IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0238**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50364598
Dated: 22nd. September, 2011

Appellant: Jbol Ltd.

First Respondent: The Information Commissioner

Second Respondent: The Medicines and Healthcare Products Regulation Agency

Date of Hearing: 3rd. April, 2012

Date of Decision: 26th. April, 2012

Before

David Farrer Q.C.(Judge)

and

Pieter de Waal

and

Henry Fitzhugh

Attendances:

The Appellant appeared by its director, Mr. Orde Levinson.
The Respondents did not appear but made written submissions.

Subject matter:

Vexatious Requests: FOIA S.14(1)

Dispensation for Notices : FOIA s.17(6)

Cases:

Rigby v IC and Blackpool NHS Trust EA/2009/0103;
[2011] 1 Info LR 643;
Welsh v ICO EA/2007/0088;
Gowers v ICO EA/2007/0114

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22nd. September, 2011 and dismisses the appeal.

No Action Required

Dated this 26th. day of April 2012

Signed

David Farrer Q.C.

Judge

Introduction

1. Mr. Orde Levinson is a director and evidently the driving force of the Appellant company. It manufactures urine sample containers and its operations are regulated by the Second Respondent ("the MHRA"). Regrettably, relations between Mr. Levinson and those with whom he dealt within the MHRA deteriorated markedly over recent years in the course of disputes as to the compliance of a Jbol product with required standards and the requirements applicable to a product marketed by a competitor. These disputes have led to High Court litigation and a failed prosecution of Jbol Ltd., we were told.

2. The details and the merits of these disputes are irrelevant to the determination of this appeal but they, in particular the dispute regarding the Jbol product, provide the subject matter of, if not an explanation, for the extraordinary correspondence, over a period of eighteen months, between Mr. Levinson (on behalf of the Appellant) and the MHRA.

3. Between September, 2008 and February, 2010, Mr. Levinson made twenty - nine requests and issued eighteen formal complaints against MHRA, five of which were referred to its Independent Complaints Adviser (ICA), two being partly upheld. To the tone of the requests we shall refer later. In October, 2009, immediately before the notice referred to in the next paragraph, he sent around forty – seven letters and e mails to the MHRA. It is a tribute to his resilience and energy that he still had time to keep his business afloat.

4. On 20th. November, 2009, the MHRA issued what purported to be a notice under s.17(6), to the effect that the requests received were vexatious and that no response was required nor would be given to further requests on a linked range of subjects.

The request for information

5. On 10th. February, 2010. The Appellant made the following further request[1]:

". . . . . please provide me with
(a) date, name of person making contact and to whom at the Irish competent authority, the IMB, about myself my company or my products from Jan 2009 to 31st Jan 2010;

(b) copies of all communications pertaining to (a);

(c) confirmation that Mr Petrie contacted the IMB and when in these last 6 months re , me or my company or its products, the dates of such contact, whom he spoke to and the contents of any correspondence or notes."

[1] The request has been reformatted in the interests of clarity but without alteration of content.

6. It is accepted that this request, viewed in isolation, could have been properly answered from about thirty minutes` research. It is reasonably framed and, of itself, has none of the characteristics of a vexatious request. Mr. Levinson argues that, in that case, it cannot possibly be treated as vexatious and should have been answered without more ado, let alone the lengthy and time – consuming proceedings to which it has led.

7. The MHRA did not respond to this request, relying on the notice issued on 20th. November, 2009.

The complaint to the Information Commissioner

8. The Appellant contacted the ICO and agreed the scope of his complaint on 31st. January, 2011. For our purposes, it can be briefly defined :

- Was the request dated 10th. February, 2010 vexatious ?
- Did the notice dated 20th. November, 2009 entitle the MHRA to provide no response to that request by virtue of FOIA s.17(6) ?

The Decision Notice indicated that the ICO`s answer to both questions was "Yes".

9. The reasons for the ICO`s decision were contained in a confidential annex to the Decision Notice. It is not clear to the Tribunal why they could not be published in the normal way. It is highly desirable that such reasons should be readily accessible to the public, unless there is a powerful justification for confidentiality. That said, this is not a matter which affects the Tribunal`s decision.

10. It is unnecessary to deal in detail with the reasons for that decision. The ICO set out the familiar criteria appearing in his published guidance[2] and Tribunal authorities and measured against each his findings in this case. He concluded that the request must be viewed in the context of the earlier sequence of requests and responses. On that basis, he found it to be burdensome, harassing and obsessive, though he found that its objective, a resolution of what Mr. Levinson believed to be unfounded criticisms of his product, was serious and sincerely pursued.

[2] As had the MHRA in its notice of 20th. November, 2009.

The appeal to the Tribunal

11. Jbol appealed by notice dated 13th. October, 2011. Mr. Levinson submitted a very substantial file of documentary evidence, which the Tribunal members read before the hearing date. It included Mr. Levinson`s account of his earlier dealings on other appeals with the judge in this appeal in the form of his lengthy application for permission to appeal an earlier ruling (Appellant bundle 191 1 – 28). That was, of course, quite irrelevant to the determination of this appeal but, since he included it, all Tribunal members read it, before meeting.

12. Mr. Levinson further introduced extensive material relating to the MHRA policy on handling unreasonable requests, the Department of Health internal guidance on FOIA requests and the DBERR Code of Compliance for Regulators. He exhibited a very large quantity of e mail and postal correspondence between the Appellant and the MHRA and internal MHRA e mails which included the messages to which this Decision refers at paragraphs 25 and 29 and footnote 5. It was not easy to follow the relevance of some of that material.

13. As stated already, both Respondents answered Jbol`s case in written submissions but did not appear. In this case that was clearly a reasonable course since the evidence of vexatiousness, if such it was, lay in the submitted documents.

14. Jbol`s case, as presented by Mr. Levinson, involved the proposition that the Tribunal should look no further than the request said to be vexatious, when deciding whether it was. On that basis, this request was not vexatious, an assessment with which it was impossible to quarrel.

15. He further argued that it would have been much simpler, from the MHRA`s standpoint, to provide the information and move on. That is really the same point put slightly differently.

16. As to the nature of the request of 10th. February, he asserted that it was different from the earlier requests, so that the notice under s.17(6) did not absolve the MHRA from responding. More significantly, it precluded a finding of vexatiousness.

17. He asserted that he was provoked by MHRA responses into any unduly emphatic language.

18. The health interests that he was pursuing, namely whether a sample container was sterile and whether certain containers were required to be sterile, justified untiring tenacity, when ignored or suppressed by MHRA.

The Principles to be applied

19. The tests proposed in the ICO`s guidelines are clearly helpful. They are set out in the Decision Notice and are closely followed by the Tribunal[3]. We do not need to recite them verbatim here; they can be summarised as :

- Burdensome – on resources ?
- Harassing ?
- Obsessive ?
- Serious in purpose ?
- Deliberately disruptive and/or annoying ?

20. How far any of these factors comes into the reckoning depends on the particular case. It is not necessary to show that, say, four out of five tests are passed in order to refuse a request on the ground of vexatiousness. In an extreme case a request might demand such enormous resources or be so utterly offensive to those called upon to respond to it that those factors would, of themselves, justify reliance on s.14.

21. Contrary to Mr. Levinson`s submission, it is well – established law[4] and plain good sense that a request must be judged by reference to any previous history of relations between requester and public authority. Looking at the five tests, only the first could be answered sensibly without reference to the previous history.

22. Whatever view is taken of the burden imposed on the MHRA by the long stream of repetitive and often discursive requests which led up to the request under examination, that request could have been dealt with in thirty minutes. It may well be entirely reasonable when judging the burden to look further at preceding or predictable future requests and the staff time that they demanded or will demand but, for reasons which will become obvious, it is unnecessary to reach a decision on that point in this appeal.

23. Neither Respondent has questioned the seriousness or sincerity of Mr. Levinson as the human face of Jbol in pursuing his requests. Whatever we think of his methods of doing so, we do not differ from their view. Indeed, quite the reverse, his state of mind seemed

[3] *Rigby v IC and Blackpool NHS Trust* EA/2009/0103; [2011] 1 Info LR 643
[4] *See e.g., Welsh v ICO EA/2007/0088 ; Gowers v ICO ea/2007/0114*

to us that of a man utterly dominated by a sense of grievance (whether justified or not is not a matter for us) and willing to forsake normal professional constraints as a result.

24. We think that the most striking features of the series of requests material to our judgement can be seen as relevant to questions of harassment, obsession and deliberate disruption, annoyance and offence.

25. Those features may be shortly described as :
    - Sheer volume (see paragraph 3 – communications not amounting to fresh requests are clearly relevant to these issues).
    - Repetitiveness and refusals to accept an answer as final.
    - A certain lack of clarity coupled with gross prolixity.
    - Highly offensive comparisons of the conduct of MHRA staff with Nazi officials and party leaders, imputations of bribery and corruption and claims that the MHRA behaved corruptly like the Health authorities who failed to prevent the gross abuse and finally the murder of “Baby P” or fraudulently in the context of the Fraud Act, 2006.

26. It is unnecessary to deal with the second and third points in detail, given the evidence as to the last.

27. In paragraph 34 of the Decision Notice the ICO cites eight examples of Mr. Levinson`s literary style relevant to this point. We noted others in the correspondence with which we were supplied. In the Decision Notice extracts, Mr. Levinson makes the “Baby P“ allusions and links them with the attitudes of concentration camp guards. He asks if MHRA staff are bribable “in terms of the UK corruption laws”. He states that they are corrupt. He talks of “mafiosa blackmail” by the MHRA. He relates the MHRA to the Star Chamber and speaks of its “institutionalised violence”. He labels as the “Wannsee conference” a meeting which apparently considered how to deal with the volume of communications from Jbol to various agencies and proposed a single contact point. The Wannsee conference was, of course, the infamous meeting in January, 1942 at which Nazi party leaders formulated the first version of the “final solution of the Jewish question”, namely the extermination of Jews in all German – controlled territories. Mr. Levinson explained that he saw the MHRA as bent on the extermination of Jbol. He speaks of the allegedly anti democratic rules or policies pursued by the MHRA as the

Nuremberg Laws - statutes, it will be recalled, passed from about 1935, designed to identify a Jew and to deprive Jews of basic human rights and freedoms.

28. Discovering that MHRA staff have played around with his name in internal e mails (which they should not have done, even as an office joke) he surmises the growth of anti – Semitism in the institution.[5]

29. There is a considerable body of such material, especially allusions to Nazi attitudes, in Mr. Levinson`s communications with the MHRA. He described his use of such images as "slightly intemperate" and observed that there was no explicit evidence that they caused offence. He asserted that he was provoked to use such metaphors.

30. That (the lack of evidence) may be so but we cannot imagine a clearer case for a public authority to conclude that a requester is insulting and harassing its staff and defaming the authority. Taken as a whole, we judge Mr. Levinson`s communications with the MHRA to be quite outrageous in tone and a gross abuse of the FOIA regime. Moreover, he seemed oblivious to the fact that, as a Jew of considerable standing and talent, his grotesquely expressed accusations, coupled with references to the fate of family members in the Holocaust, might be all the more offensive and unacceptable.

31. We do not consider that the silly frivolity of the e mails to which we refer detracts from that point in any way. Individuals targeted in correspondence may have felt very differently when first confronted by such allegations.

32. Before leaving this topic, we wish to record our concern at such internal e mail traffic mocking, even lightly, an admittedly tiresome and unreasonable member of the public with whom staff had to deal over a long period.

FOIA s.17(5) – (7)

33. As indicated at paragraph 4, the MHRA did not respond to the request of 10th. February, 2010 in reliance on s.17(6), which dispenses with the requirement of notice where three conditions are satisfied -

"(a) the public authority is relying on a claim that s.14 applies,

[5] It should be said that the tone of some e mails and the nature of the name changes are disrespectful and improper in such an environment but not perceptibly anti – semitic. Furthermore, the dates of such e mails do not appear consistent with any suggestion that they provoked Mr. Levinson `s more insulting utterances. Much of the internal MHRA e mail material is a reasonable reaction to the barrage to which MHRA was subjected.

(b) the authority has given the applicant a notice, in relation to a previous request for information that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

34. Paragraph (a) is satisfied and it may well be that (c) is also. As to (b), a notice must satisfy the conditions set out in s.17(7). It must specify any procedure provided by the authority for the handling of complaints or state that there is no such procedure (s.17(7)(a)) and must contain particulars of the right conferred by s.50 of FOIA (s.17(7)(b)).

35. Mr. Gallagher`s letter of 20th. November, 2009 ("the notice") refers at the end to the right of complaint to the ICO (s.50). It also refers, in the immediately preceding passage, to dealing with complaints against staff in accordance with procedures previously supplied to Mr. Levinson. It is not clear to the Tribunal that such a procedure is the same as a procedure for handling complaints over the handling of information requests. That being so, there was a failure to comply with s.17(7)(a) and, to that very limited extent, the MHRA breached FOIA by failing to serve notice again after 10th. February, 2010, since it could not rely on the provision for dispensation.

36. So the answer to the second question posed in paragraph 8 is "No".

37. That breach does not in any way affect the finding that the request dated 10th. February, 2010 was vexatious. It has no practical effect.

38. Our decision is unanimous.

[Signed on original]

David Farrer Q.C.
Judge
26th. April, 2012

THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL, PURSUANT TO RULE 42 OF THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (GENERAL REGULATORY CHAMBER) RULES 2009 ("THE 2009 RULES")

EA/2011/0238

B E T W E E N:-

JBOL LIMITED

Applicant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

THE MEDICINES AND HEALTHCARE PRODUCTS REGULATION AGENCY

Second Respondent

RULING ON AN APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

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1. The applicant requested from the MHRA on 10th. February, 2010 information which is set out in paragraph 5 of the Tribunal`s Decision.

2. This request followed a long sequence of requests and correspondence which is very shortly summarised in the Decision at paragraphs 23 and 24. The MHRA had purported to serve notice on the Applicant under FOIA S.17(5) on 20th. November,

2009 that it relied on a claim that s.14 applied to an earlier request, hence it served no such notice in response to the request referred to in paragraph 1, in reliance on s.17(6) .

3. The Tribunal concluded that, taken in isolation, which, the Applicant submitted, was the correct approach, the request was entirely reasonable but that the MHRA was entitled to have regard to the previous history of requests in deciding whether to treat it as vexatious.

4. That conclusion is consistent with earlier decisions of the Tribunal, with the ICO`s suggested criteria and, most importantly, with common sense.

5. Those previous requests had, in the Tribunal`s judgement, been obsessive, on several occasions profoundly offensive and oppressive in their frequency, amounting to harassment. It had no hesitation in upholding the Decision Notice. Our reasons are clearly set out in the Decision.

6. The Applicant, with characteristic thoroughness, submitted no fewer than fifty - two grounds of appeal supported by a wealth of argument. In those grounds he attacked the decision from every possible angle as to matters of fact and law and further criticised in very frank terms my impartiality and integrity. Inevitably, those grounds were discursive and repetitious and, especially in so far as they strayed into other appeals, irrelevant. I have read them carefully but have no intention of dealing with them individually.

7. The assertion that the tribunal refused to issue witness summonses for various people (Ground 27) is simply wrong. Following interminable requests and demands addressed to the tribunal the Applicant was invited to make any application for witness summonses at the hearing. He did not do so. Since none could apparently give relevant evidence on the issues raised on the appeal, that failure seems, in the event, immaterial.

8. I shall not review the Decision pursuant to Rule 44 of the 2009 Rules.

9. If this application raises any issues of law for the purposes of Rule 42(5)(b), for example, whether the Tribunal must view the request in isolation, I am satisfied that no error of law was involved in our decision.

10. Accordingly, I refuse this application.

11. The Applicant has the right to apply to the Upper Tribunal for permission to appeal against the Decision within one month of this refusal. Any application must be in writing and must conform with the requirements of Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

12. The address for service of such an application is –

Upper Tribunal (Administrative Appeals Chamber)
5th Floor Rolls Building,
7 Rolls Buildings, Fetter Lane,
London, EC4A 1NL.

[Signed on the original]

David Farrer Q.C.

Tribunal Judge

1st. June, 2012

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2011/0238

B E T W E E N:-

JBOL LTD

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Ruling on an Application for Permission to Appeal a Refusal to recuse myself.

1. This application is refused.

2. As to Rule 43(1), the Tribunal does not review its decision as to recusal. No error of law was involved.

3. The Tribunal`s reasons for refusal were set out in its ruling dated 16th. December, 2011, a copy of which is attached to this Ruling. They stand as reasons for refusing permission to appeal.

4. I held no bias against the applicant and no reasonable and informed observer would have thought otherwise. The applicant fails to distinguish between an adverse ruling and judicial hostility.

5. This application demonstrates no error of law in this decision.

6. The Applicant has a right to apply in writing, in accordance with Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008, to the Upper Tribunal for permission to appeal against this refusal, within one month of receiving this ruling.

[Signed on original]

David Farrer Q.C.

Judge

14th. May, 2012