IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0060
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50304283
Dated: 7 February 2011

Appellant:	**Dr Gary Duke**
First Respondent:	**Information Commissioner**
Second Respondent:	**University of Salford**
On the papers on:	**7 July 2011 at Field House, London**
Date of decision:	**26 July 2011**

Before

ROBIN CALLENDER SMITH
(Judge)

and

PIETER DE WAAL
DR HENRY FITZHUGH

Representation:

For the Appellant: Dr Gary Duke in person
For the first Respondent: Richard Bailey, Solicitor, on behalf of the Information Commissioner
For the second Respondent: Rosemary Jay, Solicitor, Pinsent Masons LLP, for the University of Salford

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0060
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter:

FOIA

Vexatiousness or repeated requests s.14

Cases:

Ahilathirunayagam v London Metropolitan University [EA/2006/0070];*Carpenter v The Information Commissioner [EA/2008/0046]; Coggins v IC [EA/2007/0130] and Welsh v IC [EA/2007/0088].*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 February 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is unusual. It is the first appeal against a public authority who has decided to refuse requests for information in a wider context of a substantial number of FOI requests being received during a specific period. The Second Respondent ("the University) believed the requests were, to a significant degree, associated with each other.

2. It is the FOIA equivalent of concluding that these multiple, associated requests amount – in effect – to a Denial of Service attack (DOS) in Internet terms.

3. The University's conclusions about this linkage came not only from the timing of the requests for information – a small number of individuals submitting a volume of requests roughly equivalent to a years' worth during the space of about three months – but also because of specific similarities in the information being requested.

4. Between the end of October 2009 and early February 2010 the University received over 100 requests for information – submitted by 13 individuals – all but three of which was submitted via the WhatDoTheyKnow.com ("WDTK") website.

5. This represented a significant increase in the number and rate of requests compared to the volume received prior to October 2009.

6. By way of comparison the University received 117 requests during the whole of 2008 submitted by 78 different requestors, none of whom had submitted more than three requests during that year. In the year up until October 2009 it had received 78 requests.

7. Prior to the sudden increase in requests the University had not received any requests via the WDTK or any other FOI website. The University concluded that the receipt of so many requests so quickly via the same route had not occurred only by chance.

8. The requests originated from a comparatively small number of individuals who, the University believed, had connections with the Appellant.

9. The Appellant was a former member of staff at the University who had recently been dismissed by it. The University considered the requests to be a concerted attempt to disrupt its activities by a group of activists undertaking a campaign.

The requests for information

10. The Appellant submitted a series of 13 requests for information from the University via WDTK between 3 November 2009 and 13 November 2009. Two of those requests made on 3 November 2009 were refused on 10 November 2009 on the basis that the costs for compliance with the requests would exceed the statutory limit of £450. The Appellant requested an internal review of that response on 14 December 2009 and that was completed – and the outcome communicated to him – 7 April 2010. The internal review upheld the decision to refuse the requests but amended the grounds for refusal to section 14 (1) FOIA, that the requests were vexatious.

11. The Appellant submitted five requests on 11 November 2009 on the basis that those requests – as resubmitted – were refined versions of his earlier requests so that they stayed below the costs limit. Those requests were refused on 11 December 2009 on the basis of section 14, that they were vexatious. The Appellant requested an internal review of the University's response on 14 December 2009. The internal review of 7 April 2010 upheld the decision to refuse the requests as vexatious.

12. The Appellant submitted six requests on 11 November 2009 which were refused on 11 December 2009 on the basis of being vexatious. He requested an internal review on 14 December 2009. On 7 April 2010 the University upheld the decision to refuse the request as vexatious.

The complaint to the Information Commissioner

13. On 29 March 2010 the Appellant contacted the Information Commissioner ("IC") and complained about the way his requests had been handled. He wrote again to the IC on 28 April 2010 asking the IC to consider two points: (1) his 11 November 2009 requests had been refused as vexatious when they had been submitted following the advice of the University when it refused his earlier requests and (2) he had not received a response to his requests for an internal review.

14. The IC observed that the Appellant's second submission, received on the IC's standard complaint form, contained identical wording to the original 29 March 2011 letter of complaint which had been submitted prior to his receipt of the University's internal review. The IC noted that the Appellant's comments – that he had not received a response to his request for an internal review – may have been the result of the failure properly to edit the later complaint document as by that time the University had provided its internal review to 12 of his 13 requests. The University confirmed that its internal review applied to all of the refused requests.

15. The IC received a number of complaints from various parties who had requests similarly refused as vexatious by the University at around the same time. The IC corresponded with the University between May and November 2010 in relation to all the complaints.

16. The IC wrote to the Appellant on 31 August 2010. He indicated that – in association with a number of related complaints – he intended to investigate the university's application of section 14 FOIA to the Appellant's requests. The IC referred the Appellant to guidance on the ICO website about the use of section 14 FOIA and drew his attention to the five tests commonly applied when implementing that guidance.

17. The IC told the Appellant that the University was arguing that his, and other, requests were part of a campaign against the University and invited his comments.

18. The Appellant responded on 6 September 2010. He argued that his requests had a serious purpose – connected to a forthcoming Employment Tribunal – and could not be considered as harassing the University or causing distress to staff as none were mentioned by name. He rejected the suggestion that his requests were obsessive and argued that his serious purpose justified the requests and that the University was refusing them as vexatious in an attempt to avoid providing the information he wanted for the pursuit of his case in the Employment Tribunal. He alleged that members of the University's FOI staff were seriously deficient in relation to his pursuit of the information and that the University's dealings with him in relation to requests under the Act and the Data Protection Act implied intervention at a senior level within the University on political grounds.

19. The IC wrote to the Appellant again on 29 September 2010 requesting clarification of the allegations about the conduct of the University's FOI staff. The Appellant responded on 10 September 2010 enclosing copies of correspondence associated with a request for his personal data under the Data Protection Act. The IC replied on 1 October 2010 advising the Appellant that – as the allegations related to a request made under the

Data Protection Act – they would not be considered as part of his investigation into the University's refusal of his FOI requests (but that the Appellant was entitled to bring a complaint to the IC about those specific matters if he so wished).

20. The Appellant wrote to the IC on 16 November 2010. He enclosed copies of internal e-mails and a link to a recent response by the University to a request on the WDTK website which, he asserted, showed that the University's Registrar/Deputy Vice Chancellor, and the Vice Chancellor, were exercising undue influence over the FOI process. He commented:

"I am fully aware that as Head of Information Governance [name] *is, with others working alongside him in similar roles, responsible for the processing and if necessary, for the refusal of initial FOIA requests.* [Name] *is also responsible for conducting internal reviews in a timely fashion according to the FOI Act legislation.*

….

"[Deputy Vice Chancellor] *should play no role in the refusal of legitimate FOI requests, and I see his involvement as very serious indeed. It may also serve to explain why all my requests have so far been refused."*

21. The IC found as of fact that the Appellant was known to be the author of the series of newsletters, critical of the University, entitled "the Vice Consul's Newsletters". These had been circulated around the University in the first half of 2009. The Appellant acknowledged his authorship of those newsletters and described them as "satirical". His role in producing and circulating them was partially responsible for his dismissal from his post as a part-time lecturer at the University. The Appellant had taken that matter to an Employment Tribunal which – at the time of the decision notice – had not yet begun to hear the case. The Appellant's position was that he had made the matter public and discussed his dismissal and his forthcoming Employment Tribunal – together with other topics including various matters connected to the University in an online blog (http://vagrantsinthecasual wardoftheworkhouse.blogspot.com).

22. The IC considered the context and history of the requests as well as the strengths and weaknesses of both parties' arguments in relation to elements of the five factors used to consider whether a reasonable public authority could refuse to comply with requests on the grounds that they were vexatious. Those five factors were:

- whether compliance would create a significant burden in terms of expense and distraction

- whether the request was designed to cause disruption or annoyance

- whether the request had the effect of harassing the public authority or its staff

- whether the request could otherwise fairly be characterised as obsessive or manifestly unreasonable

- whether the request had any serious purpose or value

23. The IC accepted that the surge in the number and rate of FOI requests received – many which were complex and multifaceted – would create a situation where dealing with it would be a burden both in terms of cost and staff resources in processing and responding to the requests. The University was unlikely to have allocated staffing resources to FOI compliance beyond those necessary to deal with its normal level of enquiries.

24. The IC concluded that the University had not been able to demonstrate indisputable links between all the parties whose requests were refused. The IC was satisfied, however, that a significant number of requests were related to topics raised by the Appellant either overtly or via anonymous documents including "The Vice Consul's Newsletters". The Appellant's blog website "Vagrants in the Casual Ward of a Workhouse" continued to campaign about related matters, criticised the University and discussed the circumstances of the Appellant's dismissal and forthcoming Employment Tribunal and other hearings. It made reference to the FOI requests submitted to the University by the WDTK website and included some comment on the University's responses.

25. The IC noted there was a different, anonymous blog called "the rat catchers of the sewers" – the 'Ratcatchers' blog – which adopted a similar tone and was substantially directed against the University. That blog could only be viewed by invitation and was password-protected. The IC had been unable to view any postings more recent than the cached examples provided by the University dated from December 2009 to February 2010.

26. The IC concluded that given the unusual wider circumstances surrounding the requests he could give weight to the argument that compliance with the Appellant's requests could be considered in conjunction with the other WDTK requests and would create a significant burden in terms of expense and distraction.

27. The IC considered the use of pseudonyms in requests that were made of the University. He found – having unsuccessfully requested suitable proof of identity from 'James Brown' – that there were reasonable grounds for concluding that that name was a pseudonym and that it was also reasonable to suspect that 'Roger Norvegicus' was also a pseudonym.

28. The IC found that the surge in requests was designed to cause disruption or annoyance and that it was more likely than not that the Appellant was a significant causal factor in that surge.

29. In terms of whether the requests had the effect of harassing the University or its staff the IC acknowledged that named individuals would be likely to have felt harassed and that the Appellant bore some responsibility for any associated harassment.

30. The issue of whether the requests could be characterised as obsessive or manifestly unreasonable was considered. The IC did not consider the Appellant's own requests were obsessive or otherwise manifestly unreasonable.

31. The IC gave some weight to the Appellant's arguments that his request had a serious purpose and value but did not consider there was sufficient weight to outweigh the combined weight of the University's arguments on this point.

32. He concluded that the University had correctly applied section 14 (1) in refusing the Appellant's requests as vexatious. He found some significance in the fact that the Appellant was the originator of the first requests to have been submitted via WDTK. The University had not received any such requests via this route or any other FOI website prior to the Appellant's first requests. At Paragraph 82 of the Decision Notice he stated:

"It cannot therefore be coincidental that [the Appellant] has used this facility and has immediately been followed by a number of others, some of whom are known associates. The use of FOIA requests in this fashion, noting also the use of pseudonyms, may fairly be characterised as an abuse of the right of access to information provided at section 1 of the Act."

The appeal to the Tribunal

33. The Appellant's grounds of appeal in respect of the IC's decision were presented in a clearly-typed 12-page, 82-paragraph document.

34. He submitted a 31-page, 111-paragraph witness statement dated 7 June 2011 that set out in a comprehensive fashion considerable background detail and his arguments about why the IC's and the University's decision was wrong. His final submissions were in a three-page 16 paragraph document dated 5 July 2011.

35. He disputed that two staff members might have felt harassed because of FOI requests made by individuals unknown to them on the WDTK website. He did not accept that they were harassed because of his actions in authoring the Vice Consul's Newsletters nor did he bear any responsibility for what the IC described as their harassment. If they felt harassed that was because they were generally unpopular.

36. The satirical Vice Consul's Newsletter was a platform for raising pertinent issues when the existing mechanisms at the University were not functioning.

37. The University had not proved conclusively that his requests were part of a wider vexatious campaign. The University had chosen to make unfounded allegations against him.

38. In terms of the 'Ratcatchers of the Sewers' blog he believed this was a smokescreen set up by the University (and accepted by the IC) in order to detract from the issue of the blanket refusal of any more of his FOI requests. He did not believe the IC had sufficiently proved or made the case that compliance would have created a significant expense to the University in terms of expense and distraction. Simply stating that did not prove the case.

39. He pointed out that the IC had a meeting with the University and the IC accepted – in correspondence – that this was "unusual". He believed that meeting gave a distinct advantage to the University in making their case and created an inequality of arms which, in effect, breached the Article 6 ECHR principles and which could be reviewed by the Tribunal in the appeal.

40. He believed the decision to refuse his requests – as characterised by the IC's office – was "borderline". He maintained that the University had deliberately misinformed the IC in terms of harassment of two individuals who had never made a complaint about this against him. The IC had been wrong to accept the University's claim that he was part of some wider vexatious campaign against the University. That had been based on untruths and deliberate misinformation provided to the IC by the University's Deputy Vice Chancellor.

41. His final point was that the general inequality of arms had been further widened by the refusal of the Tribunal to provide un-redacted evidence and information that both the IC and the University had used to make their case. That had placed him at a distinct disadvantage and provided him with compelling grounds for any future appeal in relation to the matter.

42. The Tribunal also received an open four-page witness statement from Matthew Stephenson, the University's Head of Information Governance, dated 7 June 2011. He has held that post for 18 months. Previously he performed the same role as Head of Compliance for around three years.

43. He stated that the vexatious requests for information had taken a substantial amount of his and his assistant's time as well as that of senior colleagues. At the time of dealing with the requests he had felt harassed due to the volume and repetitive nature of them as well as the obvious use of pseudonyms. He took his job very seriously and where there was a genuine request for information he strived to ensure it was dealt with thoroughly. He felt his ability to do the job was impaired by the weight of requests experienced at that time.

The questions for the Tribunal

44. The Tribunal had to decide whether, in the context of all matters being presented in this appeal, the University and the IC had been correct to determine that the Appellant's conduct was vexatious in terms of section 14 (1) and that it was legitimate to refuse to respond further to the requests made by him.

Conclusion and remedy

45. The Tribunal makes it clear that the material presented to it by the IC and the University was all contained in the open bundle provided for this appeal. The Tribunal has not considered any un-redacted evidence or secret information in coming to its conclusions.

46. The elements of the IC's decision notice have been set out extensively above because – as the IC acknowledges – this was an unusual case. It involved considering the context and history of requests to assess whether they would fall into specific categories identified by him more generally in section 14 cases. These were matters such as whether compliance with the request would create a significant burden on a public authority in terms of expense and distraction, whether it would cause disruption or annoyance, whether it had a harassing effect, whether it could be characterised as obsessive or manifestly unreasonable and finally whether the request had any serious purpose or value.

47. The Tribunal had no difficulty in concluding that the Appellant had, together with others, mounted a campaign in the stream of requests for information that amounted to an abuse of the process.

48. The Tribunal concludes that the closest analogy to what was occurring with these requests was what – in Internet terms – would be called a Denial of Service attack (DoS). That is when a website is deliberately inundated with incoming information in an attempt to cause it to crash or become inoperative by overloading it.

49. In the three-month period between the end of October 2009 and early February 2010 the University received slightly over 100 requests for information. Previously, during the whole of 2008, the University had received 117 requests submitted by 78 different requestors. For 2009 up until October, it had received 78 different requests.

50. Those requests originated from a comparatively small number of individuals and the Tribunal finds that the University and the IC were correct to conclude that the requestors had connections with the Appellant who was a former member of staff who had recently been dismissed. It is a fair characterisation that this was a concerted attempt to disrupt the University's activities by a group of activists undertaking a campaign.

51. The Tribunal considers it significant that the University instigated proceedings in the United States and the United Kingdom to try to determine the origin of the contributions to the 'Ratcatcher's Blog'. The blog was hosted by US company and it was necessary to apply to the US courts for an order to obtain the holders of the IP address associated with the creation of the blog. The hosting company released the information on the basis of the University's submissions to the US courts, making a formal order unnecessary.

52. That information confirmed that the IP address was held by Virgin Media Limited. An application was made in the United Kingdom to obtain an order for Virgin Media to disclose the identities of the subscribers associated with the IP address. The court was satisfied that there was a *prima facie* case of defamation and made an Order on 21 January 2011 for disclosure.

53. The judge in that matter had invited the Appellant to attend the court hearing and considered submissions made by his representative on the question of whether the material should be regarded as defamatory. The Appellant was invited by the judge to confirm or deny authorship of the site, which would have made the Order unnecessary, but the Appellant refused to do so.

54. In compliance with the Order, Virgin Media provided confirmation that the articles on the blog were submitted from an account registered to the Appellant's wife at the Appellant's home address.

55. The University subsequently began defamation litigation against the Appellant (which is on-going). In his defence in this litigation the Appellant accepted that he was the author of the blog.

56. The decision of the IC to meet with the University, while it may be unusual, is within the IC's powers of investigation. The Tribunal declines to characterise this as creating an inequality of arms that created any unfairness in respect of the Appellant. The IC was, after all, seeking to assess whether the Appellant had been characterised unfairly as vexatious.

57. For all these reasons the Tribunal finds, on the balance of probabilities, that the University's and the IC's decision in relation to the Appellant's requests being vexatious and falling within section 14 (1) was correct.

58. Our decision is unanimous.

Robin Callender Smith

Judge

26 July 2011