IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0041**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50183889
Dated: 9 February 2010

Appellant: MICHAEL JACOBS

Respondent: THE INFORMATION COMMISSIONER

On the papers

Date of decision: 24 August 2010

Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
MALCOLM CLARKE

Subject matter: Vexatious or repeated requests s.14

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0041**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed for the reasons set out below.

REASONS FOR DECISION

The request for information and the investigation by the Information Commissioner into its refusal.

1. On 10 December 2007 the Appellant wrote a letter to the Insolvency Service (an executive agency of the Department for Business, Innovation and Skills and referred to in this decision as "the Insolvency Service"). In it he first referred to earlier correspondence regarding his attempts to obtain information, going back to October 2006. He stated that he had not received a satisfactory response and then wrote:

   "I would list the points as follows on which precise and detailed information is sought,

   1) Investigating a legal action against another party for responsibility for the incurring of a debt that the bankrupt had previously requested to be settled from funds in hand, but due to wrongful retaining of funds belonging to the bankrupt instead led to a far greater claim of debt being incurred as a consequence.

   2) Responsibilities to reject an invalid claim in respect of a false creditor where there is clear evidence on record of various discrepancies in accounting and duplicate payments and overcharged fees.

   3) As an appointed officer of the court, although a private firm of accountants the basis of appointment by the Official Receiver on condition of acceptance of rules of the court. Details of the Rules of the Court relating to such an appointment.

   4) Responsibilities to act fairly and impartially in dealing with false creditors and in presenting a true financial report to the Court concerning all matters relating to the alleged debt."

   We will refer to this letter as "the Request".

2. It is accepted by all parties that the request was for information to which the Appellant claimed to be entitled under section 1 of the Freedom of Information Act 2000 ("FOIA"), which provides:

   "(1) Any person making a request for information to a public authority is entitled

   (a) …

(b) …, to have that information communicated to him".

3. The Insolvency Service rejected the request. Initially it did so in reliance on FOIA section 14(2) (repeated requests that are identical or substantially similar), but it subsequently changed the ground for its refusal to FOIA section 14(1) (vexatious request).

4. The Appellant complained to the Information Commissioner who, having carried out an investigation into the Insolvency Service's treatment of the request, decided that the Insolvency Service had been entitled to rely on section 14(1), but not section 14(2), and that the Insolvency Service had exceeded the 20 working day period for responding to a request, as provided by FOIA section 10.

The Appeal to this Tribunal

5. On 14 February 2010 the Appellant appealed to this Tribunal against the Information Commissioner's decision that the Request was vexatious and that the Insolvency Service had been justified in refusing it on that basis. As there was no appeal by the Insolvency Service against the other elements of the Decision Notice this is the only issue we have to decide.

6. The Appellant's right to appeal arises under FOIA section 57. The Tribunal's jurisdiction on such appeal is established under FOIA section 58, which provides that the Tribunal may allow the Appeal if it considers that the Information Commissioner's Decision Notice is not in accordance with the law, or involved an exercise of discretion that ought to have been exercised differently. In the process the Tribunal may review any finding of fact on which the Decision Notice was based.

7. The burden of proof on the Appeal is on the Appellant.

8. The Appellant asked for the Appeal to be determined on the papers, without a hearing, and the Information Commissioner agreed to that procedure. Directions were given to the effect that each party should file written submissions, to be accompanied by copies of any documents on which it wished to rely. Although both parties filed submissions, only the Appellant appended copy documents.

Was the Request Vexatious?

9. FOIA section 14 is in two parts. Subsection (1) provides:
"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".
Subsection (2) then deals with the circumstances in which a public authority may refuse repeated requests.

10. Sub-section (2) provides a more specific test than the more general language of subsection (1) and is likely to be easier to apply to the facts of a particular case. We found it helpful to consider the term "vexatious" in context, treating the two sub-sections as being intended, together, to define the circumstances in which the behaviour of the person seeking information is such that complying with his or her request would cause the advantages of openness by public authorities to be outweighed by the disadvantage of subjecting them to disproportionate trouble and expense.

11. The Information Commissioner found that, before the date of the Request, the Insolvency Service had engaged in lengthy correspondence with the Appellant about aspects of the insolvency procedures that caused him concern. The correspondence was both regular and voluminous, and covered the same or related subject matter. The Information Commissioner found, too, that the language used had at times been confrontational and he included in his decision notice a few examples to illustrate the point.

12. The Information Commissioner made the general point that the FOIA was enacted to assist people in seeking access to recorded information held by public authorities, without distracting public authorities unreasonably from their other duties or causing public money to be spent unproductively. He considered that the tone and pattern of the correspondence justified the conclusion that, if the Request had been answered this would simply have led to further correspondence. He considered that the burden imposed on a public authority by a request for information is one of the factors he should take into account and decided that in this case the burden would have been significant.

13. The Information Commissioner concluded:

> *"The Commissioner has considered all the evidence presented, including the history and context of the request. The Commissioner accepts that the complainant had genuine concerns about the Insolvency Service's actions but it is also clear from the evidence that the complainant pursued his concerns to an unreasonable extent. The Commissioner believes that the level of correspondence was obsessive leading to the harassment of the public authority's staff. It is therefore fair to state that this particular request can be deemed as vexatious.*
>
> *"The Commissioner considers that the obsessive nature of the request, when taken in the context of the previous correspondence, and its impact on the public authority and its staff is sufficient for the request to be deemed as vexatious."*

14. The Information Commissioner also made the point, in the Decision Notice and in written submissions on this Appeal, that FOIA section 1 gives a right to see information that is held by a public authority at

the time of the request but does not give either the Information Commissioner or this Tribunal any right to judge whether the public authority should have created and/or kept other information or whether the information that it did retain was of an acceptable standard, (whether in terms of accuracy, completeness or the correctness of the decisions it recorded). Perceived shortcomings in any of those respects may form the basis of a complaint through other channels, but they fall outside the regime established under the FOIA.

15. On this Appeal we have had the advantage of seeing a quantity of material about the Appellant's grievances, which he attached to his written submissions. It included copies of documents filed in a High Court Bankruptcy matter dating back to 1995. The material also included 54 pages of correspondence between November 2005 and December 2007 regarding the investigation by the Association of Chartered Certified Accountants ("ACCA") of a complaint about one of its members, when acting as an insolvency practitioner, and a subsequent complaint to the Insolvency Service about that investigation.

16. It is apparent that, towards the end of the correspondence with the Insolvency Service the arguments being exchanged had started to become repetitive. On 2 October 2006 the Appellant wrote to the Deputy Head of its Insolvency Practitioner Policy Section describing that individual's previous letter as "rather a long winded repeat of the same points that you have made previously". He then went on to himself repeat, under the guise of a summary of the dispute, many of the arguments that had been aired previously. The next letter in the bundle is from the Insolvency Service and is dated 21 November 2006. It refers to a letter written by the Appellant to the then Secretary of State for the Department of Trade and Industry, Alistair Darling MP, and concludes by saying "*Everything that you have raised in your letters has been raised and addressed in our previous correspondence; consequently I have to tell you there is nothing that either the Secretary of State or the Insolvency Service can do to resolve these matters to your satisfaction."* It was in response to that letter that the Appellant submitted the Request which, as is apparent from the extract quoted in paragraph 1 above, included a cross reference to the earlier correspondence.

17. By the time the Appellant referred the rejection of the Request to the Information Commissioner it is clear that the sense of grievance that he originally felt towards the particular individual who had been the trustee in bankruptcy in the earlier bankruptcy had been extended, first to the ACCA, (which in his view had failed adequately to pursue his criticisms of the trustee), and then to the Insolvency Service in its role as the body regulating the licensed insolvency practitioners' regime. The Appellant prefaced his letter of complaint to the Information Commissioner in this matter by

saying *"In order to substantiate my allegations that the Insolvency Service had not acted on a fair and impartial basis, I decided to apply to the Freedom of Information Department to ascertain my rights concerning various points of law as previously explained".* That suggests that he misunderstood the quite limited jurisdiction of the Information Commissioner which, under FOIA section 50, is limited to considering whether the public authority in question dealt with an information request in compliance with the detailed requirements of the FOIA. It does not entitle the Information Commissioner to explore the justice or legality of any other element of the public authority's behaviour.

18. This Tribunal similarly has neither the jurisdiction nor the evidence to determine if the Appellant's dissatisfaction with those responsible for the operation of the insolvency regime is justified. Our jurisdiction is limited to the narrow issue of whether or not the Information Commissioner was justified in concluding that the request for information was vexatious. However, we do proceed on the basis that, as the Information Commissioner concluded, the Appellant's grievances are genuinely felt, that the Request was not made with the sole intention of causing disruption or annoyance and that the fair and effective operation of the insolvency regime is of public interest.

19. The test for establishing whether or not a request is vexatious has been considered in a number of previous Tribunal decisions. We are not bound to follow such decisions. However, they include a number of general principles, which we have found particularly relevant to the facts emerging on this Appeal, and which we summarise in the following paragraphs.

20. The normal meaning of the term "vexatious" points to activity that is likely to cause distress or irritation. The concept of an organisation, as opposed to an individual, experiencing those reactions is a little artificial but we deal later with the likely impact of the Appellant's communications on individual officers of the Insolvency Service and the way in which their reaction may be said to be that of the organisation as a whole.

21. In applying the term "vexatious" it is appropriate to consider, not just the information request in isolation, but the overall circumstances in which it was submitted to the public authority. In that context the fact that it deals with the same broad subject matter as a previous request or requests may be relevant, even if it is not so similar as to fall foul of section 14(2). In this Appeal the Appellant argued that the effect of the Information Commissioner's conclusion that the Insolvency Service could not rely on FOIA section 14(2) (because it was not possible to find in the earlier correspondence requests for information that were identical or substantially similar to those in the Request) was that the Request

should be treated as entirely new. The implication, as we understand the argument, was that it was therefore wrong to have found it vexatious. However, the argument lacks logic and ignores the fact that the Information Commissioner found that all of the earlier correspondence was on the same general subject matter, even though it did not raise an identical or substantially similar information request.

22. The similarity with previous requests or correspondence will have particular relevance if the information request under consideration appears to have been principally intended to reprise an earlier debate with the public authority, especially one on which the public authority has already provided as complete a response as may reasonably be expected. It is apparent from correspondence in September 2006, which the Appellant provided to us that this was the case in the present appeal. In fact the Appellant seemed keen to continue the earlier debate even during the Information Commissioner's investigation, as is clear from the quotation from the letter to the Information Commissioner set out in paragraph 17 above.

23. Particular care must be taken when assessing the tone of correspondence in the broader context we have considered. An abusive tone adopted by the person seeking information in previous communications is a relevant factor, but it would be inappropriate to take into account the attitude displayed by the individual either in communications with the same public authority on unrelated matters, or in communications on the same issues with other individuals or organisations. The test to be applied is whether the request is vexatious, not the person making it. In the present case we have therefore taken into account the whole of the correspondence with the Insolvency Service since the Appellant first referred to it the criticisms of the ACCA's disciplinary processes, but have ignored the earlier materials provided by the Appellant dealing with communications with the ACCA and the even earlier court proceedings.

24. The same caution applies to any evidence of the person making the request either harassing his or her correspondents with a consistent flow of letters or emails or displaying obsessive concern with the subject matter, particularly its minor details. Both characteristics are relevant factors to take into account, but only when sufficiently closely associated with the information request under review. We found some evidence of this in the tone and frequency of the Appellant's correspondence with the Insolvency Service.

25. The existence of other litigation or complaints instigated by the person making the information request may in some cases be evidence of an aggressive or obsessive approach, but it may equally represent the legitimate use of available remedies to pursue

a genuine grievance. Because it is the request, and not the person making it, that must be assessed under section 14(1), it is likely that only the manner in which those other processes are reflected in the information request or associated communications will carry any weight. Although, therefore, we have not taken into consideration the existence or content of the earlier litigation and complaint to the ACCA, we have taken into account the repetition of the complaints underlying those processes in the communications with the Insolvency Service. As we have indicated already the Appellant deployed arguments in this connection that were derived from those other proceedings. In some cases they clearly had no relevance to freedom of information issues, and/or were covered in excessive depth or with unnecessary repetition. To that extent they certainly support the Information Commissioner's case that the request was vexatious.

26. The terms in which the information request is expressed may be a particularly relevant factor to take into account. For example the language used may reinforce the suspicion that, by reason of its similarity with earlier requests or debates (see paragraph 20 above), it is intended simply to reopen or continue an earlier dispute. We found that in this case the language used in the Request betrayed the Appellant's intention, which was not really to obtain information but to trap the public authority into making an admission that the Appellant felt would be to his advantage in some other context, or to embarrass the Insolvency Service in some other way.

27. Although it is relevant to consider the impact that the Request and associated communications may have on those to whom they are addressed, the Tribunal should not be over-protective of them. Public authorities and the individuals representing them must expect to be exposed to an element of robust and persistent questioning, sometimes articulated in fairly critical tones. And the test of when a dialogue develops to the stage where it may be said to have become vexatious will be an objective one, not based on the particular sensitivities of the individual or individuals dealing with the person making the request. This particular factor will carry weight in the overall assessment only if distress or irritation would be caused to a reasonably calm, professional and resilient officer of a public authority, with no improper motive (such as a wish to avoid the disclosure of information that will disclose his or her wrongdoing or incompetence). We place limited weight on this factor in this Appeal because we felt that, with the exception of the passages quoted in the Decision Notice, the tone of the correspondence was generally not objectionable.

28. Whether or not the threshold of vexatiousness is exceeded may also be influenced by the underlying subject matter. The pursuit of information on a trivial matter may justify much less persistence and

vigorous persuasion, before it may properly be characterised as vexatious, than would be the case where the underlying subject matter is of great significance. But the test is again an objective one. It is not whether the person making the request considers that the issue on which information is sought justifies the approach adopted, but whether someone with a reasonable interest in, and balanced attitude towards, the conduct of public affairs would agree. The Appellant suggested that the Information Commissioner had allowed a minor issue (presumably the question of whether disclosure should be ordered under FOIA) to take precedence over the more important issue of his claim, which he characterised as an abuse of power by the Insolvency Service. The argument fails to recognise that, while we have jurisdiction to determine what the Appellant refers to as the minor issue, the FOIA gives us no jurisdiction whatsoever to determine the one that he considers to be more important. In any event the Appellant presented no evidence that suggested that there was a sustainable complaint of such public importance that the threshold between reasonable persistence and vexatiousness should be moved in his favour. Although he argued that the Insolvency Service's sole motivation for refusing the Request had been to prevent disclosure of its own wrongdoing, he adduced no evidence to support that assertion. It is, in any event, not a relevant consideration. If a public authority establishes that information is exempt, applying the relevant tests set out in the FOIA, then the motivation that led it to rely on the exemption is irrelevant.

29. Although the financial burden likely to be imposed on the public authority may be a factor in determining what is vexatious, it is likely to carry less weight than other factors, due to the existence of FOIA section 12, which provides a separate and clear basis for refusing an information request on cost grounds. However section 12 is focused on the cost involved in complying with a particular request, whereas the relevance, under section 14(1), of the broad circumstances surrounding the request may legitimately bring into play the financial burden on the public authority created by the whole course of dealing with the person making the request. It is then the likely reaction of the notional officer defined in paragraph 26 above to the financial implications for his or her public authority that will determine whether this factor should be considered and the weight that should be given to it. In this case the Information Commissioner took into account his perception, derived from the correspondence when viewed as a whole, that, even if the Request had been answered, the Appellant would have continued the correspondence. The Appellant, by contrast, sought to demonstrate that any burden imposed on the Insolvency Service by his behaviour was much less than would have been suffered if the Request had been answered. On this we accept the Information Commissioner's argument. We think that he was justified to take into account in his decision on this matter the likely future conduct

of the Appellant, based on his approach up to that time, and that his conclusion to the effect that the Appellant would have sought to continue the dispute even if the Request had been answered, was fully justified.

Conclusion

30. We have concluded that, when all the factors we have mentioned are taken into account, the Information Commissioner was entitled to conclude that the Request was vexatious and that the Insolvency Service was entitled to refuse it on that basis. The Appeal is therefore dismissed.

31. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Chris Ryan
Tribunal Judge
24 August 2010

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0041**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50183889
Dated: 9 February 2010

Appellant: MICHAEL JACOBS

Respondent: THE INFORMATION COMMISSIONER

Application for Permission to Appeal.

1. On 24 August 2010 the Tribunal promulgated its decision on this Appeal ("the Decision") in which it concluded that the Information Commissioner had been entitled to conclude that a request for information addressed to the Insolvency Service by the Appellant had been vexatious within the meaning of section 14(1) of the Freedom of Information Act 2000 ("FOIA").

2. On 3rd September 2010 the Appellant made a written application to the Tribunal for permission to appeal. The right to appeal arises out of section 11 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). That section provides that any party to a decision of a First Tier Tribunal has a right of appeal to the Upper Tribunal on any point of law but that the right may only be exercised with permission. Under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") permission to appeal must be sought from the relevant First-tier Tribunal.

3. The application for permission to appeal in this case satisfied the formal requirements set out in rule 42 of the Rules in respect of both its contents and the time limit for its submission.

4. Rule 43(1) requires the Tribunal, on receiving an application for permission to appeal that satisfies those requirements, to consider first whether to review the

decision in accordance with Rule 44. That rule provides, in relevant part, as follows:

> *"(1) The Tribunal may only undertake a review of a decision –*
> *(a) pursuant to rule 43(1)….; and*
> *(b) if it is satisfied that there was an error of law in the decision"*

5. I am satisfied that there was no error of law in the Decision. In reaching that conclusion I have satisfied myself that:
   (a) the Tribunal's reasons for reaching its conclusion were adequately and intelligibly recorded in the Decision.
   (b) there was no dispute between the parties as to the law which the Tribunal was required to apply, namely FOIA section 14(1);
   (c) the Tribunal interpreted that sub-section correctly, taking account of the (non-binding) principles articulated in previous decisions of the same Tribunal and the submissions it had received from the parties;
   (d) the facts relevant to the case were apparent from the materials presented to the Tribunal (and in particular from copy correspondence submitted by The Appellant himself) such that there was no error of law in reaching a conclusion that was not supported by evidence;
   (e) the Tribunal's application of the evidence to the law was rational and its conclusion, that the facts established that Mr Jacob's information request did fall within FOIA section 14(1) as vexatious, was justifiable; and
   (f) the procedures adopted by the Tribunal gave the parties adequate opportunity to present their evidence and arguments and included an opportunity to apply to vary the procedural directions if they thought that this was not the case.

6. Mr Jacob's application for permission to appeal included a number of criticisms of the Tribunal's factual conclusions, which do not give rise to an issue of law. They cannot therefore support his application. He also complained that the outcome of the Tribunal's decision resulted in what he regards as the principles underlying FOIA being undermined. This, again, is not an issue that may be considered under TCEA section 11. Elsewhere in his application he concentrated his criticisms on matters of fact which, he contended, had not been given appropriate weight by the Tribunal and did not, in his view, justify the conclusion that the

Tribunal reached. He also asserted that the Tribunal lacked impartiality and had not acted fairly. Although these are issues that are capable, in theory, of giving rise to an error of law I do not believe, having considered each criticism against the text of the Decision, that any one of them in fact do so. The Appellant has not therefore satisfied me that there was any error of law in the Decision. I therefore decline to review the Decision under rule 44.

7. Because my decision not to review is based on my conclusion that there was no error of law in the Decision it follows that the Appellant does not have ground for appealing under section 11. Accordingly, pursuant to rule 43(2), I also refuse his application for leave to appeal.

8. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Appellant has one month from the date of 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

Further information can be found at: www.administrativeappeals.tribunals.gov.uk.

Signed:

Chris Ryan
Tribunal Judge

Dated: 20 September 2010