



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0270

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50546087

Dated: 8 September 2014

Appellant: David Rapp

Respondent: The Information Commissioner

**Second Respondent: The Office of Qualifications and Examinations
Regulation**

Heard on the papers: Field House, London

Date of Hearing: 3 March 2015

Before

Chris Hughes

Judge

and

Melanie Howard and Dave Sivers

Tribunal Members

Date of Decision: 22 April 2015

Date of Promulgation: 5 May 2015

Decision: The appeal is dismissed

**Subject Matter:
Freedom of Information Act**

Cases considered:-

ICO v Dransfield and Devon CC 2012 UKUT 440 AAC

REASONS FOR DECISION

Procedure

This case was listed for an oral hearing, the Appellant was notified of the time and place on 18 December and acknowledged by a communication on 27 January. He did not attend the hearing. The tribunal staff attempted to contact him on the morning of the hearing to ascertain his intentions and his whereabouts. They were unable to establish contact. The tribunal considered whether to adjourn the hearing but concluded that, in all the circumstances known to it, the interests of justice did not require an adjournment and it would be possible to fairly consider and decide the case on the papers. An adjournment would therefore not be an appropriate and proportionate use of the tribunal's resources and would cause unnecessary delay.

Introduction

1. On 18, 19 and 30 April 2014 Mr Rapp (the Appellant in these proceedings) made a number of requests for information from the Second Respondent (The Office of Qualifications and Examinations Regulation "Ofqual") concerning the cancellation or invalidation of qualifications. The requests arose out of difficulties in which Mr Rapp had found himself in some years before and concerning which there had been extensive correspondence between Mr Rapp and Ofqual.

2. The request of 18 April was:

"I would like to know if Ofqual has any record of any silent powers for an awarding organisation to cancel an NVQ qualification?"

I would like to know how an awarding body should go about cancelling an NVQ qualification if it suspected malpractice?

I would like to know if that is in any way different to how an awarding body should cancel an NVQ qualification if the holder wished to surrender it?

I would further like to know what regulatory framework exists to enable a person to surrender an NVQ qualification?

I would like Ofqual to explain to me its understanding of the difference of the words cancel, invalidate and withdraw and whether Ofqual considers or has ever considered these terms to be substantially different?

3. the request of 19 April covered similar issues:

I understand that Ofqual has a unique definition of the word cancelled which distinguishes it from invalidated

in a letter to [name redacted] of the Parliamentary Ombudsman dated 1 March 2013 [name redacted] wrote :

"It appears that there may have been a different interpretation between Ofqual and the awarding organisation about the use of the term "cancelled". Cancelled means that the certificate is cancelled but the qualification remains on the system. Invalidation means that the qualification is removed."

I'd like to know what other unique terms or examples of Orwellian "Newspeak" Ofqual has also managed to come up with? Is there a dictionary available of these terms? How are these new definitions of words distributed to awarding bodies? How frequently is this dictionary updated? Is it publicly accessible anywhere? Who creates this terminology?

4. The request of 30 April again revisited these issues.
5. On 20 May Ofqual replied indicating that it considered the requests to involve issues relating to a complaint submitted to Ofqual sometime before which had been the subject of correspondence and investigation for a considerable time. It informed him that given the context and history it considered that the requests fell within section 14 (1) vexatious and or section 14 (2) repeated requests. On review it continued to maintain this position; at the request of Mr Rapp the First Respondent in these proceedings (the Information Commissioner "ICO") investigated and on 8 September he issued his report.
6. At paragraphs 27 to 36 of the decision notice he set out the background history of the request. He noted that the correspondence had gone on for a considerable period of time. Mr Rapp had made a series of requests in 2011. There had been concerns about Mr Rapp's conduct, he had subsequent to these requests made requests using a pseudonym and all the requests concerned Mr Rapp's complaint about the handling of his complaint about Edexcel. Ofqual stated *"the complainant contacted staff members directly and continued to make threats including threats to commit suicide at the offices of Ofqual, naming individual members of staff being responsible for what had happened"*. The Commissioner agreed that the correspondence would have been highly distressing for the recipients and named members of staff. Ofqual remained concerned about defamatory statements being made by Mr Rapp. Considering the volume and nature of the correspondence the Commissioner concluded that compliance with the requests would have a detrimental impact on

Ofqual: "*whilst not particularly onerous in themselves the requests were one of several received by Ofqual from the complainant. There is a clear pattern of each response generating an unreasonable response from the complainant with attempts to reopen issues which had been dealt with in depth by two public bodies. Recent requests received illustrate an attempt to reopen the issues in the public domain ...*" (paragraph 53). He therefore concluded that responding to the requests would cause a disproportionate burden on Ofqual.

7. Accordingly the Commissioner concluded that Ofqual had been correct in its approach to this case and that section 14(1) applied.
8. Mr Rapp appealed against this decision and drew attention to the judicial review he commenced against the PHSO and Ofqual in April 2014. Permission to proceed with the application was granted on 18 July 2014, the judge noting the unusually detailed nature of the documents in the case and concluding that as a gatekeeper it would be inappropriate for him to embark on a fact-finding exercise. In the light of this Mr Rapp argued that the matter was still open and therefore the Commissioner's reasons were wrong and the request was "*a request for information relating to a current live judicial review*". The information request was now more valuable "*due to the simple fact that permission has been granted to debate points directly related at the High Court*". He argued that in the mediation proceedings envisaged in the permission to appeal there would be a requirement to provide information similar to the information requested and therefore the Commissioner had treated the judge's decision with contempt and his actions were "dangerous and an abuse of the Commissioner's position".
9. In his response the Commissioner maintained the position set out in his decision notice. He referred to the approach adopted in *Dransfield*. He noted that the purpose of section 14 was to protect the resources of the public authority from disproportionate use and from the present and future burden that could be linked with the previous course of dealings. He argued that the documents supplied by Mr Rapp were in themselves very good evidence of the burden which his requests had placed on Ofqual and its staff, he noted that at Ofqual's request defamatory remarks by Mr Rapp had been taken off a public website concerned with FOIA and he concluded that the decision notice had come to the correct conclusion that the requests were vexatious.

Evidence

10. The PHSO decision (bundle 283-316) which is the background to the judicial review sets out the whole history in detail of Mr Rapp's work assessing training and the concerns he had expressed that he was not competent to carry out some assessments. It recorded the involvement of the police in these allegations and Ofqual's response to questions of whether a CV had been falsified. At paragraph 118 the PHSO stated:-

"In summary, Mr Rapp did not initially raise his complaint that his certificate had been removed and so it was not unreasonable that Ofqual did not explore this at first. Having said that, once they looked into the matter, although it was appropriate to them to recommend that Mr Rapp certificate be returned, they did not give an accurate explanation of their role in Mr Rapp's certificate being cancelled. With regard to Mr Rapp's allegation that his CV was falsified, Ofqual failed to properly investigate this issue. They did not consider the evidence provided by Mr Rapp, and they did not reassure themselves that the awarding organisation had properly investigated Mr Rapp's allegation. Those failings are so serious that they amount to maladministration." PHSO awarded Mr Rapp £750. In the report the PHSO specifically stated "we have not found that Ofqual's actions were the cause of the mental health difficulties that prevented Mr Rapp from working, although they may have compounded those problems."

11. Ofqual explained to the Commissioner (bundle pages 123-130 – with enclosures to 336) the background of the requests. Mr Rapp had initially complained against Edexcel in 2009 and then against Ofqual's handling of the complaint, in 2011. Ofqual upheld in part the original complaint. Mr Rapp made a series of information/subject access requests in 2011 and threatened legal proceedings twice for alleged personal injury caused by Ofqual through its actions in 2009 and 2010. No proceedings were issued. He then complained to PHSO who issued a draft report in 2012, which after correspondence Ofqual accepted in August 2013. Mr Rapp was dissatisfied, exhausted the PHSO's complaints procedure and in early 2014 the PHSO issued the final report which covered in depth issues which were the subject of the information request from Ofqual. Ofqual stated *"[Mr Rapp] is well out of time to bring any legal proceedings against Ofqual in relation to his complaints. Ofqual is however concerned that the proceedings seek to use the Judicial Review process to seek to make a claim against Ofqual and to go over the issues which have been raised in the previous complaints and requests for information. If permission is*

granted Ofqual will incur substantial time and resources in addressing these issues again”.

12. The enclosures demonstrated the substantial level of contact on the issues raised by Mr Rapp over the years, his questioning as to the identity of persons handling his requests (email 4 July 2014 page 179), similar requests made by Mr Rapp under a pseudonym (bundle pages 253 -270) emails from Mr Rapp to individuals in 2011 with highly offensive comments (page 271) *“are you trying to murder me?”* (page 272) *“your officer made a direct lie to me”* (page 273) *“Congratulate yourself, by the time you read this I will be dead. What sterling work you did. Best prepare the answers for the coroner. Your organisation fucked my life up, admitted wrongdoing and then refused to do anything about it. I hope you can live with yourself.”*

13. An undated posting (bundle page 274) from Mr Rapp reads:-

“£750 blood money does not compensate me for the years of my life your incompetence ruined. I plan to drive to your offices in Coventry and commit suicide so that you [names redacted] all become aware o...f (sic) what it was you did and how you lied to get out of it. I cannot recommend an organisation as incompetent and dishonest as yours. As a regulator you are nothing more than a schoolyard bully with blood on your hands”.

Consideration

14. Mr Rapp is clearly very distressed by the sequence of events of recent years. He has had a long-standing psychiatric condition which has recurrently required treatment for relapses and it appears possible that these relapses may have some relation to the level of stress he has experienced, but his behaviours also clearly cause distress in others. He has been unable to accept the explanations which have been given to him and has continually pursued the same issues, frequently against Ofqual, although his original concern was with his employer, then with Edexcel, and only after that with Ofqual, and later PHSO.

15. In dealing with Ofqual he has made a number of repetitive FOIA requests and subject access requests, has pursued a complaint with them and then with PHSO and he has repeatedly threatened (although not pursued) personal injury litigation. On his account the current wave of requests relates to a judicial review he has launched against PHSO.

16. In considering the three requests it is necessary to look at them in the overall context of the history of Mr Rapp and Ofqual in the light of the decision in *Dransfield*. The

purpose of FOIA is to encourage accountability of public bodies and to enable citizens to have a greater understanding of those bodies. However the primary duty of public bodies is to provide services and s14 FOIA exists to protect them from dissipating their energies on requests of little value.

17. In this case the information requested has long been supplied and explored fully in the previous processes of Ofqual and PHSO. The requests themselves are somewhat polemic rather than simply seeking information (the reference to newspeak). The burden of dealing with the requests has over time been considerable and the manner in which Mr Rapp has conducted his correspondence has caused considerable distress. While his discussions of suicide are clearly a manifestation of his mental disorder they are still highly distressing to the individuals who received them and he is responsible for his emails. The emails manifest an obsessive pursuit of his complaint which is irrational, obsessive and serves no useful purpose. The existence of the judicial review proceedings are his further pursuit of his private obsession, if information is required in those proceedings it should more appropriately be sought within the proceedings or the mediation. Any potential utility of the information as requested in those proceedings can only be seen as a private benefit and not a matter of any significant public interest.

Conclusion and remedy

18. The Commissioner fully and correctly explored the issues in his decision notice and the tribunal is satisfied that it is correct in law and dismisses the appeal.
19. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 22 April 2015