explains" the regulations for conducting and reporting the findings of an enquiry into complaints which the School must follow (letter dated 28 September 1999);

- A list of the Governors serving on SWBG's sub-committee dealing with complaints (letter dated 19 November 1999);

- Minutes of the meetings of SWBG between September 1992 and May 1998 (letter dated 29 January 2003); and

- Copies of SWBG's reports on progress on SEN for the academic years 1994 to 1996, and the policy summary included in the School's prospectus for 1995 to 1996 (letter dated 29 January 2003).

Requests For Information Made under FOIA

31. The Appellant's first request made after FOIA came into effect was dated 22 March 2005. The Appellant asked for a copy of the minutes of meetings of SWBG between 1 September 1995 and 30 December 2000. The information requested was provided on 24 June 2005 following payment of a fee by the Appellant.

32. On 30 June 2005, the Appellant requested the further information listed below (we have added the numbering for convenience):

(1) The School's SEN Policy from Sept 1992 to July 1996;
(2) The School's anti-bullying policy in place between Sept 1992 to July 1996;
(3) The Model Premature Retirement Policy;
(4) The Model Disciplinary Procedures for Staff other than head teachers - adopted at the Governing Body's meeting on 14 October 1996;
(5) Whether the School had a duty to consider or investigate new evidence in the case of allegations of abuse of a child who was at the School; and
(6) Whether at the time of SWBG's investigation into the Appellant's complaints, the School had a duty to report teachers suspected of involvement in abuse to the DFES.

33. On the same day, the Appellant sent a second letter requesting:

(7) Copies of numbered items 11 – 29 missing from the minutes of 16th October 1995; and
(8) Information/documents which refer to the Appellant's complaint and the Chairman's investigation.

34. On 29 September 2005, the Appellant wrote to ask for a response to her previous requests.

35. On 19 January 2006, the Appellant wrote again referring to her unanswered letters dated 30 June 2005 and 29 September 2005.

36. On 27 January 2006 the Appellant wrote again referring to her unanswered letters dated 30 June 2005, 29 September 2005 and 19 January 2006, and requesting, in addition:

(9) A copy of the procedures for investigating allegations of abuse; and
(10) A copy of the procedures for investigating allegations of misconduct.

37. On 9 March 2006, the Appellant wrote again referring to her unanswered letters dated 30 June 2005, 29 September 2005, 19 January 2006 and 27 January 2006. She repeated certain of her previous requests and included an additional request, namely for:

(11) The SEN policy adopted at SWBG's meeting on 13 May 1996.

38. On 16 March 2006, the Appellant requested:

- (1) again and asking whether or not this was the same as (11).
- (2) again and asking for confirmation if no policy existed at the time; and
- (7), (8), (9) and (10) again.

39. On 20 April 2006 the Appellant wrote following advice from the Commissioner. She said she had been told that some of her requests were out of date and should be re-submitted. She reiterated her requests (1) and (2) and also requested:

(12) The present complaints procedure;
(13) SWBG's report on the School's SEN policy for the years 1992 to 1997;
(14) The relevant procedures following an incident in July 1994, July 1995 and January 1997;
(15) The procedures following an incident in July 1995; and
(16) The anti-bullying policy in force at the time of the Ofsted inspection in 1997.

40. On 23 May 2006, the Appellant reiterated several of her previous requests.

41. On 7 September 2006, the Appellant again reiterated several of her previous requests.

42. On 22 September 2006, the Appellant referred to her requests dated 16 March 2006 and 20 April 2006. She also asked for the following:

(17) Whether it was the case that the School had no SEN Policy from September 1992 to May 1996;

(18) Whether it was the case that the School had no bullying policy in place between September 1992 and July 1996;

(19) A copy of the minutes of SWBG's meeting at which any SEN Policy in place between September 1992 and May 1996 was agreed;

(20) A copy of the minutes of SWBG's meeting at which any bullying policy in place any time between September 1992 and July 1996 was agreed; and

(21) If any of the foregoing minutes had been destroyed, then she requested a copy of the minutes of SWBG's meeting in which such destruction had been agreed.

43. We have not set out here the requests made after 5 March 2007 which is when SWBG invoked section 14(1).

The Parties' Positions

44. We have summarised below the position of each party.

45. The Commissioner says that the requests are vexatious. He refers to the criteria in AG22 referred to above. He considered the Appellant's previous behaviour in terms of the requests she had made since February 1997 as set out in paragraphs 22 to 40 of the Decision Notice. He took into account the number of times the Appellant's underlying complaint had been investigated by SWBG and the Local Education Authority. He considered that the Appellant's repeated requests were indicative of a pattern of obsessive behaviour and had constituted a significant burden on SWBG. He referred to the Tribunal's decision in **Betts** where the Tribunal said that it was reasonable for a public authority to consider its past dealings with the complainant, particularly in relation to its experience of answering one request which would likely lead to still further requests, thus perpetuating the requests and adding to the burden on the public authority's resources.

46. He noted that the Appellant had said that she had asked for certain information on more than one occasion because some of the information sent to her by SWBG was contradictory. He also noted her assertion that some of the information was either inaccurate or produced to satisfy her information requests. However, he pointed out that the right under FOIA was to information held, not to information which is accurate.

47. SWBG asks the Tribunal to uphold the Commissioner's decision. It has not itself made any submissions to the Tribunal as to why it regards the Appellant's requests to be vexatious. It simply relies on the Commissioner's submissions. It has also not submitted any witness evidence as to the effect on its staff, if any, of the Appellant's requests.

48. Previously, however, and in particular in its letter dated 5 March 2007 to the Commissioner, SWBG expressed the following reasons for why the Appellant's requests are vexatious:

- The requests are a continuation of a previously demonstrated pattern of behaviour that had been treated as vexatious in another context;
- The succession of requests/complaints have had the cumulative effect of harassing the School;
- The Appellant's actions are manifestly obsessive and have had the effect of bringing her in confrontation with the School;
- The Appellant's repetition of requests, already answered, has no serious purpose or value; and
- The Appellant knows that SWBG does not hold the information she seeks.

49. The Appellant gives a number of reasons for why her requests are not vexatious, in particular:

- The underlying complaint concerns a serious issue which has never been fully or properly independently investigated; the investigations that have been undertaken have been inadequate;
- Following a long grievance procedure cannot be said to be indicative of a pattern of obsessive behaviour;
- It is not obsessive to seek clarification of earlier responses which were unclear, or where further requests; have been generated by SWBG's non-compliance;
- It has been SWBG's failure to provide complete and accurate policy information that has necessitated the requests;
- The requests cannot be considered to be vexatious just because they seek information which SWBG would prefer not to disclose; and
- SWBG has given different reasons for why they have refused the requests.

Findings

50. We come now to the key question in this appeal. Were the Appellant's requests vexatious? Having given careful consideration to the requests, the history of prior dealings between the Appellant and SWBG, the submissions made by the parties, and to the considerations set out in paragraphs 22 to 25 above, in our view, the requests were vexatious. We make this finding for several reasons, as set out below.

51. First, it is clear that the requests formed part of the Appellant's wider grievance against SWBG and the School. The requests were inextricably linked to the Appellant's quest which began in 1996, to establish that SWBG had acted improperly in relation to the underlying complaint. Many, if not most, of the Appellant's letters related both to information requests and to the underlying complaint. We accept that the Appellant's requests arose from

serious concerns she had about how her son was treated. However, those concerns had already been investigated on a number of occasions. The requests continued for over a decade and were a vehicle to reopen issues which had been disputed several times before. In our view, those on-going requests went beyond the reasonable pursuit of information, and indeed beyond even persistence. They indicate an obsessive approach, rooted in the Appellant's grievances about the underlying complaint.

52. There are a number of particular characteristics of the Appellant's requests which we consider highlight their obsessive quality:

(a) The Appellant made many of her requests repeatedly. To the extent that this was because SWBG had not replied to the requests, we do not consider the repetition to be vexatious. However, when requests were repeated, on several occasions the particulars of the request were varied making it difficult to know what the Appellant was seeking and making it less likely that her requests could be satisfied. For example, on 1 May 1998, the Appellant requested SWBG's annual reports for the years 1994-1997. When she repeated the request on 14 July 1998, this was extended to the years 1992-1997 without drawing any attention to the fact that the period had now changed. Likewise, on 16 December 1998, the Appellant requested a copy of the School's complaints procedure without reference to any specific period or date. On 28 September 1999, she requested the complaints procedure covering the years 1994 - 1999.

(b) Even when provided with the information requested, the Appellant seems to have been convinced that what she had been provided with was not accurate or not genuine, and that SWBG was trying to conceal information from her. For example, on 21 January 1998, having been provided with the SEN policies for 1992-1996, she then queried their accuracy. Likewise, in February 1997, in response to her request, the Appellant was provided with the School's anti-bullying policy. On 21 April 1998, she sought confirmation that this was an accurate copy of the policy. On 30 June 2005, she asserted that the anti-bullying policy she had been provided with was a "fake" document. On 22 September 2006, she made allegations about having been sent the wrong information about the School's anti-bullying policy. The Appellant has given no reasons for her suspicions.

(c) We also find that when the Appellant has been provided with information, that has tended to trigger further requests and correspondence making it unlikely that a response ending the exchange of correspondence could realistically have been provided.

53. We also consider that the requests, at least from 2005 onwards, had no serious purpose in that they were unlikely to further the Appellant's grievance against SWBG. The Appellant's requests continued notwithstanding that the underlying complaint had already been investigated several times, both internally and externally. They continued long after the incidents giving rise to the underlying complaint had taken place and various members of staff in employment at the time had retired or moved on. They also continued after

most, if not, all the information the Appellant was seeking had already been provided to her or as she had been informed, did not exist.

54. Finally, the volume of the requests has been very considerable. Although we would have expected SWBG to provide evidence as to the effect the requests had on it, clearly SWBG is a very small public authority and it is reasonable to expect that the requests entailed a substantial and disproportionate administrative burden and diverted resources from other functions.

55. No single one of the above factors would lead to a finding, by itself, that the requests were vexatious. However, the strength of the various factors taken together, and in view of the history and context of the requests, we are satisfied that the requests were vexatious.

56. There are two further points we would make. First, it is of course important that all requests from an applicant should not be dismissed as vexatious just because some are vexatious. However, we consider that to try to distinguish between the various requests in this case would be to ignore their overall character and history.

57. Second, we accept from the Appellant's witness statement and that of her son's that the events leading to the underlying complaint have been very distressing for them, and that they do not feel that they have achieved justice through the various investigations (listed in SWBG's letter dated 2 May 2007) which have been carried out. However, we make no findings in relation to that the underlying complaint. Such matters are entirely outside the scope of this Tribunal's jurisdiction.

Other Issues

58. There are certain other issues that have arisen in this appeal that we should address, although we do so only briefly since they do not go to the core issue in this appeal.

Refusal Notice

59. Under section 10 of FOIA, a public authority must comply with a request for information within 20 days of receipt. A public authority that is relying on an exemption to refuse a request, must also within 20 days, give the requester a notice stating this fact. The notice must specify the exemption and must state why the exemption applies.

60. Where a public authority relies on section 14, section 17(5) provides that within 20 days of receipt, it must give the requester a notice stating this fact. It would seem that in those circumstances, there is no requirement to give reasons.

61. We have set out at paragraphs 31 to 42 above, the requests made by the Appellant under FOIA. In the Decision Notice, the Commissioner found that SWBG was in breach of section 17(5) because it did not respond to the Appellant's requests until 31 March 2006. However, SWBG's letter of 31 March 2006 was not addressed to the Appellant, but to her son. In any event, that letter simply states that following legal advice, SWBG was not prepared

to enter into further correspondence. It did not state that SWBG was relying on section 14. Indeed the letter made no reference to FOIA at all, even though the Appellant's requests were clearly stated to be made under FOIA. There was also no information given as to which requests were being refused. This is not simply a case, therefore, where the public authority failed to respond within 20 days. Its failings clearly went further.

62. On 15 September 2006, SWBG sent a short letter to the Appellant stating that it no longer had any of the information she had requested except for the current complaints procedure which it enclosed. On 31 October 2006, SWBG wrote to the Appellant, stating that the School had no additional minutes of SWBG's meetings. Neither of these two letters constituted Refusal Notices (although the parties have at times referred to them as such). In neither letter did SWBG refer specifically to which request(s) it was refusing, nor did it refer to section 14.

63. It seems to us that SWBG completely failed to recognise that FOIA imposed a new legal regime governing how public authorities must deal with requests for information. This is notwithstanding that the Commissioner advised SWBG on 16 October 2006 and 16 February 2007, that if it was relying on any exemption, it should provide a Refusal Notice in compliance with section 17. It does not appear that a Refusal Notice was ever issued.

64. The result is that Appellant seems to have been informed only through the Decision Notice, over 4 years after her first request under FOIA, that SWBG was refusing her requests under section 14. Although SWBG wrote a detailed letter to the Commissioner on 5 March 2007 in which it invoked section 14 and gave its reasons for so doing, that letter appears to have been provided to the Appellant only through its inclusion in the bundle of documents prepared for the hearing. We note that SWBG sought permission in that letter to provide a copy of it to the Appellant, but was informed by the Commissioner on 22 March 2007 that that it was not necessary to do so because the Decision Notice would reflect the arguments of both parties. That Decision Notice, regrettably, was not issued for a further two and a half years which means that the Appellant was unaware for some considerable period of time of the basis on which her requests were being refused under FOIA. That is clearly unacceptable and is contrary to both the spirit and letter of FOIA.

Section 14(2)

65. In its letter dated 2 May 2007, SWBG says that it has sent the Appellant "every policy and copy of minutes" that it possesses. We take this to mean that SWBG says that it had provided the Appellant with all the information it holds.

66. In light of this, we have considered whether SWBG was entitled, in addition to section 14(1) or in the alternative, to rely on section 14(2). Although as noted above, SWBG did not issue a Refusal Notice specifying which exemptions it was relying on, in its letter to the Commissioner dated 5 March 2007, SWBG referred to both sections 14(1) and 14(2).

67. In its Decision Notice, the Commissioner noted at paragraph 13, that SWBG considered that the requests were covered by section 14(1) and 14(2). However, the Commissioner made its own decision squarely on the basis of section 14(1) without further reference to section 14(2). The Commissioner has provided no explanation for why section 14(2) was not considered.

68. Nevertheless, SWBG has not sought to rely on section 14(2) in this appeal, nor has it submitted any evidence on the basis of which the Tribunal could make a finding in relation to section 14(2). In these circumstances, we have determined this appeal only on the basis of section 14(1).

The Scope of the Decision Notice

69. When the Appellant made her complaint to the Commissioner on 27 April 2006, she did so on the basis that she had not received answers to her requests for information since 30 June 2005. More particularly, she said that she had not received responses to her requests dated 19 and 27 January 2006.

70. Before the date of her complaint to the Commissioner, the Appellant had made further requests in her letters dated 9 March 2006, 16 March 2006 and 20 April 2006.

71. In her letter dated 5 October 2006 to the Commissioner, the Appellant complained that she had not received a response to her letter dated 16 March 2006. The Commissioner informed her that he had written to SWBG and had highlighted that her request of 16 March 2006 was outstanding. In his letter dated 16 February 2007 to SWBG, the Commissioner referred to the Appellant's requests of 27 January 2006, 30 June 2006, 9 March 2006, 16 March 2006, 20 April 2006, and 23 May 2006 as being outstanding.

72. In his Decision Notice, however, the Commissioner dealt only with the Appellant's requests dated 30 June 2005, and 27 January 2006. He stated that her request of 16 March 2006 did not form part of her complaint to the Commissioner. He made no reference to her other requests.

73. In our view, the Appellant's communications to the Commissioner did expand her complaint beyond the requests initially mentioned, and the Commissioner's communications with the Appellant before the Decision Notice would likely have given rise to a legitimate expectation that the Commissioner was investigating and would deal with the Appellant's other outstanding requests referred to in paragraph 71, above.

74. Although the Appellant had previously complained that the scope of the Decision Notice was too narrow, in an e mail to the Tribunal on 16 February 2010, and in her written submissions to the Tribunal, the Appellant now says that in fact the Commissioner has construed the information in dispute too widely. She says she is only seeking the "School's procedure for dealing with complaints concerning issues of child abuse by teachers/staff in force at present in the School", and the "procedure for dealing with issues of staff misconduct". She says that the inaccuracy in recording her complaint is unfair to her.

75. The Appellant's current position appears likely to be motivated by a concern that if her complaint is seen as being too wide, that might more easily lead the Tribunal to conclude that the section 14(1) threshold is met. However, the precise scope of the requests does not determine the outcome of this appeal. In considering whether some of the requests were vexatious, we need to look (as we have done), not only at those requests, but at the context and history. All other requests are therefore also relevant.

Delay

76. The Appellant made her complaint to the Commissioner on 27 April 2006. The Commissioner did not issue his Decision Notice until 29 September 2009, a delay of about three and a half years. We are aware of the Commissioner's workload in this period, but must record our concern about such an excessive delay.

The Correct Identity of the Additional Party

77. Some of the request for information were sent by the Appellant to the headmaster of School, while others were sent to SWBG or the Chairman or Board members of SWBG.

78. Under Part IV of Schedule 1 of FOIA, it is clear that SWBG rather than the School is the public authority. However, we have not sought to distinguish between requests made to the School and requests made to SWBG. The parties have not themselves drawn a distinction between such requests and it would be artificial for us to do so.

Closed Information

79. The Tribunal has been provided with closed information comprising two letters from SWBG to the Commissioner, dated 5 March 2007 and 5 May 2007, respectively. Both letters are included in the open bundle with very limited redactions in relation to personal data of third parties. We are satisfied the redactions were properly made and do not impair the contents of the letters to the extent relevant to this appeal. In other words, we consider that the redactions have caused no prejudice to the Appellant.

Effect of the Tribunal's Findings

80. Our finding that the requests were vexatious means that we uphold the Commissioner's Decision Notice.

81. In determining this appeal, as already indicated, we have taken as the proper scope of this appeal, the Appellant's requests made under FOIA before 5 March 2007 (which is the point at which SWBG invoked section 14(1)). Any later or future requests made by the Appellant fall outside the scope of this determination and must be considered on its own facts.

Decision

82. For all the reasons set out above, this appeal is dismissed. This decision is unanimous.

83. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First-tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website.

Signed **Date: 25 May 2010**

Anisa Dhanji
Judge

IN THE FIRST-TIER TRIBUNAL **EA/2009/0093**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. This is an application by Mrs Alison Ward (the "Appellant"), made under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, for permission to appeal against a decision of the First-tier Tribunal (Information Rights), dated 25 May 2010. That decision dismissed the Appellant's appeal against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 29 September 2009.

Background

2. The Appellant had made a number of requests for information to the Governing Body of Sir William Borlase's Grammer School ("SWBG") under the Freedom of Information Act 2000 ("FOIA"). The requests arose out of the alleged failures by SWBG in relation to the Appellant's son who had been a pupil at the school.

3. The Appellant complained to the Commissioner that SWBG had failed to provide her with the information requested. The Commissioner found that the Appellant's requests had been vexatious and that SWBG was entitled to rely on section 14(1) of FOIA. The Appellant appealed to the Tribunal. SWBG was joined as a party. The appeal was determined on the papers. In a determination comprising some 18 pages, the Tribunal reviewed the requests made by the Appellant from the period 1996 to 2006 and concluded that the requests were vexatious. The appeal was dismissed.

The Scope of the Tribunal's Consideration of an Application for Permission to Appeal

4. Rule 43 provides that on receiving an application for permission to appeal, the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. Rule 44(1) provides that the Tribunal may only undertake a review if it is satisfied that there was an error of law in the decision.

5. If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action, the Tribunal must consider whether to give permission to appeal to the Upper Tribunal. An appeal to the Upper Tribunal lies only on a point of law.

6. The first question therefore, is whether any of the grounds raised by the Appellant disclose an error of law in the First-tier Tribunal's decision.

7. In approaching this question, I have kept in mind that the distinction between an error of law and an error of fact is not always clear cut. Certain factual findings can result in an error of law. For instance, making a perverse or irrational finding on a factual point which has a material bearing on the outcome, giving weight to immaterial facts, or making a mistake as to a material fact, can all amount to errors of law.

Was There an Error of Law in the Tribunal's Decision?

8. The Appellant's application comprises some 13 pages. Essentially, she says that the First-tier Tribunal: (1) misunderstood or failed to take into account material facts to which it should have had regard and that its decision was not in accordance with the evidence; and (2) that it was an error of law for the Tribunal to hold that the requests were vexatious under section 14(1) of FOI when the public authority had failed to comply with the requirements of section 17(5).

9. The particular points the Appellant's makes are set out below in italics. For the avoidance of doubt I should state that I have considered the grounds in their entirety and have not confined myself to the summary below.

   (a) The Tribunal failed to consider that virtually every request for information made by the Appellant over a 10 year period had been disregarded.

   To the extent the Tribunal concentrated on the requests rather than the responses, it is because the focus of section 14(1) is on whether the requests are vexatious.

   The Tribunal did, however, consider SWBG's responses to the requests. The Tribunal noted that SWBG had not responded to certain requests and it found that where the Appellant had repeated her requests because of SWBG had failed to respond, the repetition was not vexatious (paragraph 52(a)).

   The Appellant's assertion that SWBG had disregarded virtually every request for information she had made over a 10 year period, is not, in any event, supported by the evidence. SWBG provided certain information. It also informed the Appellant, on a number of occasions, that the information she was seeking had either already been provided to her or did not exist (see for example its letters dated 15 September 2006 and 31 October 2006).

   (b) The Tribunal failed to recognise that some of the Appellant's requests were for information which the school was legally required to publish outside the FOIA regime. This should have been a strong indication that the requests, even repeated requests, were legitimate.

This was not one of the Appellant's grounds of appeal and the examples she now gives (at paragraph 13 of her application), have not been supported by evidence.

(c) *The Tribunal erred in concentrating on the total number of requests, but not on the responses or lack of responses from SWBG. The Tribunal failed to recognise that with the exception of 5 documents which SWBG disclosed, it had refused or ignored all the Appellant's requests.*

This is essentially the same point as in (a).

(d) *Although the Tribunal was highly critical of SWBG's failure to comply with FOIA, it failed to consider whether SWBG's shortcomings contributed to actions on the Appellant's part which the Tribunal considered were obsessive. The passage in the Tribunal's decision which was critical of SWBG appears after the substantive findings that the Appellant's requests were vexatious and there is no indication that the Tribunal took these failings into account in reaching its substantive decision, nor did it regard SWBG's failure to comply with FOIA as relevant in reaching its substantive decision.*

The Tribunal noted that SWBG had not informed the Appellant that it was relying on section 14(1) and had not issued a Refusal Notice. It is not evident, however, how the actions on the Appellant's part which the Tribunal considered were obsessive arose from these failures. The Appellant also did not assert, in her grounds of appeal that these failures contributed to her actions, nor indeed has she provided evidence to support such a claim.

(e) *SWBG failed to give the Appellant notice under section 17(5) of FOIA and was not entitled, therefore, to treat the Appellant's requests as vexatious under section 14(1).*

A public authority's failure to give a requester notice under section 17(5) of FOIA does not preclude it from treating the requests as vexatious. Section 14(1) does not making the giving of such notice a pre-condition.

(f) *When citing particular characteristics of the Appellant's request which the Tribunal considered hi-lighted their obsessive quality:*

- *the Tribunal should not have given weight to the fact that some of the repeated requests covered slightly different timescales. These minor discrepancies were of negligible significance.*

  It was proper for the Tribunal to take into account that the Appellant had made many of her requests repeatedly and that in some cases, the repeated requests covered different timescales. The Tribunal made no finding, specifically, as to how significant these variations were, but it is unlikely that the examples of the variations noted at paragraph 52(a) could properly be regarded as being insignificant.

- *the Tribunal should not have drawn any adverse inference from the Appellant's suggestion that certain documents provided to her were not factually accurate.*

  It was proper for the Tribunal to take into account, as indicating the obsessive quality of the Appellant's requests, her claim that certain documents she was provided with were not accurate or genuine, particularly since there appears to have been no basis for the Appellant's suspicions in this regard.

- *the Tribunal's conclusion that where the Appellant had been provided with information that tended to trigger further requests and correspondence is not supported by the evidence, and was premature given that only 5 disclosures were made during a 10 year period;*

  The Tribunal may have erred, in paragraph 52(c) by referring specifically to the Appellant's responses when she was provided with information. The point, in fact, applies more widely; the history of the Appellant's correspondence with SWBG shows a clear pattern in which responses from SWBG simply triggered criticisms, questions and further requests.

- *it was not correct to consider the investigations that had been carried out into the Appellant's complaints as being independent or external. They were not independent and not thorough.*

  The Tribunal noted that the Appellant's underlying complaint (as defined in the decision), had been investigated both internally and externally. However, the Tribunal made no finding as to the independence or thoroughness of the investigations.

(g) *The Tribunal erred in concluding that from 2005 onwards, the Appellant's requests had no serious purpose and were unlikely to further the Appellant's grievance against SWBG. In fact, the Appellant is actively pursuing a Serious Case Review.*

The Appellant's requests spanned a decade. The Tribunal noted that the Appellant continued with her requests even after the underlying complaint had been investigated, and continued long after the incidents giving rise to the complaint had taken place, and long after various members of staff had retired or moved on, and also continued notwithstanding SWBG's assertion that it had given her all the information it held. Against this background, it was reasonable for the Tribunal to consider that the Appellant's requests from 2005 onwards were unlikely to further the Appellant's grievance against SWBG. Nothing in the Tribunal's decision, however, precludes the Appellant from pursuing a Serious Case Review if she has grounds to do so.

(h) *Even though the school maintains that it no longer holds any of the requested information other than its current complaints procedure, the relevant files are currently in the possession of the Local Education*

Authority who holds them on behalf of the school. For the purposes of FOIA, therefore, the material is held on behalf of the school.

A public authority can rely on section 14(1) even if it holds the information requested.

The Appellant did not, in any event, submit evidence to show that any of the information she was seeking was held by another body on behalf of SWBG (and that it was therefore held by SWBG pursuant to section 3(2) of FOIA). If the Appellant wished to assert that the reason or one of the reasons for her many requests was because SWBG was refusing to provide information which was held on its behalf by another body, that point should have been made clearly. It is not an error of law for the Tribunal not to consider a point that was not raised by the Appellant, about which no evidence was submitted, and in respect of which the other parties have not had an opportunity to respond.

(i) *Given SWBG's failure to notify the Appellant of any proper reason under FOIA why it was not prepared to answer her requests, it was unreasonable to treat any FOIA requests the Appellant continued to make as further evidence of an obsessive approach on her part.*

To an extent this is the same point as in (e) above. I note in any event that SWBG's notified the Appellant on a number of occasions that it did not hold or had already disclosed the information held to the Appellant.

(j) *Given that SWBG provided only 5 documents, the Tribunal erred in finding that the Appellant's requests likely entailed a substantial burden for SWBG.*

This is reiteration of a point already argued during the course of the appeal. The Appellant's position is misconceived. The burden to the public authority is not determined simply by the requests that it has met. The burden created by the Appellant's requests would have arisen also in receiving, considering and responding to the large volume of requests made by the Appellant, even where it did not result in information being provided.

10. I am not satisfied that the Appellant's grounds of appeal identify an error of law in the Tribunal's decision. Many of the points the Appellant raises amount to no more than a disagreement with the Tribunal's findings of fact, or they are new points. It follows that an appeal to the Upper Tribunal would not have any reasonable prospect of success. Permission to appeal is therefore refused.

11. For completeness, I would point out that the Tribunal's decision makes it clear (see paragraph 55 in particular), that its finding that the Appellant's requests were vexatious was based on a number of factors. No one factor was determinative. Therefore, even if the Tribunal had fallen into error in its findings on any one factor (which I consider was not the case), it seems unlikely that it would have had a material effect on its overall findings.

12. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Appellant has one month from the date this Ruling is sent to her to lodge an application for permission to appeal directly with the Upper Tribunal by sending it to:

The Upper Tribunal (Administrative Appeals Chamber)
5th Floor, Chichester Rents
81 Chancery Lane
London WC2A 1DD
DX: 0012 London/Chancery Lane

Signed **Date: 9 September 2010**

Tribunal Judge
A Dhanji

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/2457/2010

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Appellant:	Alison Ward
First respondent:	Information Commissioner
Second respondent:	The Governing Body of Sir William Borlase's Grammar School (the school)
First-tier Tribunal no:	EA/2009/0093
Date of decision:	25 May 2010

DECISION

Permission to appeal is refused.

REASONS FOR DECISION

A. The oral hearing

1. I held an oral hearing of this application for permission to appeal on 26 March 2012. Ms Ward lodged her application on 11 October 2010. It was, unfortunately, not possible to arrange an oral hearing sooner on account of her ill health. Ms Ward was accompanied by Mr Frankel of the Campaign for Freedom of Information, who presented a case on her behalf. I am grateful to them both. The Information Commissioner did not send a representative to the hearing, but had provided a written submission opposing the application. Ms Ward also sent me a written response to that submission. The School did not take part in the proceedings.

B. The history of the requests to the school

2. Ms Ward has been concerned about the bullying that her son experienced while at the school. I am not concerned with what did and did not take place. Her son attended the school from September 1992 to May 1995. She first asked for information in December 1996. In total, she made 19 requests for information between then and 22 March 2005, when the Freedom of Information Act 2000 came into force. In March 2005, she made a request under the Act, which the school answered. She then made requests by two letters sent on 30 June 2005. The school did not respond. It did write to Ms Ward's son on 31 March 2006, but not about her requests. Ms Ward explained to me that this letter was a reply to a letter written by her son and not related to her requests. She made more requests in January 2006. Again the school did not respond.

3. I have not read every word of every letter that Ms Ward has written to the school. But those that I have read have been couched in polite terms and explained why she wanted the information. It is, though, fair to say that, on 30 June 2005, she did accuse the school of providing a faked document.

C. The Information Commissioner's investigation and decision

4. On 27 April 2006, Ms Ward complained to the Information Commissioner. The Commissioner began his investigation in February 2007, in the course of which the school told the Commissioner that it was relying on section 14(1):

> **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.

The Commissioner made his decision on 28 September 2009 under reference FS50142022. He decided that: (i) the school had correctly applied section 14(1); and (ii) it had failed to inform Ms Ward that it was relying on that provision, but (iii) it was not required to take any steps as a result of that failure.

D. The appeal to the First-tier Tribunal

5. Ms Ward exercised her right of appeal to the First-tier Tribunal. The tribunal decided that it could properly decide the case without a hearing. It considered the papers on 21 and 30 April 2010, and dismissed the appeal on 25 May 2010. Ms Ward applied to the tribunal for permission to appeal, but this was refused by Judge Danji. The judge gave detailed reasons for doing so. Those reasons do not concern me. An appeal to the Upper Tribunal lies only against a decision of the First-tier Tribunal. The reasons given for refusing permission are not part of that decision. The Upper Tribunal does not review those reasons: *CIS 4772/00* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67]. To be fair, Ms Ward has not sought to use them in that way.

E. When the Upper Tribunal can give permission

6. An appeal to the Upper Tribunal lies on 'any point of law arising from a decision' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The party must obtain permission. The Upper Tribunal has a discretion to give permission under section 11(4). In *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538, Lord Woolf MR said that the discretion may be exercised: (i) if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law; or (ii) if there is some other good reason to do so. It is inherent in the nature of a discretion that it need not be exercised, even if one of those conditions is satisfied.

F. Ms Ward's argument at the hearing

7. Mr Frankle conveniently summarised his points at the start of his presentation:

- The First-tier Tribunal had wrongly taken into account events after the time at which section 14(1) had to be applied.
- It failed to deal with the issue of the authenticity of a document.
- This led to an error of fact, which further led to the decision on vexatiousness.
- The pattern of requests was partly a response to the way in which the school dealt with Ms Ward's requests.
- The tribunal did not deal with the issue whether information was held by the County Council on the school's behalf.
- It looked at all the requests together.
- There was a serious purpose underlying the request.

G. Why I have refused permission to appeal

8. I have exercised my discretion to refuse Ms Ward permission to appeal. The Upper Tribunal does not have to set aside a decision, even if it was made in error of law. Section 12(2)(a) of the 2007 Act so provides. In this case, the tribunal did make errors of law, but I am satisfied that it came to the correct decision on the evidence. It would be an empty exercise to give permission only to dismiss the appeal.

H. How the First-tier Tribunal went wrong in law

9. In FS50319503, the Commissioner said:

> 49. The Commissioner's view is that whether a request is vexatious for the purposes of the Act must be considered at the date it was received by the University – so on 26 April 2010.

In *Robin Makin v Information Commissioner* (EA/2010/0080 and 0081), the public authority did not respond to the request timeously. The First-tier Tribunal said:

> 52. ... the Tribunal was attracted to the IC's argument that the latest relevant date for these purposes should be the date when the decision ought to have been made. The provisions regarding time limits, both in statute and by way of guidance, ... provide a degree of legal certainty in this process.

I can see merit in both those statements. I can also see merit in later requests being taken into account as well. It all depends on the circumstances. The later requests may cast light on the earlier requests.

10. My approach is this. Regardless of the correct time, it was not appropriate to take account of requests made after 30 June 2005. First, those requests were, in part at least, made to follow up the requests made on that date. Second, the lack of any response by the school may, again in part at least, have explained why further requests were made.

I. Other matters

The decision under appeal

11. The First-tier Tribunal is statutory and only has jurisdiction over the decision under appeal. In this case, that was the decision notice of 28 September 2009. Ms Ward told me that she had expected other matters to be considered under the same reference number. That may be so, but the tribunal had to deal with the decision notice as it stood.

Information held by the County Council

12. The school has said that it no longer holds information, as it has all been passed to the County Council. (That may be connected with the school becoming an Academy.) If that information was held on behalf of the school, it would still be held by the school for the purposes of the 2000 Act. See section 3(2)(b). Mr Frankle pointed out that the First-tier Tribunal did not deal with that issue.

13. I accept that the tribunal did not deal with the issue. But I do not know what more it could realistically have done *in these proceedings*. The school said it had transferred the documents to the County Council. It was not participating in the proceedings. The Council was not a party. Ms Ward was not in a position to do anything other than raise the question. In those circumstances, the tribunal had to accept what the school said. There was nothing more it could do. It is inquisitorial, but it does not have an independent investigative function.

14. I suggested that the obvious solution was to ask the County Council to see if it claimed to hold the documents only for the school. But Ms Ward told me that her dealings with the Council were now also considered vexatious.

The paper hearing before the First-tier Tribunal

15. Ms Ward mentioned this a number of times. She said that she could have explained some of the factors that the tribunal took into account, if she had been given the chance.

16. The tribunal had the power to deal with the case on the papers. The issue is: was that a fair procedure? It certainly ran the risk that Ms Ward might be able to give relevant information about some aspects of the case. That is always a risk with a paper hearing. The tribunal had all the relevant documents. It was always possible that oral evidence would affect the outcome on points of detail. But it was inherently unlikely that it could have any significant effect on the overall nature of the requests.

J. Why the 2005 requests were vexatious

17. I consider that these requests were vexatious and that the First-tier Tribunal could only have properly come to that conclusion. This is why.

The pre-2005 requests

18. Whether a request is vexatious is a matter of fact. It depends on the all the circumstances. That includes requests that are made outside the scope of the 2000 Act and requests that were made before that Act came into force. The tribunal had to take account of the whole of the correspondence from 1996 to 2005.

The number, pattern and duration of the requests

19. The sheer number of requests is of itself a relevant factor. The pattern of the requests is also relevant. They began in 1996 and there was a steady stream from then until 2005. Sometimes Ms Ward sent a number of letters on the same day. Other times she wrote again within days. This pattern may not have increased the overall number of requests, but it has an effect on the authority that has to respond. A continuous drip-drip approach merely adds to the stress for the staff and disruption for a relatively small body with no dedicated Department to respond. The period of time involved is a further factor. As the school explained, it did not keep historic records of every policy in force at particular times. With the passage of time and the retirement of staff, Ms Ward's requests have been increasingly difficult to handle.

Drift

20. I am sure that Ms Ward has been genuinely motivated in all that she has done to find out information about how her son's case was handled by the school. I am sure that she has not intended to harass the staff of the school. But her requests demonstrate what I call 'drift'. Requests start with a focus on the 'underlying complaint', as the Commissioner called it. Each response then generates further requests on topics that are increasingly distant from the original issue. Just to take one example, I asked Ms Ward why she wanted the school's premature retirement policy. The best that she could tell me was that some of the teachers involved had since retired. That is true, but it does not explain how the information would help her. I have made allowance for her being nervous at the hearing. But she was unable to provide any rational connection between the information sought and the underlying complaint. All that Ms Ward needed to know was that some of the staff had retired, but she diverted to asking about the policy governing their retirement.

Argument and opinion

21. On 30 June 2005, Ms Ward not only asked for information. She also asked for the school's opinions on matters such as its duty to report teachers. She was also argumentative, accusing the school of faking documents and asking for genuine documents.

22. Mr Frankel pointed out that some of Ms Ward's requests on that date could have been dealt with quite simply, as they were not requests for information. Vexatiousness, he argued, should then be judged on the basis of what was left. That was the approach taken by the First-tier Tribunal in *Rosalind Craven v Information Commissioner and Department for Energy and Climate Change*

(EA/2011/0129). I accept that that might be the proper approach in some cases. I do not accept that it is always so. Categorising requests and providing different responses may itself be a factor showing that the requests as a whole were vexatious. The school is a public authority, but it lacks the experienced staff that a Government Department would have to deal with requests. For those staff, it might not be so easy to sift the requests as Mr Frankel did. Moreover, the nature and content of those requests were part of the whole parcel. They could not properly be ignored when deciding whether the request as a whole was vexatious.

Persistence

23. Ms Ward has pointed to a number of factors that make her suspicious that she is not being given the correct contemporaneous documents. Just to take one example: the school's special educational needs policy purports to relate to a particular time but refers to a handbook that did not then exist. Individually, these matters have led to more questions. Cumulatively, they have led to suspicion that documents are being faked, concealed or reconstructed. In my experience, inconsistencies like this are common features when documents are produced in relation to a past period. It happens regularly with Government Departments. There may be no complete historic record. Future needs may not have been anticipated. Draft documents may anticipate other developments. There are numerous possibilities. All too often, the only realistic option is to accept that the past cannot be reconstructed perfectly and that some matters simply cannot be explained. Ms Ward has been unwilling to see things in that light. This can only lead to endless questions that cannot be satisfactorily answered.

Repetition

24. Ms Ward asked for a number of documents more than once. In part, there may have been some pages missing. In part, she may have believed that she had not been given the correct document. But whatever was behind the request, the impact was the same. The school had either to provide the information, most of which it had already provided. Or it had to compare the current request with earlier requests to see what extra it had to provide. Either way, there was a burden for the school.

Conclusion

25. Those are the reasons why I consider that the First-tier Tribunal could only properly have come to the decision it did. That is why I have refused permission to appeal.

Signed on original
on 28 March 2012

Edward Jacobs
Upper Tribunal Judge