IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2013/0277

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50513174
Dated: 27 November 2013

Appellant: **MICHAEL SIVIER**

Respondent: **THE INFORMATION COMMISSIONER**

Heard at: Cardiff

Date of hearing: 23 April 2014

Date of decision: 6th May 2014

Promulgation Date: 7th May 2014

Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
JEAN NELSON

Attendances:

The Appellant appeared in person
The Information Commissioner did not appear and was not represented

Subject matter: Vexatious or repeated requests s.14
Cases: *Information Commissioner v Devon County Council and Dransfield* ([2012] UKUT 440 (AAC))

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0277**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

REASONS FOR DECISION

Summary

1. We have decided to reject the Appeal from the Information Commissioner's Decision Notice of 27 November 2013 because the Appellant's request for information under section 1 of the Freedom of Information Act 2000 ("FOIA"), which was in itself innocuous, had been rendered vexatious, under section 14 of FOIA, by his use of on-line messages inviting other members of the public to submit identical requests.

Background to the Appeal

2. On 25 June 2013 the Appellant e-mailed a request for information ("the Request") to the Department for Work and Pensions ("the Department") in the following terms:

> *"The following requests are made under the Freedom of Information Act 2000. They follow similar request made by others in 2012, therefore I do not anticipate that you will have any difficulty finding the information.*
>
> *Please provide the number of Incapacity Benefit and Employment and Support Allowance claimants who have died in 2012. Please break that figure down into the following categories:*
> - *Those who are in the assessment phase*
> - *Those who were found fit for work*
> - *Those who were placed n the work-related activity group*
> - *Those who were placed in the support group*
> - *Those who have an appeal pending*
>
> *I am aware that the Department for Work and Pensions came under criticism last year because it did not follow up on the conditions of people who had been found fit for work and signed off the benefit. It is to be hoped that this has been rectified and follow-up checks have been carried out. If this is the case, please provide details of:*

- *Former ESA/IB claimants who have died after being put onto Jobseekers' Allowance*
- *Former ISA/IB claimants who were taken off benefit but put onto no other means of support, and the number of those who have died.*

Thank you for your co-operation in this matter."

3. FOIA section 1 imposes on the public authorities to whom 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.

4. The Department refused the Request on the basis that it was vexatious within the meaning of FOIA section 14, which reads:

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

   There is no statutory definition of the word "vexatious".

5. The basis of the Department's refusal was that the Request formed part of a campaign to disrupt the Department, undertaken by a number of individuals working in concert and communicating with one another through a particular website. The Department maintained that position following an internal review of its original decision and during a subsequent investigation carried out by the Information Commissioner in response to a complaint lodged by the Appellant.

6. During the course of the Information Commissioner's investigation he received written submissions from the Department criticising the Appellant for causing or permitting certain messages to appear on his blog. On 27 November 2013, having completed his investigations, the Information Commissioner issued a Decision Notice in which he concluded that the Department had correctly applied FOIA section 14 and had therefore been entitled to refuse the Request. The Information Commissioner reached his conclusion that the Request was vexatious by the following route:
   a. There was a link between the Appellant and twenty four other individuals who had sent the Department information requests that were substantially the same as the Request. They were received by the Department within a few days of the publication by the Appellant of two messages on a political blog which he operates. The first, published on the same day as the Request, recorded the content of the Request and added *"I strongly urge you to do the same.* ***There is strength in numbers".*** (The emphasis is that of the original author). The second, published on 29 June 2013, included the sentence "*If you believe this cause is just, go thou and do likewise*". Between those messages a third party had submitted a comment, which praised the submission of the Request, encouraged readers to follow the

Appellant's example and added "If we swamp [the Department] with requests they surely must respond."

b. The receipt of twenty four requests within a few days could have imposed a burden on the Department, in terms of time and resources, and could have distracted it from its main functions.

c. The motive for the requests may have gone beyond the point of simply obtaining the information requested and may have been intended to disrupt the Department's main functions.

d. The Appellant and the other requesters had a serious purpose but there was evidence that imposing on the Department the need to deal with all the requests constituted improper use of the process for requesting information under the FOIA.

e. Some of the disparaging remarks and language used in the blog in question demonstrated a level of harassment against the Department.

The Appeal to this Tribunal

7. On 20 December 2013 the Appellant lodged an appeal from the Decision Notice with this Tribunal. Such appeals are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We 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. We may, in the process, review any finding of fact on which the notice in question was based.

8. The Information Commissioner submitted a written Response to the Appeal, to which the Appellant replied also in writing. The Appellant asked for his Appeal to be determined at a hearing, as was his right, but the Information Commissioner decided not to participate, but to rely on the arguments set out in its written Response.

9. Both sides relied upon the decision of the Upper Tribunal in the case of *Information Commissioner v Devon County Council and Dransfield* ([2012] UKUT 440 (AAC)) in which Upper Tribunal Judge Wikeley issued guidance on the interpretation and application of section 14. In his Grounds of Appeal the Appellant quoted part of the test identified by Judge Wikeley, namely that a request should be treated as vexatious if it constituted "*a manifestly unjustified, inappropriate or improper use of FOIA".* He argued that the Request was in fact justified, notwithstanding the issues raised in the Decision Notice regarding communications posted on his blog, because of the public interest in the disclosure of the mortality statistics for the group in question.

10. The Appellant also quoted from *Dransfield* a passage in which the Upper Tribunal Judge indicated that it was appropriate to consider, as

evidential themes pointing towards a conclusion of vexatiousness, the following:

> *" (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) any harassment or distress (of and to staff)"*

The Information Commissioner clearly addressed each of those issues in his Decision Notice (see paragraph 6 (b) – (e) above). There appears, therefore, to be no issue between the parties as to the test required to be operated, although they differ on its application to the particular facts of the case. And we bear in mind, in any event, that the Upper Tribunal made it clear that the four factors ought not to be treated as providing a "*formulaic check list*" and that we should adopt *"a holistic and broad approach ... emphasising the attributes of manifest unreasonableness, irresponsibility ... [*and*] lack of proportionality that typically characterise vexatious requests."*

11. Before examining those factors we should first consider two issues of general application. The first is whether the Request should be considered on its own or, as the Information Commissioner contends, as part of co-ordinated activity undertaken by a number of individuals. Although the Appellant argued that the submission of 24 requests in identical or similar terms resulted from nothing more than the concern felt by each individual about the mortality rates in question, we do not think that he can escape from the consequence of his own actions in this way. The blog posts mentioned in the Decision Notice, on their own and without reference to any other material published on the same website, demonstrate that the Appellant intended to increase the chances of the Department complying with the Request by maximising the number of requests it received. The second issue is whether it is legitimate to take into account events that occurred after the date on which the Request was submitted. The first blog message identified in the Decision Notice was posted on the same day as the Request was submitted and we have treated it, in effect, as having been simultaneous or so close in time as to be treated as part of one single action. The Appellant's second message was posted four days later. In *Dransfield* the Upper Tribunal approved the consideration of events earlier in time when considering an information request within its context and we have concluded that it is also appropriate to consider post-request events when they are, as here, so closely connected with the Request that they can be interpreted as part of the implementation of a single strategy.

12. We proceed, therefore, on the basis that the Information Commissioner was right to take account of the content and apparent effect of the blog posts he identified in the Decision Notice as part of the wider context that it is legitimate to consider when assessing whether an information request is caught by FOIA section 14.

13. In considering the four signpost factors identified in *Dransfield,* the Appellant laid particular emphasis on the reasons for having submitted the Request and we propose to deal with this first. He informed us that a third party had previously submitted a request to the Department asking it to update an earlier publication entitled “Incapacity Benefits: Deaths of recipients” published in July 2012. He was concerned that the request had, in his view, taken a long time to be processed and that it had ultimately been rejected on the basis of a claim that, under FOIA section 22, it was held by the public authority with a view to publication and that it was reasonable to withhold it in the meantime. The combination of the importance of the statistics in their own right and the Appellant’s belief, rightly or wrongly, that the Department had no intention of publishing updated figures, led him to take the steps for which he has been criticised by the Department.

14. As indicated above, the Information Commissioner accepted that the Request had a serious purpose. However, in applying a test of proportionality, we have to consider, not just the existence of such a purpose, but also the weight to be applied to it in terms of proportionality; whether it justified the steps taken by the Appellant in relation to the Request and the likely impact of those steps on the Department.

15. In terms of the burden the Request imposed, the Appellant drew attention to statements made by members of the Department’s staff to the Information Commissioner during his investigation, in which it was confirmed that the requested information was held and that it could be located and released without exceeding the relatively modest maximum cost permitted for responding to an information request. The Appellant suggested, therefore, that no additional burden of any significance was imposed on the Department as a result of other requestors submitting similar requests. The Information Commissioner challenged that statement. He said that there was a requirement, in respect of each request, to collate the information, consider exemptions that might apply, provide a formal response and, if necessary, refer the decision to an internal review. On that basis, he said, having to consider 24 requests within a few days could impose a burden in terms of time and resources, thereby distracting the Department from its main functions.

16. It is certainly the case that having to deal with 24 requests in addition to the Request would have imposed some work on the Department’s staff beyond that required by the Request on its own. Although we do not disregard this issue, therefore, we do not believe that any great weight should be attributed to it in our determination. We observe, in this respect, that the Information Commissioner himself put it no higher than that a burden “could” have been imposed on the Department.

17. As to motive, the Information Commissioner accepted that the Appellant, by the Request viewed in isolation, may not have intended

to disrupt the Department's main function. However, he argued that, taking account of the requests apparently generated by the blog messages (as we have determined we should), it was reasonable to conclude that the purpose of the requests as a whole went beyond the point of simply obtaining the information requested to the stage where it was intended to disrupt the conduct of the Department's functions. The Appellant conceded that he did indeed hope that readers of his blog would make information requests but he argued that it was the topicality and importance of the subject, rather than anything he did, which caused them to do so.

18. Having reviewed the evidence on motive as a whole, and having considered the parties' submissions (including those made by the Appellant during the hearing) we conclude that the Appellant was motivated by a determination to ensure that the Department took the Request seriously and that he believed that this was more likely to happen if numbers of individuals submitted substantially the same information request within a short space of time. He has told us that the strategy adopted reflected his own unfamiliarity with FOIA procedures. That may be so but it does not enable him to escape from the logical consequences of his actions – the submission of multiple requests.

19. We do not think that there is much strength in the Information Commissioner's argument that the Appellant's blog article, and the response to it by other requesters, would have the effect of harassing members of the Department's staff or causing them distress. The Request itself is expressed in sensible and balanced terms and, although some of the messages published on the Appellant's blog adopted a more strident tone, we saw nothing that a reasonably robust employee should not have been able to contemplate without distress, assuming (which is not certain) that it was drawn to his or her attention. The Appellant argued that it would be unfair, in any event, to attribute to him everything that appeared on the blog but we concluded that his ability to block or remove material prevented him from disassociating himself from the blog content in this way.

20. We nevertheless conclude that little weight ought to be attributed to the risk of staff members feeling harassed or distressed.

21. The accumulated effect on the Department, in terms of administrative burden and impact on staff, was therefore relatively light. However, the "holistic" approach advocated in *Dransfield* requires us to consider the Request in a broader context. We must step back and consider whether or not the effect of our findings on the four factors considered, viewed overall and not as a weighted checklist, indicates that the Appellant sought to make inappropriate or improper use of the FOIA regime. We remind ourselves, in this connection, that it is a regime that enables individuals to exercise a right to information which was described in *Dransfield* as "*a significant but not an overriding right in a*

modern democratic society" which was "*qualified or circumscribed in various ways".* In this context the Appellant sought to draw an analogy between the co-ordinated presentation of information requests and an online petition contributed to by members of the public. But a petition is simply a means of reinforcing a message. Its effect is very different from an information request, which triggers a statutory obligation for the recipient, at public expense, to seek and, if appropriate, disclose information. It is an obligation, breach of which may ultimately be punished as a contempt of court (see FOIA section 54(3)).

22. It was in failing to comprehend that difference, and seeking to bolster his statutory rights with the persuasive power that comes from communal action, that the Appellant converted an unexceptional request, on a matter causing justifiable public concern, into one that constituted misuse of the freedom of information regime and could therefore properly be refused on the basis that it was vexatious for the purpose of FOIA section 14.

23. We have considerable sympathy for the Appellant. We do not know if he was justified in suspecting that the Department had deliberately concealed statistics about those who died while receiving, or being assessed for, state benefits. It is certainly not for us to make any assessment on that issue or on whether the Department might have been entitled to refuse the Request in reliance on one or more of the exemptions available under the FOIA. However, the Request did seem, on its face and in context, to be one which might well have resulted in disclosure of the information requested had it not become tainted by the terms in which the Appellant attempted to generate public support for it. This may have been the result of naivety or lack of familiarity with FOIA procedures. It is nevertheless necessary, in our view, that the rights of individuals under the freedom of information regime are balanced by an obligation to operate within the rules that regulate it. The Appellant went beyond those rules in the way he attempted to add public pressure to persuade the Department to do what he believed it was required to do under FOIA section 1. That constituted inappropriate use of the section, rendering the Request vexatious within the meaning of section 14. The Information Commissioner was therefore right to conclude that the Department had been entitled to reject the Request and the appeal should therefore be dismissed.

24. Our decision is unanimous.

Chris Ryan

Judge
6 May 2014