IN THE MATTER OF AN APPEAL TO
THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
GENERAL REGULATORY CHAMBER

Appeal No. EA/2011/0015

BETWEEN:

TONY WISE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Heard in public in Manchester on 13 July 2011

By: Alison McKenna, Tribunal Judge
Paul Taylor, Tribunal Member
Ivan Wilson, Tribunal Member

Date of Decision: 27 July 2011

Subject Matter:

Vexatious or repeated requests - section 14(1) Freedom of Information Act 2000

DECISION

The Tribunal finds that s. 14(1) of the Freedom of Information Act 2000 was not appropriately applied to the Appellant's request of 5 January 2010 and accordingly this appeal is allowed and the Decision Notice FS 550311574 is set aside. The Tribunal substitutes for the Decision Notice dated 6 January 2011 the Decision Notice annexed to this Decision.

REASONS

Introduction

1. This appeal concerns the Appellant's request for information about the duties and whereabouts of Lancashire Constabulary's Chief Legal Adviser during certain days in 2009. The Appellant originally made the request under a pseudonym. When he made the request again under his own name, Lancashire Constabulary deemed it to be a vexatious request. That decision was upheld by the Information Commissioner in his Decision Notice FS 550311574, dated 6 January 2011. The Appellant now appeals against that decision.

The Information Request

2. On 5 January 2010, as part of a letter also requesting other information with which this appeal is not concerned, the Appellant made the following request to Lancashire Constabulary under the Freedom of Information Act 2000 ("FOIA"):

   "…*Please supply details of [the Chief Legal Advisor's] duties, times, meetings and places that she worked/attended on 11, 12, 13, 14 and 15 May 2009….."*

3. The Appellant told the Tribunal that his request was designed to elicit whether the Chief Legal Adviser had attended a meeting at which he believed his earlier complaint about the Chief Constable had been discussed. He maintains that she ought not to have attended any such meeting and that he intended by his request to expose any wrong doing.

4. On 5 February 2010 Lancashire Constabulary informed the Appellant that it had already published on the "*Whatdotheyknow*" website its response to another Applicant's "near identical" information request for details of the Chief Legal Officer's duties during that week (it had in fact refused that request in reliance upon sections 30, 40 and 42 of FOIA) and that, as he was repeating a request already responded to and in the public domain, his request was considered to be vexatious under s. 14(1) FOIA. The Appellant informed Lancashire Constabulary by e mail on 2 February 2010 that the previous request had in fact been submitted by himself using a pseudonym, although the letter of 5 February does not refer to this fact. Lancashire Constabulary then informed the Appellant on 12 March 2010 that it had undertaken an internal review at his request and the review panel had also considered his request to be vexatious under s. 14(1) FOIA. The internal review letter mentioned that, inter alia, this was because the request was linked to issues "*which are the subject of matters already investigated by/or presently being investigated by the Professional Standards Department and others*".

5. The Appellant told the Tribunal that he had used a pseudonym in his original request simply because other people on the website "*Whatdotheyknow*" use pseudonyms. He said he had used it before with other public authorities, but had only around the time of this complaint become aware that he could not appeal to the Information Commissioner about the refusal of information requested under a pseudonym, so he decided to tell Lancashire Constabulary that he and the original requester were one and the same person. He told the

Tribunal that he thought the application of s. 14(1) to his information request in these circumstances was a "red herring" designed to cover up the wrongful behaviour he was seeking to expose, although he did accept that there were circumstances in which repeat requests for the same information in different names might reasonably be regarded as vexatious. After the hearing the Appellant e mailed the Tribunal to say that he had checked his records and found that he had in fact used this psueudonym in correspondence with Lancashire Constabulary twice previously.

The Complaint to the Information Commissioner

6. The Appellant complained to the Information Commissioner on 30 April 2010. The Decision Notice records that the Appellant included in his letter of complaint a number of matters which fell outside of the remit of the Information Commissioner. On 17 August 2010 the Information Commissioner confirmed to the Appellant that the scope of his inquiry would be to determine if Lancashire Constabulary had appropriately applied s. 14(1) to his request.

The Decision Notice

7. In his Decision Notice dated 6 January 2011, the Information Commissioner detailed the scope of his investigation, and set out his analysis of s. 14 (1) FOIA and its application to the circumstances of this case. He referred to the principles set out in his guidance note on vexatious and repeated requests and concluded that s. 14(1) had been correctly applied to the information request by Lancashire Constabulary, with the effect that it did not have to provide the information requested because the request was vexatious. The Decision Notice records that the Information Commissioner received and relied upon certain representations made by Lancashire Constabulary in reaching his conclusion, in particular:
    (a) its description of the history and volume of information requests made by the Appellant, as set out at paragraph 28;
    (b) an assertion that the Appellant's complaints about the Chief Constable had already been investigated and found to be unsubstantiated, as set out at paragraphs 34, 42, 44, 51, 54;
    (c) that the Appellant's correspondence had been accusatory and derogatory in nature and had harassed staff, as set out at paragraph 38;

    The Information Commissioner relied upon these representations in finding that compliance with the request would create a significant burden for the public authority in terms of expense and distraction; that the request had the effect of harassing the public authority or causing distress to its staff; that the request could be characterised as obsessive and that it lacked value and/or a serious purpose. He was not satisfied that the request was designed to cause annoyance and disruption, but in all the circumstances he was satisfied that a reasonable public authority would find the Appellant's request vexatious.

The Powers of the Tribunal

8. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

9. Rule 15 (2) (a) (ii) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("The Rules") provides that the Tribunal may admit evidence whether or not it was available to a previous decision maker.

The Law

10. The relevant law in this appeal can be stated very shortly. Section 1(1) of FOIA states that a person who has made an information request to a public authority (in this case, Lancashire Constabulary) is entitled to be informed in writing whether it holds the information requested and, if it does, is entitled to have that information communicated to him. However, s. 14(1) FOIA states that a public authority is not obliged to comply with an information request if that request is "vexatious". The term "vexatious" is not defined further in the Act and is to be given its ordinary meaning. The Respondent has published awareness guidance to public authorities suggesting the correct approach to determining this question. That approach includes consideration of the factors set out at paragraph 7 above. The Tribunal has also made a number of decisions about the circumstances in which a request might be considered vexatious, although each First-tier Tribunal decision must be considered on its own facts and does not set a binding precedent.

The Issue for the Tribunal

11. The Tribunal must decide in this case whether the Information Commissioner acted in accordance with the law in concluding that Lancashire Constabulary had correctly applied s. 14 (1) of FOIA to the Appellant's request. The burden of proof lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the decision made by the public authority and upheld by the Respondent was wrong.

The Mode of Hearing

12. The Appellant requested an oral hearing, although the Information Commissioner asserted that the matter was suitable for determination on the papers. The Tribunal notes that under rule 32 of The Rules, the Tribunal must hold a hearing (by which it is meant an oral hearing) unless each party has consented to the matter being determined without a hearing and the Tribunal is satisfied that it can properly determine the issues without a hearing. Accordingly, the Tribunal had no discretion to order a paper hearing

unless all the parties agree to it and, conversely, if only one party requires an oral hearing the Tribunal has no option but to arrange one[1].

13. In this case, the Tribunal directed that the Information Commissioner need not attend the oral hearing. The Appellant objected to the non-attendance of the Information Commissioner's representative because he said he wanted to cross-examine him. The Tribunal noted that the Information Commissioner's representative was not a witness and therefore there was no right for the Appellant to cross-examine him.

14. The Information Commissioner did not provide the Tribunal with any additional submissions, authorities or skeleton argument for the hearing but informed the Tribunal and the Appellant that he relied upon the Decision Notice and Response to the Appeal. The Appellant provided the Tribunal with written submissions and also attended to make oral submissions.

The Evidence

15. In accordance with the directions of the Tribunal, the Information Commissioner prepared a paginated hearing bundle, running to some 150 pages, for the Tribunal hearing. The contents of the bundle were agreed with the Appellant and sent to the Tribunal on 30 March 2011, however the Appellant subsequently provided some additional evidence for the Tribunal, including a letter from the Chief Constable of Cheshire Constabulary to the Appellant, dated 17 February 2011, confirming that he had now been appointed to conduct an investigation into the Appellant's complaints pursuant to the Police Reform Act 2002. This was accompanied by a letter dated 26 April 2011 confirming the terms of reference of the investigation. These documents obviously post-date the Decision Notice. This additional evidence was served on the Information Commissioner by the Appellant, who confirmed that he did not object to its consideration by the Tribunal.

The Appellant's Case

16. The Appellant's case was set out in his Grounds of Appeal dated 24 January 2011, and supplemented by his written submissions to the Tribunal dated 13 May 2011 and by his oral submissions at the hearing. The basis of his application to the Tribunal may be summarised as follows:

(1) This request was made in the context of his concerns about alleged misconduct in the Lancashire Constabulary and Lancashire Police Authority;
(2) He had made complaints about the Chief Constable in 2008 which were required by the Police Reform Act 2002 to be independently investigated by another police force;
(3) At the time of his request the appropriate statutory procedure had not been set in train;
(4) He had become aware that a meeting had been arranged to discuss his complaint and had been informed that the Chief Legal Adviser had been

[1] The Upper Tribunal recently confirmed this interpretation of the rules (in the context of the analogous Social Entitlement Chamber Rules) in *AT v Secretary of State for Work and Pensions* (ESA) [2010] UKUT 430 (AAC).

invited to attend. He maintained that the discussion of his complaint by this forum was inappropriate and that her attendance would have been inappropriate. His information request was designed to elicit wrongdoing;

(5) Lancashire Constabulary had used s. 14(1) in relation to this request to try to cover up its wrong doing;

(6) The Information Commissioner had not carried out a sufficient investigation, but had relied upon "bare assertions" by Lancashire Constabulary in reaching the conclusions set out in the Decision Notice. In particular:

   (a) the Information Commissioner had accepted an assertion from Lancashire Constabulary that the tone of his letters was "acerbic" but the letters in the bundle for the Tribunal hearing were all appropriate in tone and content. The Information Commissioner had also inappropriately commented in the Decision Notice on the tone of the Appellant's correspondence to the Commissioner's office;

   (b) the Information Commissioner had accepted Lancashire Constabulary's assertion that he had made some 20 FOIA requests each generating additional complaints and queries but without requiring any corroborative evidence. This assertion was disputed by the Appellant. He accepts that he has made a number of information requests to Lancashire Constabulary but asserts that they were in relation to different matters and comments that the vast majority have been answered so cannot have been inappropriate and nor had s. 14(1) been invoked before this request;

   (c) the Information Commissioner had not taken any account of the documents he had provided showing that his complaint had not been investigated via the correct statutory procedure and had repeatedly referred in the Decision Notice to the investigation of his complaints having been completed when they had not.

(7) The Decision Notice demonstrates that the Information Commissioner is biased against him;

(8) Since the Decision Notice was issued, Lancashire Police Authority has agreed to appoint another police force to investigate the Appellant's complaints. The letters he had produced in evidence to the Tribunal demonstrated that this process was now in train and consequently the Information Commissioner was wrong to have concluded that his complaints had already been adequately investigated and that his request was in that context vexatious.

Conclusion

17. The Tribunal notes that the letters which Lancashire Constabulary wrote to the Information Commissioner during his investigation constitute evidence which the Information Commissioner, and now the Tribunal, must evaluate. The Tribunal rejects the Appellant's submission that there was "no evidence" upon which the Information Commissioner could rely but only "bare assertions" by Lancashire Constabulary. The Appellant is a lay person and the Tribunal would not expect him to be familiar with the law of evidence, however it appears to the Tribunal that the point he could legitimately make is one about the appropriate weight which should be attached to evidence which is either not corroborated or is contradicted by other evidence. The Tribunal rejects the Appellant's assertions that the Information Commissioner has demonstrated bias in this case.

18. The Tribunal has not seen all the correspondence between Lancashire Constabulary and the Appellant, however the emails and letters sent by the

Appellant and produced to the Tribunal in evidence (at pages 43, 45, 47, 49 of the bundle) are not, in the opinion of the Tribunal, accusatory, derogatory or harassing. They may come across as somewhat high-handed, however the Tribunal does not conclude that the tone or content of the letters produced in evidence is sufficient to support the Information Commissioner's conclusion at paragraph 41 of the Decision Notice that this request had the effect of harassing the pubic authority or causing distress to its staff. The Tribunal agrees with the Appellant that the tone and content of his correspondence with the Information Commissioner's own office (referred to at paragraph 41 of the Decision Notice) ought not to have been taken into account as evidence supporting the alleged vexatious nature of the Appellant's dealings with Lancashire Constabulary, although the tone and content of his correspondence with the Constabulary was clearly relevant evidence in considering the application of s. 14(1) FOIA.

19. The Appellant disputes the evidence provided to the Information Commissioner as to the volume of requests, the history of complaints and the allegation that each request then generated additional queries and complaints. The Tribunal is unable to determine whether the assertions made by Lancashire Constabulary and relied upon by the Information Commissioner are correct as no corroborating evidence in relation to volume and history has been produced to the Information Commissioner or to the Tribunal. It does not seem to the Tribunal that the Information Commissioner should be required to seek corroborative evidence from every public authority in every case, as the Appellant appears to suggest. However, where, as here, the history recounted by the public authority is disputed, it seems to the Tribunal that the Information Commissioner should take steps to verify the evidence provided by the public authority or to accord appropriate weight to evidence which is disputed but uncorroborated. The Decision Notice relies upon the evidence of history and volume to support the conclusion at paragraph 33 that this request, taken in context, would have the effect of imposing a significant burden on the public authority in terms of expense and distraction. Whilst the Tribunal does not find that there is sufficient evidence in the bundle to support the Information Commissioner's conclusions as to volume and history, the Tribunal does consider that the undisputed evidence of this request being repeated (as a result of the initial use of a pseudonym by the Appellant) is sufficient to support the Information Commissioner's conclusion in this regard.

20. The Decision Notice relies heavily on the assertion that the Appellant's complaints against the Chief Constable had already been investigated and found to be unsubstantiated. The Information Commissioner was not of course the competent body to form a view as to whether the Constabulary or the Appellant were correct in their assertions about the relevant procedure and the Information Commissioner's acceptance of the Constabulary's evidence was based on his (not unreasonable) assumption that the correct procedures for the investigation of the Appellant's complaint had been followed. The acceptance of this evidence is relied upon by the Information Commissioner to form his conclusions that the request had the effect of harassing the public authority or causing distress to its staff (paragraph 42), that the request was obsessive (paragraph 44), that the request lacked value and/or a serious purpose (paragraphs 51 and 54) and that a reasonable public authority would refuse to comply with the request on the grounds that it is vexatious (paragraph 55).

21. The Appellant has of course argued throughout this matter that the correct statutory procedures for the investigation of his complaint about the Chief Constable had not been followed, and the documentary evidence provided to the Tribunal confirms that an inquiry under the terms of the statutory scheme has only recently commenced. This information post-dates the Decision Notice and fundamentally undermines the Information Commissioner's conclusions as detailed above. The Tribunal is now able to take account of it and finds that the Information Commissioner's conclusions cannot stand in the light of this new information.

22. The Tribunal has concluded that, in view of the information now available, the Appellant's request would not be regarded as vexatious by a reasonable public authority and accordingly that s. 14(1) was not correctly applied in this case. The Tribunal therefore sets aside the Decision Notice and requires Lancashire Constabulary either to comply with s. 1(1) of FOIA and either provide the information requested or inform the Appellant if it relies on any exemptions from disclosure.

23. The Appellant told the Tribunal that he had already been informed that the Chief Legal Adviser did not attend the meeting about his complaint but that he does not believe what he has been told. The Tribunal regrets that this is the case, but doubts that the Freedom of Information Act regime is the means by which his doubts can be allayed. The Tribunal expresses the hope that the ongoing independent investigation into his complaint will resolve the Appellant's concerns.

Signed: Dated: 27 July 2011

Alison McKenna
Tribunal Judge

FREEDOM OF INFORMATION ACT 2000 (SECTIONS 50 and 58)

Appeal Number: EA/2011/0015

SUBSTITUTED DECISION NOTICE

Date: 26 July 2011

Public authority:

Lancashire Constabulary.

Name of Complainant:

Mr Tony Wise.

The Substituted Decision

1. For the reasons set out in the attached Tribunal's Decision of 27 July 2011 this Decision Notice is substituted for the Decision Notice issued by the Information Commissioner under number FS550311574 on 6 January 2011.

Steps required

2. The Public Authority must within 35 days of this Notice comply with s. 1(1) of the Freedom of Information Act 2000, by confirming or denying to Mr Wise that it holds the information requested and either disclosing to Mr Wise the information requested or informing him that it refuses to disclose it in reliance upon an exemption under the Act.

Alison McKenna
Tribunal Judge

Dated: 27 July 2011