



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0040

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50418745

Dated: 15 February 2012

Appellant: Peter Beswick

Respondent: Information Commissioner

Additional Party: The Chief Constable of Thames Valley Police

Heard at: Field House, London

Date of hearing: 23 October 2012

Date of decision: 31 October 2012

Before

Angus Hamilton

Judge

and

Jacqueline Blake

and

Michael Hake

Subject matter: s 14 Freedom of Information Act 2000

Cases considered:

Herbert v IC (EA/2011/0157)

Makepeace v Information Commissioner, EA/2011/0289

Carpenter v Information Commissioner [2010] R.V.R. 195.

Rigby v IC and Blackpool NHS Trust EA/2009/0103; [2011] 1 Info LR 643

Graham v Information Commissioner [2012] 1 Info LR 121

Ainslie v Information Commissioner & Dorset CC EA/2011/0097

Conway v Information Commissioner EA/2011/0224

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 February 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1 Section 1 (1) of FOIA provides that:

Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

2 Section 14 (1) of FOIA provides that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

Request by the Appellant

3 The Information Commissioner in his Decision Notice (DN) of 15 February 2012 has correctly set out the background to this appeal and we have adopted that description:

4 The complainant sent the following requests, which focused on the circumstances surrounding the death of Dr Kelly (the weapons inspector whose death in 2003 was investigated by the Hutton Inquiry) to Thames Valley Police (TVP) on 11 August 2011:

‘1. Who took the photograph that Lord Hutton referred to?

2. Who took the photographs that Dr Shepherd referred to?

3. Who took the photographs that Dominic Grieve referred to?

4. What time was Mr McGee booked in/out of both cordons?

5. Did Mr McGee attend the post mortem examination and take photographs?

6. In your most recent response did you detail the camera/photos taken Dr Hickey under the direction of Mr Green? (resulting in the photographs submitted as evidence RJG1)

7. Was the tent that was erected over Dr Kelly’s body open at the head end of Dr Kelly’s body? Is the tree near Dr Kelly’s head visible to those inside the tent?

Another way that this may be established is for you to allow me to view all photographs/video of Dr Kelly’s body at the scene before it was disturbed/undressed by the pathologist. If you are correct then I will surely agree with you’.

5 The Police responded on 6 September 2011 and explained that the requests were being refused on the basis of section 14(1) of FOIA because they considered them to be vexatious.

6 The complainant contacted the Police and asked for an internal review of

this decision.

- 7 The Police informed the complainant of the outcome of the internal review on 20 September 2011. The review also noted that the Police had taken into account similar requests it had received from other parties for similar information and it believed that the complainant was acting in concert with these parties in support of a campaign. It had therefore taken these future requests into account when determining whether the complainant's requests of 11 August were vexatious.
- 8 On 27 September 2011, the complainant contacted the Commissioner in order to complain about the Police's decision to refuse his requests of 11 August 2011 on the basis that they were vexatious.

The Commissioner's Decision

- 9 The chronology of the Commissioner's investigation is set out in the Commissioner's DN.
- 10 The Commissioner served a DN dated 15 February 2012 in relation to this matter in accordance with s. 50 of the Act. The Commissioner found that section 14(1) of the Act was engaged and that the public authority dealt with the request for information in accordance with the Act.

The Appeal to the Tribunal

- 11 On 21 February 2012 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal challenged the Commissioner's Decision Notice on grounds that the Commissioner erred in finding that section 14(1) of the Act was engaged.
- 12 The Appellant also objected to any suggestion that he had submitted his FOIA requests in concert with other individuals. Additionally the Appellant objected to the reliance by the Commissioner, in reaching his decision, on

any information which he believed had been obtained unlawfully from a 'closed' Facebook group.

The Questions for the Tribunal

- 13 The Tribunal judged that the sole question for them was to consider whether the Appellant's request was, on the balance of probabilities, 'vexatious' within the meaning of s14(1) FOIA. Given the points raised by the Appellant at paragraph 12 above the Tribunal decided at the outset to consider, at least initially, only the Appellant's own requests under FOIA. This meant that we put to one side the contentious issues as to whether the Appellant had or had not acted in concert with others and what he may or may not have said in other forums and the nature of those forums. We resolved only to consider these contentious issues if we were unable to make a decision based only on the Appellant's own FOIA requests.
- 14 The Tribunal also resolved that, whilst being aware of the widespread interest in the circumstances surrounding Dr. Kelly's death, we would not allow this factor to influence our decision-making process and would focus purely on the facts of this individual case.

Evidence & Submissions

- 15 With the agreement of all parties this matter was considered by the Tribunal on the papers alone. Those papers included extensive submissions from all the parties and the Tribunal members were grateful to all the parties for the effort they had clearly put into the preparation of their submissions.
- 16 The submissions presented by the parties included submissions on the appropriate approach to the term 'vexatious'. These have been summarised rather than reproduced in full in this judgement. All the submissions were however considered by the Tribunal in detail.

17 On the issue of 'vexatious' the Commissioner submitted:

1. *FOIA does not define the term "vexatious". The Commissioner's guidance on vexatious requests identifies five questions of use in determining whether a request is vexatious:*
 - (i) *Can the request fairly be seen as obsessive?*
 - (ii) *Is the request harassing the authority or causing distress to staff?*
 - (iii) *Would complying with the request impose a significant burden?*
 - (iv) *Is the request designed to cause disruption or annoyance?*
 - (v) *Does the request lack any serious purpose or value?*
2. *The Commissioner emphasises that the guidance set out above is just that: guidance. It is not intended to be a substitute for the statutory test, and is not intended to prescribe to the Tribunal how it should analyse the concept of vexatiousness.*
3. *A number of Tribunal decisions have, however, found the above questions useful: see for example Rigby v IC and Blackpool NHS Trust (EA/2009/0103); [2011] 1 Info LR 643. More recent examples include Conway v IC (EA/2011/0224) (at §§9ff) and Herbert v IC (EA/2011/0157) of 3 January 2012.*
4. *Other Tribunals have focused on the dictionary meaning of "vexatious": see for example Ainslie v IC (EA/2011/0097) and Graham v IC (EA/2011/0133 & EA/2011/0134): its meaning may be summarised as "tending to cause trouble or harassment by unjustified interference".*
5. *Although of course not binding upon this Tribunal, the Commissioner*

submits that the Tribunal's decision in Rigby helpfully illustrates how the concept of vexatiousness can be applied to requests under FOIA. He further submits that similar considerations apply to this case. At §39 of its decision, the Tribunal set out the following principles, with which the Commissioner agrees:

- (i) "Vexatious" is to be given its ordinary meaning, i.e. it refers to activity that is likely to cause distress or irritation.*
- (ii) S. 14(1) is concerned with whether the request is vexatious, not whether the applicant is vexatious. The focus of the question is on the likely effect of the activity or behaviour and whether it is likely to vex.*
- (iii) For a request to be vexatious, there must be no proper or justified cause for it.*
- (iv) The request must be examined in context, taking into account the history of the applicant's relationship with the public authority, and the number and subject matter of previous requests.*
- (v) The standard for establishing that a request is vexatious should not be set too high, nor too low. The judgment that s. 14(1) calls for is one of balancing the need to protect public authorities from genuinely vexatious requests on the one hand, without unfairly constraining the legitimate rights of individuals to access information.*

6. The Tribunal in Rigby considered that the factors to be considered may include the following:

- (i) whether the request forms part of an extended campaign to expose alleged improper or illegal behaviour, and that*

campaign is not well founded or stands no reasonable prospect of success;

- (ii) *where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;*
- (iii) *where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and/or where the applicant's purpose is to argue rather than obtain information;*
- (iv) *where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before and is, in effect, the pursuit of a complaint by alternative means;*
- (v) *where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority;*
- (vi) *where providing the information requested previously has tended to trigger further requests and correspondence making it unlikely that this request will result in a resolution of the correspondence*

18 TVP did not provide explicit detailed representations in relation to 'vexatious' but it was clear from their submissions that they had adopted and followed the guidance of the Commissioner referred to at paragraph 17.1 above.

19 Mr Beswick also did not provide explicit detailed representations in relation to 'vexatious' but his submissions and Grounds of Appeal clearly addressed the guidance of the Commissioner referred to at paragraph 17.1 above.

Conclusion

20 The Tribunal first considered its approach towards the term 'vexatious'

and reached the following conclusions on this issue:

a) The Tribunal did not consider itself to be in any way bound by the Commissioner's 5-point approach to this issue (paragraph 17.1 above) which appears in the Commissioner's 2008 guidance. Indeed the Tribunal felt that there was a compelling counter-argument that the Commissioner's guidance should not even guide the Tribunal's deliberations since this might have the appearance of giving the approach of one party a higher status than those from the other parties. The Commissioner clearly accepts some of these reservations (paragraph 17.2 above)

b) The Tribunal noted the approach taken by other FTTs in relation to 'vexatious'. The Tribunal found some of these analyses to be helpful although not, of course, binding. The Tribunal found the following analysis from the Rigby case, of the factors that might be considered, of particular assistance:

(i) whether the request forms part of an extended campaign to expose alleged improper or illegal behaviour, and that campaign is not well founded or stands no reasonable prospect of success;

(ii) where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;

(iii) where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and/or

where the applicant's purpose is to argue rather than obtain information;

(iv) where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority;

(v) where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before and is, in effect, the pursuit of a complaint by alternative means;

(vi) where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority;

(vii) where providing the information requested previously has tended to trigger further requests and correspondence making it unlikely that this request will result in a resolution of the correspondence.

21 The Tribunal then considered the evidence in this matter and sought to apply the criteria proposed in Rigby to that evidence.

22 The Tribunal noted the following description (provided by the Commissioner) of the context of the Appellant's FOIA enquiries which was not disputed by any party:

1. *Dr Kelly died in July 2003. He had worked on the controversial issue of Iraq's weapons capability in the build-up to the Iraq War. Some alleged that his death was suspicious. An inquiry into his death was established. It was conducted by Lord Hutton (at that time a Law Lord, and a former Lord Chief Justice of Northern Ireland). At a preliminary sitting of the inquiry on 1 August 2003, Lord Hutton stated that "my primary task is to investigate the circumstances*

surrounding the death and that will involve a detailed and careful examination of the relevant facts.”

2. *In all, 74 witnesses gave evidence to the Hutton Inquiry. Lord Hutton completed his report on 28 January 2004. In that report, Lord Hutton expressed himself to be “satisfied” that Dr Kelly took his own life, and “satisfied” (for reasons that he set out) that “no other person was involved in the death of Dr Kelly”.*
3. *Although an inquest into the death of Dr Kelly was also opened (on 21 July 2003), it was adjourned following the commencement of Lord Hutton’s inquiry, and it was not subsequently resumed. Norman Baker MP subsequently applied to the Attorney General for another inquest. That application was considered and refused by the then Attorney General and Solicitor General, Baroness Scotland QC and Vera Baird QC MP.*
4. *Further calls for an inquest continued to be made. Eventually, the current Attorney General, Dominic Grieve QC MP, decided to take the unusual step of carrying out his own investigation into whether an inquest would be necessary or desirable in the public interest. For this purpose, he commissioned independent expert advice from a Home Office pathologist, Dr Richard Shepherd, and from a toxicologist, Professor Flanagan. In his statement of 9 June 2011, the Attorney General explained that, having investigated matters, his conclusion was that “the evidence that David Kelly took his own life is overwhelmingly strong”. The statement also records that the Solicitor General (Edward Garnier QC MP) and the Advocate General for Scotland (Lord Wallace of Tankerness QC) had also studied the papers and “independently reach[ed] the same view”. In addition, the statement notes that the reports of Dr Shepherd and Professor Flanagan supported the finding of suicide “in trenchant terms”.*

5. *Attached to the Attorney General's statement of 9 June 2011 was a schedule of responses to issues raised. The responses to issues 66, 101, 102, 103, 105, 112, 127 and 161 indicate that the Attorney General carefully considered various allegations that Dr Kelly's body had been moved, and was unequivocal in dismissing all of them.*
 6. *All of the above matters were in the public domain prior to Mr Beswick's requests of 11 August 2011.*
- 23 The Tribunal also noted the following description (again provided by the Commissioner) of the chronology of the Appellant's FOIA enquiries which, again, was not disputed by any party:
1. *On 16 April 2011, Mr Beswick submitted a FOIA request to TVP. He asked ten questions concerning Dr Kelly's death. TVP responded on 12 May 2011.*
 2. *Mr Beswick replied on 29 May 2011. He repeated three of his original requests (as he contended that they had not been answered properly) and made five more requests, all of which concerned Dr Kelly's death.*
 3. *On 17 June 2011 (after the Attorney General had published his statement referred to above), TVP responded to Mr Beswick's requests of 29 May 2011.*
 4. *Mr Beswick replied the same day. He made four further requests under FOIA, also concerning Dr Kelly's death. He included the following allegations and requests. He asked TVP to "commence an immediate criminal investigation into the moving of Dr Kelly's body after it was discovered and the cover up that ensued". He said "... there is now clear evidence of third party activity at the scene and*

until it is explained the suicide verdict should be declared void.” He also said:

- (i) “I shall copy this email to the Attorney General’s office*
 - (ii) I also intend to copy your recent FOI response to interested parties on a confidential basis....”*
- 5. Mr Beswick did not specify the “interested parties” with whom he proposed to share his FOIA correspondence in confidence.*
- 6. TVP responded to the four FOIA requests of 17 June 2011 on 11 July 2011. The next day, 12 July 2011, Mr Beswick responded. He made six further FOIA requests regarding Dr Kelly’s death.*
- 7. On 8 August 2011, TVP responded to Mr Beswick’s six requests of 12 July 2011, but warned that further requests on the same subject matter might be treated as vexatious under s. 14 of FOIA.*
- 8. On 11 August 2011, Mr Beswick replied with seven further requests under FOIA [page 50]. He stated, “You are well aware my aim is to expose a cover up by Thames Valley Police regarding the repositioning of Dr Kelly’s body...”, and referred to his desire “to force a criminal investigation into members of Thames Valley Police and others who have conspired to pervert the course of justice...”. He suggested that Mr Hopgood (the author of TVP’s 8 August 2011 email) had not been honest, and made seven further requests for information. This appeal concerns these seven requests.*
- 9. On 23 August 2011 (i.e. after the date of the requests with which this appeal is concerned, but during TVP’s response period), Mr Beswick asked for clarification in relation to four of the responses that TVP had given to his request of 12 July 2011. TVP responded on 6 September 2011 refusing the requests of 11 August 2011 on s. 14(1) grounds. It upheld that refusal on internal review.*

24 The Tribunal then considered the first criterion proposed in Rigby – *‘whether the request forms part of an extended campaign to expose alleged improper or illegal behaviour, and that campaign is not well founded or stands no reasonable prospect of success’*. The Tribunal considered that Mr Beswick’s FOIA request was clearly part of an extended campaign – especially bearing in mind the chronology set out at paragraph 23 above. The Tribunal also concluded on the balance of probabilities that the campaign was not well founded and stood no reasonable prospect of success. This decision was based on the number of times - as detailed in paragraph 22 - that the circumstances surrounding Dr Kelly’s death had been reviewed by senior figures who had all reached the same conclusion.

25 The Tribunal then considered the second criterion proposed in Rigby– *‘where the nature and extent of the applicant’s correspondence with the authority suggests an obsessive approach to disclosure’*. The Tribunal approached this issue with great care and in particular noted the observations of the IRT in a recent decision (*Makepeace v Information Commissioner*, EA/2011/0289) that:

‘categorizing a request as ‘obsessive’ is often distressing for an Appellant who may consider that it is a judgment upon them rather than the terms of the request. This Tribunal considers that the same assessment can be made asking the question ‘whether in the opinion of a reasonable person the request would be considered to be manifestly unreasonable?’

26 The Tribunal concluded, on the balance of probabilities, and given the history of FOIA requests made by Mr Beswick (as detailed in paragraph 23), that the nature and extent of his correspondence with TVP did indeed indicate an obsessive approach to disclosure.

27 The Tribunal then considered the third criterion proposed in Rigby – *‘where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and/or where the applicant’s purpose is to argue rather than obtain information’*. The Tribunal noted various comments made by the Appellant in his correspondence with TVP. *‘this is a ludicrous statement’*, *‘you are not being honest with me’*, *‘my foi requests... are to obtain enough evidence to force a criminal investigation into members of TVP and others who have conspired to pervert the course of justice...’* (all at p50 of our evidence bundle), *‘TVP officers and others have conspired to pervert the course of justice...’*, and *‘I believe you are complicit in the cover up’* (both at p54 in our evidence bundle). This is not an exhaustive list of such remarks but such comments did lead the Tribunal to conclude that the tone adopted by the Appellant was indeed tendentious and haranguing.

28 The Tribunal considered the fourth criterion proposed in Rigby - *‘where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority’* – but concluded that there was no or no compelling evidence

upon which we could conclude that this criterion was satisfied.

29 The Tribunal then considered the fifth criterion proposed in Rigby – *‘where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before and is, in effect, the pursuit of a complaint by alternative means’*. The Tribunal considered that this should be read as *‘to reopen issues which have been disputed by the applicant’*. The Tribunal considered that, although there were some elements of the Appellant seeking to revisit issues previously raised by him, on balance this criterion had not been made out.

30 The Tribunal considered the sixth criterion proposed in Rigby – *‘where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority’*. The Tribunal considered that, when the totality of Mr Beswick’s FOIA requests to TVP are considered, then, on the balance of probabilities, responding to those requests was likely to impose substantial and disproportionate financial and administrative burdens on TVP. The Tribunal accepted the representations from TVP on this issue (paragraphs 9-10 of TVP’s final submissions) but disregarded the ‘burden’ that may have arisen from dealing with requests from people said to have been associated with Mr Beswick. The Tribunal felt that Mr Beswick did not, in his own Grounds of Appeal, deal with this issue very compellingly. He stated: *‘TVP argue that my FOIR’s have created a [sic] undue burden, I disagree with that, I have a right under the FOIA, if anything has created*

a burden it is the FOIA not my requests'.

31 The Tribunal then considered the seventh criterion proposed in Rigby – *'where providing the information requested previously has tended to trigger further requests and correspondence making it unlikely that this request will result in a resolution of the correspondence'*. The Tribunal considered that, when the history of the Appellant's requests, and in particular his follow-up requests (set out in paragraph 23 above), was taken into account, this criterion was established on the balance of probabilities.

32 The Tribunal considered that, 5 of the 7 criteria proposed in Rigby having been established, this was sufficient for the Tribunal to conclude that on the balance of probabilities the request in this case was vexatious.

33 Our decision to dismiss this appeal is unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 31 October 2012