



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

**Case No. EA/2014/0064**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50524114  
Dated: 24 March 2014**

**Appellant: HAIDER KHAN**

**Respondent: INFORMATION COMMISSIONER**

**Heard (by telephone) at:** Fox Court, London

**Date of hearing:** 28 July 2014

**Date of decision:** 11 September 2014

**Date of Promulgation:** 12 September 2014

**Before  
CHRIS RYAN  
(Judge)  
and  
NARENDRA MAKANJI  
ANDREW WHETNALL**

**Attendances:**

The Appellant represented himself

The Respondent did not attend and was not represented

**Subject matter:** Vexatious or repeated requests s.14

**Cases:**

Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC).

## DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

### REASONS FOR DECISION

#### Introduction

1. This appeal arises out of a request for information made by the Appellant, Mr Khan, and addressed to London Metropolitan University (“the University”). It was submitted to the University on 29 September 2013 and was supplemented by an email dated 1 October 2013 (together “the Request”). The Request was made under the Freedom of Information Act 2000 (“FOIA”) and was rejected on the ground that it was vexatious. The Decision Notice under appeal concluded that the University had been entitled to refuse the Request on that ground.
2. 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. FOIA section 14 provides that a public authority is not obliged to comply with a request for information if “the request is vexatious”.
3. There is no definition within FOIA of the term “vexatious”, but it was considered by the Upper Tribunal in the case of *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC). We will consider the guidance provided by the Upper Tribunal in more detail later in this decision but, as a starting point, adopt the approach it recommended of assessing the information request under consideration in the context and history of both the request itself and any previous course of dealings between the requester and the public authority. In this case the course of dealings has been extensive and is summarised in the next section (paragraphs 4 to 18). The circumstances surrounding the Request itself are then set out in paragraphs 19 to 23.

History of the relevant course of dealings between Mr Khan and the University.

4. In September 2011 Mr Khan, enrolled with the University for its Legal Practice Course (“LPC”). He completed the course in the following summer and was awarded a commendation based on his overall examination results in various subjects including two elective subjects, Intellectual Property and Alternative Dispute Resolution. Mr Khan was not happy with the marks he received and on 25 July 2012 submitted an Academic Appeal under the University’s Academic Regulations.
5. By agreement with the University Mr Khan’s time for lodging detailed Grounds of Appeal was extended. This was because he had by that time requested certain information from the University under the FOIA and he considered that the information would support his appeal.
6. The initial information request on 23 July 2012, and a number that followed, were as follows:

<b>Date</b>	<b>Subject Matter of Request</b>	<b>Outcome</b>
23 July 2012	Seven questions about the LPC course	Responded to on 20 and 21 August
20 August 2012	Statistical data for the LPC core subjects for two academic years	Responded to on 19 October and 6 November 2012
20 September 2012	Minutes of the examiners comments for the IP examination and other electives for 2012	Responded to on 5 October 2012
15 October 2012	Five questions on the analysis of examination marks.	Responded to on 22 October 2012
19 December 2012	Seven questions posed	Response provided
9 January 2013	Four questions posed	Response provided

7. The information requests included over 40 separate questions and, as the summary above indicates, included information about examination marks and their statistical analysis.

8. On 1 February 2013 the University informed Mr Khan that it considered that he had by then been provided with full responses to his requests and that the Academic Appeal should proceed to a determination. Mr Khan then lodged detailed grounds of appeal, although he stated that he did not agree that he had been provided with all the information to which he was entitled. He nevertheless appears to have had sufficient information to enable him to formulate his grounds of appeal in the following terms:

*“The University failed to comply with its own regulations and the requirements of natural justice by: 1) failing to have annual trend variation analysis (moderation). 2) Failure to second mark the minimum required number of items for moderation. 3) Having disadvantages electives (sic). 4) A failure to understand parity in assessment of electives. 5) Over-reliance on the external examiner and a misunderstanding of his/her role. 6) The work was not universally double-blind marked. 7) Incompetent second examiner. 8) A failure to understand what moderation is.”*

9. In the meantime Mr Khan had, on 23 January 2013, lodged a separate complaint under the University’s complaints procedures. The three elements of the complaint were:

*“1) Appeals are not dealt with an (sic) individual basis despite the University claiming this is the case; 2) Unfair appeal procedures due to an inability to extract pertinent information from the LPC team; 3) A clear misunderstanding by the LPC in the moderation and assessment of work. It does not use statistical data to moderate as required by the Academic Regulations.”*

10. The complaint was dismissed on 18 February 2014, on the basis that all but one of the issues raised would be considered in the context of the Academic Appeal. The remaining ground (that appeals were not dealt with on an individual basis) was dismissed on its merits.

11. In parallel with the complaint and the Academic Appeal, Mr Khan lodged the following additional information requests with the University in February 2013:

<b>Date</b>	<b>Subject Matter of Request</b>	<b>Outcome</b>
5 February 2013	Capability measures and disciplinary action taken against tutors as a result of	Information not held.

	his complaints	
24 February 2013	Complaints and appeals made in the previous two academic years on postgraduate courses	Subsequently withdrawn
25 February 2013	27 questions arising out of previous communications.	Initially refused but information subsequently provided
27 February 2013	Information about the moderation process available for quality audits and reviews	Initially refused but information subsequently provided

12. On 27 March 2013 the University issued its decision on the Academic Appeal. It concluded that the number of examination scripts subjected for second marking in the two elective subjects had not satisfied the formula set out in Academic Regulations. The decision stipulated that the error should be corrected by having a larger sample second marked and reviewed by the external examiner. The appeal was dismissed in respect of each of the other grounds put forward by Mr Khan.

13. The decision concluded:

*“You have now exhausted the University’s internal procedures for appeal ... but if you remain dissatisfied with the outcome you may wish to consider contacting the Office of the Independent Adjudicator for Higher Education (OIAHE)...”*

14. In fact Mr Khan had by then already submitted a complaint to the OIAHE. That had been on 8 March 2012. It made it clear that it arose from his criticisms of the appeals framework rather than the outcome of a particular appeal. The grounds of complaint included the University’s alleged failure to disclose information relevant to the Academic Appeal and asserted:

*“An academic appeal can only [be] made if there is a breach of the Academic Regulations, but they won’t tell me if there has been a breach.”*

Mr Khan also claimed that the absence of a provision for disclosure in the appeals process breached his human rights under Article 6 of the

European Convention on Human Rights (the right to a fair trial in civil and criminal proceedings).

15. The OIAHE complaint was put on hold pending clarification of the status of an application for Judicial Review of the decision made on the Academic Appeal, which Mr Khan filed on 3 June 2013. In the event Mr Khan and the University ultimately agreed, in August 2013, to stay the proceedings until after the OIAHE had completed its determination. The complaint was therefore re-activated at that stage, but it had not been resolved by the date of the hearing of this appeal.

16. Before commencing Judicial Review proceedings Mr Khan had written a letter to the University on 8 May 2013 putting it on formal notice of his intention to take that action. We were not provided with a copy of either the claim letter or the application for Judicial Review. However, solicitors acting on behalf of the University quoted the claim letter when replying to it on 22 May 2013. The quotation read:

*“(i) the University acted irrationally and contrary to natural justice in stating that the other grounds in the appeal were not evidenced. The University should have explained how it came to dismiss the other grounds; (ii) the failure to disclose information, ambiguous responses and refusal to answer relevant questions was contrary to natural justice and (iii) a framework from which to make the appeal was contrary to natural justice, that is to say, there was no requirement for the University to disclose information.”*

17. The solicitor’s letter went on to record that the OIAHE had suggested that, following the determination of the Academic Appeal, the University might consider returning to the two elements of Mr Khan’s original complaint which had been left unresolved when the complaint had been dismissed. The University’s response to that suggestion, doubtless also encouraged by the threat of Judicial Review proceedings, took the form of an offer in the solicitor’s letter to undertake a full and comprehensive reconsideration and review of the issues raised in the complaint and the Academic Appeal. The letter recorded what those issues were and set out a proposed procedure and timetable for the review. In the event, as Mr Khan explained during the hearing, the parties were unable to agree the detailed terms as to how and by whom the review would be conducted and it did not therefore proceed.

18. During this stage of the dispute between Mr Khan and the University he submitted the following further information requests:

<b>Date</b>	<b>Subject Matter of Request</b>	<b>Outcome</b>
5 June 2013	Identity of the Chair of the Subjects Standards Board	Response provided on 1 July 2013
11 June 2013	Information on mark variance between scores in IP and ADR	Response provided on 1 July 2013
2 July 2013	Request for a redacted copy of the external examiner minutes and report for two subjects.	Initially refused but provided following an internal review
30 July 2013	Statistical information on elective results for 2013	Response provided on 21 August 2013
20 August 2013	Redacted test scores for each individual candidate for the elective subjects during three academic years	Response provided on 17 September 2013
23 August 2013	External examiner reports for 2011/12	Response provided on 20 September 2013
4 September 2013	Elective subject standards board minutes and other material relating to the determination of marks and grades for 2011/2012	Response provided on 2 October 2013
6 September 2013	External examiner reports for two academic years	Response provided on 3 October 2013
9 September 2013	External examiner reports for two academic years	Response of 10 September 2013 to the effect that the request duplicated the previous request in one respect and sought a document that had not yet come into existence, in the other.
18 September 2013	Exam scores in all subjects for students who took IP, Commercial, Corporate and	Refused on 15 October on the basis that the information was the

	Employment electives.	personal data of third parties.
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Circumstances surrounding the Request

19. On 25 January 2013 Mr Khan had complained to the Information Commissioner about the way in which the University had handled information requests submitted up to that date (i.e. those summarised at paragraph 6 above). In the event the Information Commissioner appears to have taken into consideration a number of the further information requests submitted by Mr Khan prior to 25 March 2013, the date when the University wrote to inform him that it considered that it was entitled to reject the more recent requests under FOIA section 12, on the ground that the cost of responding would be excessive.
20. The Information Commissioner reviewed the requests and responses with both Mr Khan and the University. This appears to have led to the withdrawal of some of them and the agreement by the University to respond to the remainder. The result was a list of 59 questions to which the University responded in a letter to Mr Khan dated 27 September 2013 ("the Response Letter"). The Response Letter recorded that 13 of the later questions repeated earlier ones and that 6 had been withdrawn. Of the remaining 40, which were answered in the Response Letter, five appear to have overlapped with others.
21. The Response Letter included this passage:
- "We are providing this response to you as requested by the ICO and without prejudice to the University's position that it handled appropriately and responded to your various requests for information in accordance with its duties and obligations under FOIA at the time of your requests"*
22. On 16 October 2013 (after the University had disclosed the previously requested information in the Response Letter) the Information Commissioner issued a Decision Notice, in conjoined cases FS50501411 and FS50495750, ("the Previous Decision Notice") formerly recording the outcome of Mr Khan's complaint. It recorded that Mr Khan had indicated that he was satisfied with the information provided by the University but that he required a decision notice to record the late provision of the



information. It then set out the reasons for the decision in the following terms:

*“9. Section 10(1) of the FOIA states that a public authority in receipt of a request for information has a duty to respond within 20 working days.*

*10. From the information provided to the Commissioner in this case it is evident that [the University] did not provide all the recorded information which it held within the statutory time frame.”*

23. Although the Previous Decision Notice contains little or no information about the facts and arguments presented to the Information Commissioner, it is clear that it dealt only with two questions. First, whether the University held information at the date when it was requested and, secondly, whether the cost of providing information would have been excessive. It did not address the question of whether the University might have been able to refuse disclosure on any other ground. Specifically it did not include an assessment under FOIA section 14.

The content of the Request

24. Each element of the Request arose from one of the University’s responses in the Response Letter. We deal with each in turn:

*First request.*

25. This arose from the University’s response to a request dated 23 July 2012, which had sought information about the rate of failures on examination papers marked by different tutors. The University had stated in its response that the failure rate of specific tutors was not specifically recorded but had been extracted from existing information. It explained that the statistics produced were based on first marking of the elective subjects only and included all students who had sat examinations in June 2012. A chart was then provided showing the failure rate of each of nine, anonymised, tutors as follows:

Tutor A	34%
Tutor B	33%
Tutor C	0%
Tutor D	29%
Tutor E	30%

Tutor F	40%
Tutor G	55%
Tutor H	26%
Tutor I	30%

26. The first request asked for information relating to the number of examination scripts marked by each of the tutors within each of the nine available electives and the failure rate within that elective.

*Second to fifth requests*

27. On 15 October 2012 Mr Khan had sought information about the date/timing of the analysis of marks to review consistency across units as conducted each year through the process of moderation. The University's response took the form of a series of quotations from its Academic Regulations (dealing with the task of a second marker, the process of moderation and the role of the external examiner) and an extract from the University's application for validation of its LPC course by the Solicitors Regulation Authority. The Request referred to that response and then said:

*"I have asked for when you make an analysis of marks to review consistency across units. You are correct in stating that moderation is defined as the consideration of mark and the consequent adjustment of marks. This is the information I seek. When is the adjustment of marks made? Where is the information relating to the raw marks and then the moderated marks? To clarify what I mean, I have provided you with a document entitled moderated IP exam. You will see it contains the raw data relating to the employment and IP elective. I have run it through a formula that is used to moderate marks to ensure that the elective subjects are comparable so that no subject is disadvantageous in terms of marks. The formula also takes into account the different sample sizes. You will see from the information in the T-test that with a 95% certainty that the subjects are not comparable. This could mean that one tutor was tougher than another in marking or an exam was harder another (sic). The definition of moderation is to take out such extremes and compensate for these clear anomalies. You will see also on the same file I have attached that there are moderated scores that adjust the marks so that they are comparable. You can no (sic) see*

*that a mark that scored 60% in IP is the equivalent to 85%. The T-test demonstrates that with the moderated scores we can be 95% sure that the exam scores are comparable. So what I am asking you is:*

*(a) When did you adjust the marks as I have done which is required by the regulations.*

*(b) In addition, please provide the raw marks for IP and Employment law and also the moderated or adjusted marks.*

*(c) For clarity, I do not seek a breakdown of the regulations as it is clear to me that I understand them better than the tutors and the University. I do not question the marking of my work; I question the moderation, i.e. the adjustment of marks.*

*(d) If you have not adjusted the marks in the manner I have provided, (as it would appear), please provide the exact manner in which you did consider marks and make a consequent adjustment of them. For clarity discussing the marks is merely marking or assessment, it is not moderation.”*

#### *Sixth request*

28. The sixth request arose out of two of the responses in the Response Letter. It asked, first, for the *“date/timing of the analysis of marks to review consistency compared to the previous year as conducted each year (if such analysis is carried out)”*. It then asked for *“An outline of the process followed to evaluate anomalies between the effective scores and the core unit scores”*. In response to the first part the University stated that a statistical analysis had been provided for in the University’s Application for Validation to the Solicitors Regulation Authority (“SRA”) (the relevant extract was provided) but that there was no specific time period for the process to take place. However, the University stated that it occurred *“on an ongoing basis”* and that information on pass rates (including analyses based on student profiles and achievements) was provided to the SRA at the end of each academic year in the Annual Course Monitoring Report. A copy of the most recent report, redacted to remove personal data, accompanied the response. The response to the second part referred to the same section of the Application for Validation and stated that the monitoring process was ongoing and included the analysis of any discernible trends in marking, including the pass rate between different student cohorts. It stressed that, in line with its commitment to the SRA, any surprising results (whether disappointing or outstanding) were also reviewed by the external examiner and the exam board.

29. Mr Khan’s follow up to those responses in his sixth request was to ask for *“the redacted information used to monitor trends and anomalies. You*

*have already confirmed that you have never had statistical information across electives and between the years and had to compile this to fulfil my previous FOI request. I therefore require the actual information used in your response to [the two original questions].”*

*Seventh request*

30. An information request made by Mr Khan on 19 December 2012 had included this question:

*“Please confirm that at the time of the request [the University] last scrutinised statistical data in the 2011 Annual Report that it held no further recorded information concerning a later scrutiny of statistical mark data”*

The University stated in response that statistics, including pass rate trends, were regularly scrutinised by the Director of Assessments and all team members and reported to the SRA in the Annual Course Monitoring Report referred to above. Mr Khan’s request was to be provided with *“the exact statistical data used in the scrutiny”*.

*Eighth request*

31. A previous information request responded to by the University was for the average mark variance between the first and second examiners and the external examiners for the June 2012 electives. The University provided this answer:

*“The average mark variance for the June 2012 electives is as follows:*

<i>Subject A</i>	<i>0.88</i>	<i>– Employment</i>
<i>Subject B</i>	<i>0.06</i>	<i>– Commercial</i>
<i>Subject C</i>	<i>.09</i>	<i>– Housing</i>
<i>Subject D</i>	<i>1</i>	<i>– Intellectual Property</i>
<i>Subject E</i>	<i>0.57</i>	<i>– ADR</i>
<i>Subject F</i>	<i>0.43</i>	<i>– Corporate Finance</i>
<i>Subject G</i>	<i>0.84</i>	<i>– Family</i>
<i>Subject H</i>	<i>0.96</i>	<i>- Immigration”</i>

The Request asked for clarification and added:

*“Does Subject A 0.88 refer to a single mark, a % point of the entire marks available or something else. As I understand your disclosure you are suggesting that for subject A that the second examiner will on average only change a mark by 0.88 i.e. a mark of say 50 would*

*on average be increased or decreased to 50.88 or 49.22. Is this correct?"*

*Ninth request*

32. The Response Letter included responses to two requests. The first, included in a request submitted on 9 January 2013, asked for *"Recorded information which shows the approval of the SRA for the procedures adopted regarding 'blind marking' specifically in relation to the IP and ADR electives"*. The University responded by drawing attention to the Assessment Strategy document which disclosed that on all modules the second marker would see the marks awarded by the first marker (i.e. that second marking was "non-blind") and confirmed that this had been approved by the SRA when it validated the course.
33. Later, on 27 February 2013, Mr Khan had returned to the same broad issue and included in the request he submitted on that date a request to be told:

*"The recorded formal reasons for the choice of the moderation used i.e. why did the University choose 'universal seen double marking' as the choice of moderation?"*

The University responded in the Response Letter that it did not use the "universal seen double marking system". It went on to volunteer the information that it used "sample second marking" which, it said, was a distinct system. It then provided a detailed explanation of that system and concluded:

*"The University believes a sampling approach that asks the second marker to reflect on standards across the module and programme better delivers the requirement of fairness and the maintenance of standards and this view is the dominant one in the [Higher Education] Sector."*

34. The ninth request Mr Khan stated:

*"I require the recorded formal reasons for the choice of the moderation employed. I do not require a recital of your regulations. Your regulations require your examiners to record why they selected the 2<sup>nd</sup> marking method that they did. I seek their formal documents reasons. This should be contained in a document. Please provide the response contained in that document"*.

*Tenth request*

35. An information request dated 19<sup>th</sup> December 2012 had included a request for an outline of the moderation training the LPC team had received over the previous 3 years. The University responded that it did not hold any recorded information on the point. The relevant part of Mr Khan's tenth request read:

*“At the relevant time i.e. 2011/12, please confirm when the last time you have a record of moderation training for the tutor/assessor. Furthermore, has there been any moderation training provided to any tutors since the academic year 2011/12.”*

The Decision Notice under Appeal (“the Decision Notice”)

36. The University rejected the Request under FOIA section 14, without differentiating between its various elements, asserting that it formed part of an ongoing campaign to disrupt its core functions. The Decision Notice was issued on 24 March 2014 and followed an investigation by the Information Commissioner into Mr Khan's complaint about that rejection. The Information Commissioner summarised the history of the dispute between Mr Khan and the University and identified the Upper Tribunal decision in *Dransfield* as the most authoritative available guidance on the meaning of the term “vexatious” and the approach that should be adopted in assessing whether the circumstances of a particular case justified refusing an information request. He noted the broad definition, approved by the Upper Tribunal, that a vexatious request was one that constituted the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. He noted, too, the suggestion that a non-exhaustive list of issues that might be found instructive in reaching a conclusion comprised (1) consideration of the burden imposed by an information request on the relevant public authority and its staff; (2) examining the motive of the requester; (3) assessing the value or serious purpose of the information request; and (4) taking note of any harassment of, or distress likely to be suffered by, relevant members of the public authority's staff.
37. The Information Commissioner recorded that the University had argued that the Request was obsessive, was designed to cause disruption or annoyance, was creating a burden on its staff and was causing a disproportionate effort to respond to. He proceeded to consider each issue. He concluded that, taking into account the history of requests and their nature (all focusing on the same broad subject matter and sometimes overlapping) and the fact that the Request was submitted after Mr Khan had told the Information Commissioner that he was satisfied with the

responses he had received, the stage had been reached where the Request could reasonably be described as excessive. The Information Commissioner also concluded that the number and length of the requests submitted from time to time provided sufficient evidence of a burden being imposed on the public authority's resources in answering them even if, as Mr Khan had argued, the requested information should have been easily available. However, the Information Commissioner was not willing to go so far as to say that Mr Khan had intended to cause disruption or annoyance, although disruption may have been an unintended consequence. As to the purpose and value of the requests, the Information Commissioner considered that Mr Khan did have a serious purpose to his requests when he was attempting to access information which was of relevance to his complaint to the University and his Academic Appeal, but that once those processes had come to an end the value was reduced. In particular he concluded that by the time the Request was submitted there was no serious purpose to the questions posed. He concluded:

*"The requests do not appear to be likely to result in the provision of new information which will be of any wider public interest and they will not lead to the reopening of [the University's] academic appeal as [the University] has concluded its investigations and exhausted its internal procedures. He notes that the ongoing investigation by [OIAHE] will be likely to address the public interest concerns [Mr Khan] has about [the University] not complying with its academic regulations. As such, the Commissioner has concluded that whilst the requests did originally clearly have a serious intention behind them he considers they no longer have a sufficient value or purpose to justify the disproportionate effort in terms of burden on [the University] that would occur from responding."*

38. The Information Commissioner concluded that FOIA section 14(1) had been applied correctly by the University when it rejected the Request.

#### The appeal to this Tribunal

39. Mr Khan filed an appeal against the Decision Notice on the same day that it had been issued, 24 March 2014. Appeals to this Tribunal 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.

40. The Notice of Appeal was accompanied by Grounds of Appeal, to which the Information Commissioner responded in writing. Mr Khan filed a further response and an agreed bundle of documents was prepared by the parties for the Tribunal's use. Mr Khan had indicated from the outset that he wished to exercise his right to have his appeal determined at a hearing, rather than on the papers. The Information Commissioner chose not to attend the hearing but to rely on the points made in his formal response.
41. In the event the hearing took the form of a conference call, which lasted a little under two and a half hours and enabled us to explore with Mr Khan in considerable detail the points arising in the appeal. Mr Khan presented a well-structured argument, based on the nine grounds of appeal which he had submitted at the outset. His presentation helped to illuminate several of the issues that emerged from the documentation. He submitted additional documentation after the hearing which was provided, in copy, to the Information Commissioner and considered by us in making our decision.

#### The relevant law

42. We believe that the Information Commissioner correctly used the guidance in *Dransfield*, carefully considering each of the four factors that might suggest that a request was vexatious, but avoiding the temptation to use them as an inflexible checklist. The Information Commissioner also took particular note of the passage (at paragraph 45) in which the Upper Tribunal stressed:

*“ the importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious request”*

43. We have taken into consideration two further extracts from the *Dransfield* decision, which we think are particularly relevant to this appeal. The first, at paragraph 17 reads:

*“ ...I note that Judge Jacobs characterised the issue as one of proportionality in his ruling refusing permission to appeal in Wise v Information Commissioner (GIA/1871/2011; EA/2010/0166):*

*‘Inherent in the policy behind section 14(1) is the idea of proportionality. There must be an appropriate relationship between such matters as the information sought, the*



*purpose of the request, and the time and other resources that would be needed to provide it. As I have told Mr Wise before, his requests have become disproportionate to his original aim. There are numerous ways in which requests can become vexatious. The background that I have outlined shows what might be called a classic example of vexatiousness by drift...*

The second extract, from paragraph 37, followed a section of the decision in which the Upper Tribunal judge had considered the circumstances in which a series of requests might be regarded as reasonable because each one represented a justified probing of the response to a previous one. He then said:

*“However, in other circumstances a series of requests may suggest that later requests have become disproportionate to whatever the original inquiry was. Mr Cross, in the course of argument...described this phenomenon as “spread”. I prefer the term used by Judge Jacobs in Wise, namely ‘vexatiousness by drift’ (see paragraph 17 above).”*

#### The points argued on the appeal

44. Mr Khan put forward nine grounds of appeal. We record and comment on each in turn, in general terms, before turning to consider the application of those that we conclude have merit to the particular items of information sought in the Request.
45. The first ground was that the release of the requested information would be in the public interest. The Academic Appeal, Mr Khan said, had been unfair because the University proceeded to determine it even though not all of his freedom of information requests had been answered at the time. The Judicial Review proceedings and the OIAHE investigation, both of which arise out of the conduct of the Academic Appeal, could have far ranging consequences for the student body as a whole, not just Mr Khan. The Information Commissioner did, of course, acknowledge in his Decision Notice that there was a degree of public interest in Mr Khan’s requests at the outset that gave them a serious purpose at that stage. We would go further and say that there is a public interest in knowing that universities operate fair assessment procedures and that this may continue after the date when, internal processes having come to an end, the issues fall to be considered by other authorised bodies such as, in this case, the OIAHE and the Administrative Court.
46. Mr Khan argued that his first ground of appeal was supported by the following two specific factors:

- a. The Information Commissioner's decision in the Previous Decision Notice supported this element of the first ground because it confirmed that the University had been wrong to withhold information previously. To the extent that we can draw any conclusions from the very limited reasoning set out in the Previous Decision Notice, it is that the University had not been entitled to rely on FOIA section 12 (excessive cost of responding). It is not capable of supporting any wider argument as to the University's obligations under the FOIA.
  - b. The recommendations that emerged from the Academic Appeal had not been complied with, or at least that the University had produced no evidence to that effect, and the University had been guilty of giving false information in the past on related issues. The allegations are not supported by the, admittedly limited, contemporaneous documentation made available to us in the agreed bundle and Mr Khan produced no other evidence to support his allegation. He did not convince us either that his allegation was justified or that, if it had been, it would have had any bearing on his appeal.
47. The second ground of appeal was that the Information Commissioner had been in error in concluding that the offer letter from the University referred to in paragraphs 16 and 17 above had been reasonable. Although Mr Khan provided further information at the hearing about the issues that prevented agreement being reached, he was not able to convince us that the University had adopted an unreasonable attitude. It seemed to us that the two sides to the dispute had simply found that the differences between them were too great to bridge. Even if Mr Khan had succeeded in establishing his point on the facts it would have contributed little to the public interest that he claimed gave his enquiries serious purpose.
48. Mr Khan's third ground of appeal was that the Information Commissioner had been wrong to conclude that the Request was manifestly unjustified. He argued that the FOIA was the only means available to him to obtain information because the University did not have a written disclosure policy for academic appeals (with the result that the appeal process was unfair and students pursuing an appeal were unfairly disadvantaged). He expanded on this point in a later submission, arguing that the University, as a signatory of the QAA Code<sup>1</sup> was obliged to provide the requested

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<sup>1</sup> Quality Assurance Agency for Higher Education

information so that all students would be made aware of the assessment processes it adopts. Mr Khan did not expand the point and the Information Commissioner challenged the relevance of any disclosure process or policy for academic appeals. However, we can understand that, if an appeal process does not operate in a fair manner, viewed overall, then the pursuit of information that might moderate the unfairness, or at least make the public aware of it, could represent a serious purpose justifying a degree of persistence by those seeking it through FOIA requests. In fact, before submitting the Request Mr Khan had already established that the appeal processes did not include a disclosure phase. In those circumstances the key question is whether it was unreasonable of Mr Khan to pursue the issue with the further requests for information included in the Request. A valuable clue to Mr Khan's purpose in pursuing the point may be found in the extract from his complaint to the OIAHE quoted in paragraph 14 above<sup>2</sup> from which it appears that his approach is that either he should be entitled to pursue information requests without limit or that an academic institution should bear the burden of establishing that the appellant on an Academic Appeal did not have a ground of appeal.

49. There was a degree of overlap between Mr Khan's fourth ground of appeal and the first ground of appeal considered above. This is because the fourth ground returned to the argument that the University had been wrong to refuse previous requests. It alleged that the University, by not disclosing information either at all or in sufficient detail, had made it necessary for Mr Khan to pursue follow up requests. In dealing with the first ground of appeal we have already dealt with the purposes underlying Mr Khan's request, including his claim that the Information Commissioner had already determined that the University should have responded to earlier requests. It is for Mr Khan to demonstrate, by reference to the particular items covered by the Request, a convincing link between the information being sought and earlier, allegedly incomplete, responses or unjustified refusals.

50. Mr Khan also included in the fourth ground a challenge to the Information Commissioner's conclusion that, even if the Request were to be responded to by the University, this would not bring the process to an end. Mr Khan pointed out that the 59 responses (in fact 40 – see the analysis in paragraph 20 above) had generated a much smaller number of further information requests and suggested that his pursuit of information from the University might well be coming to an end. The point is not one that helps

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<sup>2</sup> "An academic appeal can only [be] made if there is a breach of the Academic Regulations, but they won't tell me if there has been a breach."

us to make a decision one way or another because both side's positions are based largely on supposition and the only firm evidence presented to us has been the course of dealings to date. They provide a more reliable indication as to what may be likely to occur in future, if the University does respond to the Request. They lead us to believe that there is a significant risk that, after reflecting on any further information provided, Mr Khan may well find that it does not satisfy him, in the same way that he was ultimately not satisfied by the information covered by the Previous Decision Notice.

51. Mr Khan's fifth and sixth grounds of appeal arose from a single sentence in the Decision Notice in which the Information Commissioner concluded his review of facts he had taken into consideration when considering whether or not the Request was obsessive. It read:

*"The Commissioner also considers it important to highlight that despite the offer of a review [the University] has still effectively concluded its own internal investigations into the matter and taken corrective action to rectify the error it found. ... As such [the University] argues it has complied fully with its own procedures and the Commissioner acknowledges that the persistent requests being made despite the fact that [the University] has exhausted its own procedures demonstrate that the requests are going beyond the point of persistence."*

Later, in the course of considering whether dealing with the Request would impose on the University a task that was not proportionate to the issue of concern that underlay it, the Information Commissioner stated:

*"The Commissioner notes that after the conclusion of the academic appeal the continuing requests at a point when the matter has been referred to an independent adjudicator and the offer by [the University] to provide a full review has not been responded to would not seem to still have any serious value as [the University] has concluded its investigations and further requests will not result in any further action by [the University] or any more investigation which may uncover any further failings."*

52. The fifth ground was that the Information Commissioner's decision turned on whether he had been right or wrong to conclude that the Request was submitted after the University's internal procedures had been concluded. The correspondence on which Mr Khan relied for this purpose was not clear. As stated in paragraph 13 above the University had, on 27 March 2013, notified Mr Khan of the outcome of the Academic Appeal and

informed him that he had exhausted the University's internal procedures for appeal but that he had the option of taking the matter to the OIAHE. On 22 May 2013 the University's solicitors, responding to Mr Khan's claim letter in respect of his intention to seek Judicial Review (as described in paragraph 16 above) stated:

*"The proposed review will mean that the University's internal procedures remain ongoing"*

The letter went on to explain that this had the effect of preserving Mr Khan's rights in respect of both an OIAHE complaint and his application for Judicial Review, which might otherwise have become time barred by the time the review was completed.

53. It seems clear to us that if, as happened, the offer did not lead to an agreement for a review, then the University's offer to treat its internal procedures as ongoing during the performance of that review would also fall away and the position would revert to that imposed at the conclusion of the Academic Appeal. We therefore find no error in the Information Commissioner's fact finding on this point.
54. The sixth ground of appeal was that it was beyond the Information Commissioner's remit to decide that the corrective action identified in the conclusion of the Academic Appeal had been taken. Mr Khan in fact cast doubt on whether or not it had. However, it seems clear from the materials included in the agreed bundle of documents that there were adequate contemporaneous records to justify the Information Commissioner's conclusion, in the absence of evidence to the contrary, that the required process of second marking of a larger number of examination papers was carried out. We therefore again find no error in the Information Commissioner's fact finding on this point.
55. As we have already decided (see paragraph 45 above), the existence of an OIAHE complaint and Judicial Review proceedings means that the conclusion of the University's internal procedures would not, in any event, have removed the purpose of Mr Khan's further enquiries and we carry that principle into the examination, below, of the individual components of the Request.
56. Mr Khan's seventh ground of appeal arose from a passage in the Decision Notice in which the Information Commissioner considered whether the history of information requests had imposed a burden on the University and its staff. The Decision Notice recorded the University's complaint that it had on occasions received five or six telephone calls from Mr Khan on

the same day, made to different offices or staff members, and that it had felt it necessary to impose a formal embargo on him speaking to anyone other than the University Secretary. Mr Khan challenged this during the hearing. The University was not joined as a party to the appeal and we received no evidence from it. We are not therefore able to resolve the factual dispute. In reaching our decision, therefore, we have not taken into account the suggestion that Mr Khan had previously harassed University staff on occasions.

57. The Decision Notice also recorded that dealing with Mr Khan's requests had disrupted the work of staff members and had placed considerable strain on its core functions. It sought to balance that against an argument put to it by Mr Khan to the effect that the information he sought should be readily available. The Decision Notice then read:

*"The Commissioner can clearly see that the requests sent by the complainant are at times lengthy and will require considerable time to provide responses to. He notes the complainant's comments that the information should be held by [the University] and available and this may well be true but there is no argument from the University that the information is not held or that it cannot be provided, the argument is that it would create a burden."*

58. The challenge in the seventh ground of appeal was that, in reaching his conclusion on this issue, the Information Commissioner had not properly considered the meaning of the phrase "readily available". Mr Khan expanded on the point in these terms:

*"...it is difficult to see how the information requests could be so burdensome to the University as they suggest. The information should be 'readily available' due to the advanced nature of the systems the University possesses. "Readily available" means just that. It means that the information is easily assessable. There is no reason why the information should take long to receive from the advanced systems the University process. Retrieving the information is simply a matter of a few clicks on a computer. The information commissioner did not consider the method of retrieving the information in his decision."*

59. The Information Commissioner did not respond to Mr Khan's assertion, repeated to us during the hearing, that the University would have held all the requested information on a sophisticated computer system, which could easily have been searched for specified elements of information. Instead, he drew attention, first, to the fact that the FOIA does not require a public authority to hold information in an easily accessible form and,

secondly that there was a clear pattern of requests, sometimes overlapping and sometimes in multiple form, being followed up by further requests and that this had placed a not insignificant burden on the University's resources.

60. We are not in a position to determine whether or not the University held the requested information on an easily searchable computer system. We therefore approach the issue of the burden placed on the University by reference only to the time and effort likely to have been required to generate an appropriate response to the relevant information requests, once raw data had been extracted from the University's records, rather than the time and effort likely to be required in locating and extracting such data. It is evident from the correspondence we have seen that considerable time and effort must have been involved in formulating the University's response to previous requests and we consider, below, the likely burden for the University in responding to each element of the Request.
61. Mr Khan's eighth ground of appeal was that the Information Commissioner had drawn a conclusion that the Request had no serious value but had failed to substantiate it. There is, again, a degree of overlap between this and earlier grounds of appeal. As to the purpose of his general pursuit of information, Mr Khan's position is that the University is required to comply with its academic regulations to moderate LPC examinations and to take notice of trends and anomalies in the record of marks. He argued that any failure to do so disadvantages students as a whole, not just himself as an individual, by creating inconsistencies depending on the year a student takes the exams, the electives he or she chooses and the identity of the marking tutor. Although the Information Commissioner restricted himself, in his Response to the Appeal, to a statement that he could discern no serious purpose in respect of the specific information sought, the University had previously been more expansive on the point. It spelt out its case on the apparent purpose of Mr Khan's information gathering process as a whole in the course of correspondence with the Information Commissioner during his investigation and with the OIAHE.
62. The essential difference which emerges between Mr Khan's position and that of the University was that Mr Khan believed that statistical data needs to be applied during the course of examination marking and moderation in order to ensure parity and consistency. His view is that outcomes should produce consistent results both across the range of papers taken by an individual, and within the student cohorts of successive years. If the aim is to test application and ability, it seemed to him to follow that as these will be constants for each individual, so marks across the range of core

subjects and electives should be consistent. For Mr Khan the moderation process should be a process of adjustment of marks against a statistical template, bringing “raw” marks into line with the expected distribution in the process of moderation. This seems to be the root of his comments that the University did not understand or ensure the appropriate process of moderation, and his comments on the competence of examiners. He argues that the information he seeks is exactly the type of information the University should already have access to as this is a requirement of the QAA Code which it is a signatory to. It cannot therefore cause significant burden, disruption or disturbance to provide the information. His requests cannot be vexatious, he argues, because they seek to elicit information that should be shared with students as a requirement of the QAA Code. His requests and follow up requests were needed only because of insufficient transparency and inadequate initial responses.

63. The University’s position was that Mr Khan’s requests indicated a misunderstanding of its examination and moderation process, and that it was a mistaken view of transparency requirements to expect publication of a statistical framework it was not required to use in the course of marking and moderation. The University’s regulations did not require it to use statistics at any stage in the moderation process. The aim was to achieve fairness and consistency and to maintain academic standards as approved by the SRA. There was no obligation to mark to a relative standard so that each cohort of students achieved a consistent proportion at each grade from year to year. Nor was there a requirement to ensure that marks for elective papers were consistent with marks for core subjects, either across the cohort of students or for each individual. Awards were conferred on the basis of each student’s level of achievement against a validated standard. Statistical information was prepared to assess and monitor trends and explore any issues arising at general meetings, but such information was produced at the conclusion of the academic year when results had been confirmed, and was not used or required in the moderation process. There was no requirement to adjust results by reference to a statistical benchmark for the distribution of marks.

64. It is not for us to assess the systems adopted by the University and apparently approved by the SRA. Having said that, we do not find explicit support for Mr Khan’s expectations on the role of statistical methods as the key to adjustments in moderation and marking in the Academic Regulations, said to be based on best practice and relevant precepts in the QAA Code.



65. Whatever the rights and wrongs of the parties' conflicting arguments, there is clearly a public interest in the points they have been debating. That much was acknowledged by the Information Commissioner by the acceptance, in his Decision Notice, that Mr Khan did have a serious purpose to his requests at least at the outset of his course of dealings with the University.
66. Mr Khan challenged, in particular, the Information Commissioner's view that the completion of the University's consideration of his complaint and Academic Appeal diluted the serious purpose behind the earlier requests. First, as mentioned above, Mr Khan did not accept that the University's processes had been completed. Secondly, Mr Khan argued that, even if it were accepted that the University's internal procedures had been concluded, there was a continuing serious purpose in having the requested information disclosed for the purposes of his Judicial Review and complaint to the OIAHE. We have dealt with this by reference to other grounds of appeal in paragraphs 45 and 55 above.
67. Mr Khan also stressed that the OIAHE would not, in any event, have the power to force the University to carry out any recommendation emerging from its consideration of his complaint. We infer that Mr Khan would wish to argue that it is more important in those circumstances that relevant information be disclosed to enable the public to assess the University's conduct, both in handling the LPC assessment process and in responding to any recommendation which the OIAHE may ultimately make. It is not in our view a point that adds significant weight to the, already acknowledged, public interest in the fairness of the University's assessment procedures generally.
68. The Information Commissioner added in his written Response to the appeal the challenge that Mr Khan had addressed the purpose of the Request only in very broad terms. He argued that it was for Mr Khan to demonstrate what serious purpose there was in disclosure of the specific information he requests and that he had failed to do so. We return to this issue below, when considering each element of the Request, both because we think that the challenge is an appropriate one to have made and because it creates an overlap with the ninth, and final, ground of appeal, which challenged the Information Commissioner's conclusion that the specific requests set out in the Request were not likely to result in the provision of new information.

Our application of the arguments to the component elements of the Request

*First request – more refined data on tutor failure rates (paragraph 26).*

69. The University recorded that the information provided on tutor failure rates had not been specifically recorded but that it had extracted the requested statistics from existing information. It seems likely, therefore, that further refining the data in the manner Mr Khan has requested will involve some degree of effort on the University's part, although no evidence was presented to us on exactly what would be involved in terms of locating data and then carrying out the analysis which Mr Khan requires. Even if the burden of work placed on the University were to be relatively light, however, we are not satisfied that there is any serious purpose served by further refining the data with which Mr Khan has already been provided. There clearly are material differences between markers, with most showing a failure rate of between 26% and 34% but with one outlier at 55% and another at 0%. If that information does not provide sufficient support for Mr Khan's representations to any or all of the University, the OIAHE, the SRA or the Administrative Court then it is difficult to see how providing the more detailed breakdown he seeks in the first request would improve his chances.

70. We have no material on which to base an assessment of Mr Khan's motive in making this particular request but note that the first request constitutes one of many submitted on the same broad subject matter over a period of time, several of which related to marking statistics and their analysis.

71. We have concluded that no serious purpose would be served by permitting Mr Khan to continue his pursuit of information on this topic, which has become disproportionate and therefore vexatious.

*Second to fifth requests – process of moderation (paragraph 27).*

72. The tone and content of points (a) to (d) inclusive suggest to us that Mr Khan's motive here was to debate points with the University, if not to impose on it his perception of what the correct approach should be. That is particularly the case in respect of (a) and (c). It is at least possible to identify a request in (b) but that does not detract from the overall tone and our view as to what it indicates about Mr Khan's motive. As to (d), it is clear from the University's previous response that its position is that the method it adopted was that required by the sections of the regulations to which it referred and that it believes that it was appropriate to do so. Mr Khan has done no more than to dress a challenge to the correctness of the University's approach in the guise of a question.

73. Although it seems unlikely that responding to these requests would impose an excessive burden on the University it would be sufficient, in our view, to

be disproportionate to the value to the public of any information likely to arise. Mr Khan has clearly been provided with more than sufficient information to demonstrate that the University has not applied the particular method of mark adjustment that he advocates and providing him with the detail requested in (b) would not advance the issue. All of these requests are, in our view, vexatious.

*Sixth request – process of analysis of marks and its timing (paragraph 28)*

74. We see no serious purpose in supplementing the University's previous, perfectly adequate, response to Mr Khan's original question with more information and believe that the request betrays a wish on Mr Khan's behalf to impose his view as to what statistical analysis should be carried out, whether or not the SRA regards it as relevant for its purpose in monitoring the standards of those offering training courses for potential solicitors. As the request acknowledges, it is likely that the requested information would have to be extracted from other sources and we believe that the burden of doing so is not justified by any information that the public is likely to have reason to assess. The University was therefore entitled to reject the request under FOIA section 14.

*Seventh request - post 2011 scrutiny of statistics (paragraph 30)*

75. The burden likely to be imposed on the University in this case is difficult to assess, due to the vagueness of the request, but it is potentially very significant. It seems capable of extending to any statistics that the individuals mentioned might have looked at in the course of reviewing student performance over a considerable period of time and preparing the University's annual report to the SRA. We do not think that it is proportionate, or an appropriate use of the University's resources, to carry out those enquiries when the annual report to the SRA had already been disclosed. Mr Khan has already been provided with the material that is most appropriate to the issue he has raised and there is no justification for the University being required to do more – the request is vexatious.

*Eighth request – average mark variance scheme (paragraph 31)*

76. Our assessment is, again, that Mr Khan has already been provided with all the material that he may reasonably have expected to require for his stated purposes. He has demonstrated a degree of familiarity with statistics and we do not believe that, in the context of the overall history of

Mr Khan's dealings with the University, it should be required to enter into further dialogue on the detailed process for carrying out the measurements recorded in the response to an earlier information request.

*Ninth request – reasons for choice of moderation (paragraph 34)*

77. The request is vexatious. Mr Khan has claimed that there is a serious purpose in questions that would help to demonstrate to the public how the University has conducted examination marking. His questions have produced information as to the second marking system the University uses (with SRA approval) and it has gone on to provide an explanation of the options available and its reasons for adopting the system it uses. Asking the University to trace back into its records for minutes of meetings, notes of discussions or the like to enable Mr Khan to examine the precise language in which the University recorded its adoption of a sampling, non-blind approach to moderation would impose a burden out of all proportion to the likely significance of the information when found. It is not clear to us whether the purpose of the request was to seek to embarrass or harass the University but we can certainly not see any objective justification for it in terms of accessing information that would be of any value or interest.

*Tenth request – moderation training (paragraph 35)*

78. The FOIA requires a public authority to disclose any recorded information that it holds on a matter raised in an information request. The second part of the request seems to us to be no more than a restatement, in different language, of the previous request. Mr Khan has his answer - there is no record of monitor training. He must make of that what he may in the various complaints and processes he is pursuing. To press further, as he seeks to do, is simply a disguised way of harassing the University for what Mr Khan believes is a significant failing.

79. Given the absence of recorded information during the period covered by the original request on this topic, it will impose a disproportionate burden on the University to require it to delve deeper into historical records to see if Mr Khan can add further evidence in support of the point he seeks to make. The training of staff to undertake moderation is already a long way from the starting point of Mr Khan's enquiries, with only the most remotely conceivable relevance to the matters of public importance that he has pressed on us. We regard this enquiry as a classic example of drift from Mr Khan's original purpose towards a campaign of pursuing any line of enquiry that might enable him to find

fault in some part of the University's examination processes. It was therefore entitled to reject the request as vexatious.

Conclusion

80. The Information Commissioner was correct to conclude that the University had been entitled to reject each element of the Request on the basis that it was vexatious.

81. Our decision is unanimous.

Chris Ryan

Judge

11 September 2014