IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0184**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50443225
Dated: 6 August 2012

Appellant: **MR M BOYCE**

First Respondent: **THE INFORMATION COMMISSIONER**

and

Second Respondent: **THE DEPARTMENT FOR TRANSPORT**

On the papers

Date of decision: **11 January 2013**

Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
ROSALIND TATAM

Subject matter: Vexatious or repeated requests s.14

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0184**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

Introduction

1. This is an appeal from a decision notice of the Information Commissioner in which he concluded that two requests for information submitted by the Appellant to the Department for Transport ("DfT") under the Freedom of Information Act 2000 ("FOIA") were vexatious because of their similarity to a previous request found to have been vexatious in an earlier decision notice. It is therefore necessary to put the information request into context with that earlier decision notice.

Historical context

2. After an attempt had been made by a terrorist to destroy an aircraft in flight in December 2009 the DfT started to deploy airport security body scanners at UK airports. The Appellant had concerns about certain health and privacy issues arising from this development and engaged in extensive correspondence with the DfT on the subject. This culminated in a request for information sent to the DfT on 5 August 2011. It asked for the following information from the DfT:

> *"(1) Has Manchester Airport, or Heathrow Airport, or Gatwick Airport made any representations to the Secretary of State for Transport, or to anyone else at the DfT, at any time in the last 18 months, to the effect that passengers should be allowed an alternative security check (full body pat-down etc…) to body scanners if a passenger objects to body scanners on health/safety/privacy grounds?*
> *(2) Does the DfT intend on continuing the Manchester Airport trial of x-ray body scanners beyond October 2011 if the European Parliament votes, by October 2011, for the European Commission legislative proposal to ban x-ray body scanners throughout European airports?"*

We will refer to this as the "First Information Request".

3. The First Information Request was made under Section 1 of FOIA, which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. FOIA section 14 provides that the obligation to disclose information does not arise if the request is vexatious. There is no statutory definition of the word "vexatious".

4. The DfT relied upon FOIA section 14 to refuse the information request and the Appellant complained to the Information Commissioner who, after completing his investigation, issued his decision notice FS50411835 on 27 February 2012 ("the First Decision Notice") in which he concluded that the information request had been vexatious and that the DfT had therefore been entitled to refuse it. In the process he made the following findings of fact:
    a. The information request formed part of an obsessive pattern of behaviour by the Appellant in relation to the use of scanners, the public information about them published by the DfT and the UK Government's consultations on, and implementation of, changes to the law on the subject.
    b. The volume and frequency of information requests and, in some cases, the hostile and provocative language used was likely to have had the effect of harassing or distressing the members of the DfT staff to whom they were addressed.
    c. Although, taken in isolation, complying with the First Information Request would not impose an unreasonable burden on the DfT, the volume of requests, of which it formed a part, had been such that a significant burden had been imposed on the DfT in terms of both costs and the distraction of staff away from their core functions.
    d. The request, even in the context of the volume of other requests and correspondence received from the Appellant, was not designed to cause disruption or annoyance and there was a serious issue of public interest underlying it.
    e. The Appellant did not have an issue with the DfT that could reasonably be resolved in any manner other than a change in those aspects of the law on the subject which he wished to challenge.

5. The Information Commissioner concluded:

> *"Although the request does not lack a serious purpose or value and raises issues of personal importance to the* [Appellant] *and general public interest, this does not outweigh nor justify the manner in which the complainant has chosen to pursue the DfT."*

6. It was open to the Appellant to appeal the First Decision Notice to this Tribunal. The mechanism for such an appeal is set out in FOIA section 57. Section 58 then goes on to provide that the Tribunal's role on such

an appeal is to consider whether the Decision Notice is in accordance with the law. It may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. The Tribunal may, in the process, review any finding of fact on which the notice in question was based.

7. In the event the Appellant did not appeal and his time for doing so expired many months ago. He did, however, write to the Information Commissioner explaining why he thought that the First Decision Notice was wrong.

The information requests the subject of this appeal

8. On 30 December 2011, after his previous complaint to the Information Commissioner, but a few weeks before the First Decision Notice rejecting it was published, the Appellant made a further information request to the DfT (the "Second Information Request"). It was in the following terms:

> *"The UK did not support an opt-out when this was presented to the EU Aviation Security Committee.*
>
> *(1) What date did this occur?*
>
> *(2) Did the DfT also inform the EU Commission, or make it clear to the Commission, that the UK did not and would not support an opt-out?*
>
> *(3) If so, what date did this occur?*
>
> *(4) When the EU Commission gave the DfT permission to extend, for a further year, its trial of x-ray body scanners at Manchester Airport did the DfT inform the EU Commission, or make it clear to the Commission, that it would not allow an opt-out for passengers (i.e. that it intended to defy the new EU Commission implementing Regulations on security scanners which are legally binding in their entirety on all member states)?*
>
> *(5) If the answer to question 4 is yes, then what briefly was the EU Commission's response to the DfT? Was the Commission in agreement with, or accepting of, the DfT's decision that the UK could ignore the fundamental rights of passengers to request an opt-out if they so wished?"*

9. On 6 March 2012, after the First Decision Notice had been published the Appellant submitted a further information request to the DfT (the "Third Information Request"), in the following terms:

> *"The DfT recently published an Equality Impact Assessment (EIA) on the use of security scanners at UK airports.*
>
> *(1) Has the DfT produced a similar (post consultation) Privacy Impact Assessment (PIA) on the use of security scanners at UK airports?*
> *(2) If so, does the DfT intend to publish this PIA?*
> *(3) If the DfT does not intend to publish it, could it please explain why it will not do so?*
> *(4) If no post consultation PIA has been produced, could the DfT please explain why this is?"*

10. The DfT did not respond to either request and explained to the Information Commissioner, after the Appellant had again complained to him, that it had ignored them both because it regarded them as vexatious under FOIA section 14.

The Information Commissioner's decision in respect of the Second and Third Information Requests

11. On 6 August 2012 the Information Commissioner issued the Decision Notice on which this appeal is based (the "Second Decision Notice"). In it he concluded that the Second and Third Information Requests represented a continuation of the Appellant's previous correspondence with, and requests to, the DfT about similar matters and that the analysis and conclusions set out in the First Decision Notice were therefore applicable. He accordingly adopted that analysis and concluded that the DfT had been entitled to apply FOIA section 14 to both of the information requests.

The appeal to this Tribunal

12. The Appellant lodged with this Tribunal an appeal against the Second Decision Notice on 22 August 2012. In the Grounds of Appeal, incorporated partly in the Notice of Appeal and partly in a separate written submission that accompanied it, the Appellant:
    a. Criticised the Information Commissioner for having, in his view, failed to acknowledge that the subject matter of his requests was different from that referred to in the First Decision Notice and argued that, in such a dynamic legal and policy area, it was not appropriate to have adopted, without qualification, the analysis and conclusions of the First Decision Notice.
    b. Challenged the Information Commissioner's conclusions on each of the issues summarised in paragraph 4 above.
    c. Accused the Information Commissioner of being biased against him because he had been involved in a previous government consultation on the issue of body scanners, in the course of which he had expressed an opinion which the Appellant

considered would ultimately be shown to have been wrong and inconsistent with EU policy and law.

13. The DfT was joined as a Second Respondent to the Appeal and, as all parties were content for it to be determined on the papers, without a hearing, and the Tribunal considered that this was appropriate, directions were given for written submissions and an agreed bundle of documents to be made available to the Tribunal.

The Parties' Submissions

14. In his Response to the Grounds of Appeal the Information Commissioner denied that he had found the Second and Third Information Requests vexatious simply because the earlier request had been found to have been vexatious. He had not treated the First Decision Notice as having bound him, but had simply treated as relevant the general principles and analysis set out in it. He reiterated that the two requests under consideration represented a continuation of the Appellant's previous correspondence with, and requests for information from, the DfT.

15. The Appellant argued that the Information Commissioner had not taken into account any of the developments that had occurred since the date when the first information request had been refused. In particular he relied on certain regulations that had been issued by the EU Commission in the meantime and which, he said, the UK Government was not obeying. He said that his information requests addressed those aspects of the matter and, being therefore different from the request dealt with in the First Decision Notice, should not have been characterised as a continuation of the previous correspondence.

Our conclusions on whether the Second and Third Information Requests were vexatious

16. It is certainly the case that the Information Commissioner did not, in either the Second Decision Notice or the Response, give any detailed consideration to developments that may have occurred since the date of the refusal covered by the First Decision Notice. We regard his reliance on the analysis set out in the First Decision Notice as having been simplistic and his defence of his approach in this regard unconvincing. At the same time we do not think that it is open to the Appellant, at this stage, to challenge the correctness of that analysis as it applies to the facts of the First Information Request. We therefore proceed on the basis that the facts summarised in paragraph 4 above are true and form part of the historical context in which the Second and Third Information Requests must be assessed. However, we also acknowledge that another part of that context which we have to take into account is the sequence of events that occurred subsequent to the First Information Request. These include developments in the legal

framework affecting body scanners and changes in the behaviour of the Appellant.

Different Issues?

17. By the date of the First Information Request the EU Commission had started the process of introducing general measures intended to implement the very broad policy for introducing screening for airline passengers set out in Regulation 300/2008. It did this by promulgating Commission Regulation 272/2009 on 2 April 2009 and Commission Regulation No 185/2010 on 4 March 2010, which together set out the categories of screening methods that Member States were entitled to implement. By that date, also, security scanners had been deployed at three of the UK's largest airports and a public consultation had taken place on the code of conduct for their operation.

18. The significant events that occurred after the date of the First Information Request were that:
    a. on 4 November 2011 the EU Commission promulgated Regulation 1141/2011, which added to the list of permitted screening methods security scanners which did not use ionising radiation;
    b. on 11 November 2011 the EU Commission promulgated Implementing Regulation 1147/2011 setting out the detailed measures to be put in place for the operation of, among other things, security scanners; and
    c. on 21 November 2011 the Transport Minister made a statement in the House of Commons announcing the Government's decision, in light of the consultation referred to above, to continue with the use of security scanners and not to introduce a procedure under which individuals could opt out of being subjected to that form of inspection.

19. Although those developments are not without significance, we do not think that they represent such a radical change in circumstances that the Second and Third Information Requests may properly be characterised as having different subject matter to the First Information Request. The issue that motivated the Appellant's actions was his concern at the privacy and health issues resulting from the use of scanners. The developments that had occurred represented further stages in a continuing process by which national and regional authorities evaluated the advantages and disadvantages of their deployment and considered the processes that should be introduced in order to regulate their use.

20. It follows that, in our view, the findings of fact set out in the First Decision Notice continue to be relevant to an assessment of the Second and Third Information Requests. They continue to form part of the context in which those requests must be assessed.

Different behaviour?

21. Although there are some indications that, after the publication of the First Decision Notice, the Appellant decided to adopt a more emollient tone and a more reasonable attitude, we do not believe that the approach adopted in relation to the Second and Third Information Requests represented such a departure from his previous behaviour that the earlier history may be ignored or its significance reduced on that ground either.

22. In summary, therefore, we conclude that the Second and Third Information Requests were both vexatious for the purposes of FOIA section 14 and that the DfT was therefore entitled to refuse them on that basis. We therefore reject the appeal.

Postscript

23. We should add that we regard it as at least arguable that the information sought by the Appellant constituted environmental information and that the Environmental Information Regulations 2004 should have been applied, rather than the FOIA. The test under those regulations, equivalent to FOIA section 14, is to be found in regulation 12(4)(b), which entitles a public authority to refuse a request if it is "manifestly unreasonable", provided that the public interest in maintaining the exception outweighs the public interest in disclosing the information (regulation 12(1)(b)). However, we do not believe that the conclusion we have reached would have been any different had we applied those provisions instead of the test under section 14. For the reasons we have given above we think that the Second and Third Information Requests were manifestly unreasonable and, having considered the detailed terms of each request we think that any public interest in the information falling to be released under them would not outweigh the public interest in preventing the purpose of freedom of information legislation being undermined by its misuse in the manner demonstrated by the Appellant.

Signed:

Chris Ryan

Tribunal Judge
11 January 2013