



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0061

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Mr Micheal Jones
Mr Narendra Makanji

Between

Paul Arnold

Appellant

-and-

The Information Commissioner

Respondent

Attendances:

For the Appellant: In person

For the Respondent: Did not appear

DECISION AND REASONS

BACKGROUND

Context

1. The Appellant owned a franchise from a company called 'Chem-Dry Northern and Southern (Chem-Dry). Almost 20 years ago in 1999 the Department for Business, Energy and Industrial Strategy (the Department) considered taking action against Chem-Dry under the Trading Schemes Regulations 1997 (the Regulations), but decided that the Regulations did not apply to Chem-Dry, and no action was brought. The Appellant believes that the Department caused the collapse of his franchise by failing to bring such an action and that he has incurred loss as a result.
2. The Appellant has been aggrieved about this and the losses caused ever since. He has corresponded with the Department for many years. There have been times when he has used unacceptably intemperate language when talking to and describing officials, and he has 'doorstepped' ministers on a number of occasions to provide documents, the last time being Vince Cable in 2014 or 2015. There have been a number of FOIA requests (the Department's email of 20 December 2017 states that there were four between 2009 and 2014), with the most recent (prior to the request with which we are concerned) reported in the Decision Notice to be in July 2014, which asked for briefing notes made available for Department officials for the purpose of responding to complaints brought about breaches of the Trading Schemes Act 1996. It is clear that the Appellant feels very aggrieved and quite angry about what he feels has happened to him, and we are aware that there are a number of other people who feel they have also suffered and been caused loss (we have read the witness statement of a Mr Sellars, for example).

The request

3. The background to the current request is that the Appellant had contacted his MP (James Heappey MP) in March 2016 and raised his long-standing concerns, and Mr Heappey then arranged a meeting, which took place on 13 June 2016, with the Minister of State for Skills, Nick Boles, for Mr Heappey to discuss the issues with Mr Boles.
4. Following the meeting, Mr Heappey then wrote to the Appellant on 19 July 2016, to report back. It appears that Mr Boles had asked officials to make enquiries about whether there was a 'wider issue' with the legislation. It seems that Mr Heappey enclosed with his letter a response to the effect that there had been so few enquiries that a review of the legislation would not be worthwhile. We note here that we did not have a copy of the response included with the letter with our papers at the hearing. The Appellant has since provided a copy which confirms the content described above.
5. Although Mr Heappey was pessimistic that anything further would be done, he does say that 'I stand ready to take further action should you wish me to do so' and asks how the Appellant and his colleagues wish to proceed.
6. The Commissioner makes reference to the response received by the MP in paragraph 15 of the Decision Notice, and then goes on to say that 'the information provided to the complainant...in the letter of 19 July 2016 accurately reflects the information contained in the briefing note (withheld material)' (paragraph 16).
7. Prior to receiving the response from his MP, the Appellant had already made a FOIA request on 22 June 2016 for the 'minutes of that meeting' (13 June 2016).

8. On 20 July 2016, the Department confirmed to the Appellant that it 'holds information falling within the terms of your request', but that more time was required for the Department to respond. There was some delay before the Appellant received a substantive response to his request. When it came on 7 November 2016 (over four months later), the response was not that the information had already been provided (by way of the response to the MP), but that 'the minutes of the meeting' were exempt from disclosure pursuant to s36(2)(b)(ii) of FOIA (prejudice to the effective conduct of public affairs).
9. Following a complaint by the Appellant to the Commissioner, the correspondence in the bundle reveals that on 27 January 2017, the Commissioner wrote at length to the Department with a number of questions as to why and how the s36(b)(ii) FOIA exemption applied in this case, and also noting that 'the Department's public interest test was inadequate'.
10. The Department responded on 7 March 2017, to explain why s36(2)(b)(ii) FOIA continued to be relied upon. We are unable to comment on these reasons as they are mostly redacted, and are not the focus of this appeal in any event. This is because the Department went on to state that it intended to rely upon section 14 FOIA on the basis that the 'Request forms part of a vexatious course of correspondence', and referred to the Commissioner's guidance on s14 FOIA which notes unreasonable persistence and the making of futile requests as two factors that might indicate a vexatious FOIA request.
11. Thus, it was that the Decision Notice in this case issued on 16 March 2018 (over a year later) considered whether the Department had correctly applied the section 14 FOIA to refuse the request because it was vexatious.

12. In finding that the request was vexatious, the Commissioner rehearses the long history of contact between the Appellant and the Department, the abusive or aggressive language sometimes used by the Appellant, the 'door-stepping' tactics used by the Appellant on occasion, the fact that the Appellant had been told on a number of occasions that the Department is not going to take further action, and the four FOIA requests made between 2009-2014. The Commissioner concludes that it is futile for the Appellant to continue to engage in correspondence, that his behaviour is obsessional, that any response is unlikely to satisfy the Appellant, that his abusive and aggressive tone is totally unacceptable, and that he has shown a 'marked and unreasonable persistence'.

13. In his appeal, the Appellant denies that he is vexatious.

14. The Appellant requested an oral hearing of this appeal, but the Commissioner decided not to attend. We heard from the Appellant briefly at the hearing. It was not necessary to hear from the witnesses (whose statements we had read), and we informed the Appellant of the outcome of the appeal at the end of the hearing.

DISCUSSION

15. In both the Decision Notice and her response to the appeal the Commissioner has set out in some detail the law on the meaning and applicability of section 14 FOIA, mainly based around the case of *Dransfield* (see below), which is uncontroversial and with which we agree.

16. Thus, section 14(1) FOIA states that "(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious". Vexatiousness is not defined in section 14, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.

17. The Commissioner's guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

18. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) when it defined the purpose of section 14 as follows:

'Section 14...is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1) ...The purpose of Section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA...' (paragraph 10).

19. Also in *Dransfield*, the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. As the Upper Tribunal observed:

'There is...no magic formula - all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.

20. *Dransfield* was also considered in the Court of Appeal (*Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454) where Arden LJ observed that: -

“...the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public... The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.’. (Para 68)’

21. The Commissioner’s guidance also contains a list of indicators which have been relied upon in this case by the Commissioner. The most relevant indicators seem to be as follows: -

Abusive or aggressive language

The tone or language of the requester’s correspondence goes beyond the level of criticism that a public authority or its employees should reasonably expect to receive.

Burden on the authority

The effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester.

Personal grudges

For whatever reason, the requester is targeting their correspondence towards a particular employee or office holder against whom they have some personal enmity.

Unreasonable persistence

The requester is attempting to reopen an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny.

Unfounded accusations

The request makes completely unsubstantiated accusations against the public authority or specific employees.

Intransigence

The requester takes an unreasonably entrenched position, rejecting attempts to assist and advise out of hand and shows no willingness to engage with the authority.

Futile requests

The issue at hand individually affects the requester and has already been conclusively resolved by the authority or subjected to some form of independent investigation.

22. In this case we are of the view that the Commissioner has wrongly labelled the Appellant's request of 22 June 2016 as vexatious. We should say first of all that it may well be that the Appellant has been overly persistent over the years, that it may well be that continuing to try to persuade the Department to take action is now futile, and it is certainly the case that there have been occasions when the Appellant has used aggressive and abusive language to which officials should not be subjected.

23. Additionally, we accept that it is right to look at the current request in the context of the almost 20 years of correspondence and contact (including a number of FOIA requests) which the Appellant has generated.

24. But we do remind ourselves that we have to take all the circumstances surrounding the request into account, and that having done so we have to find that it is the request (and not the requester) that is vexatious.

25. In this case, 'all the circumstances' has to include the fact that the Appellant asked his MP to seek a meeting with the Minister and the Department, the Minister and the MP agreed to meet. The meeting took place, and the MP wrote back to the Appellant after the meeting and, while not raising the Appellant's hopes, stated that he was ready to take further action on the Appellant's behalf. The Appellant was provided with a response to a query raised by the Minister as to whether there was a wider issue with the legislation which needed to be considered, but it is not said that this constituted the minutes of the meeting.

26. The Appellant made a straightforward request for the minutes under FOIA, and the Department have accepted that there is indeed relevant information, but that it would be withheld. Even taking into account all the circumstances of this case, we cannot see how this particular request could be described as vexatious. If an MP is willing to go to the trouble of arranging a meeting on behalf of a constituent with a Minister, and then state afterwards that he is willing to help the constituent further with the issue at hand, then it seems to us that a constituent is entitled to ask for the minutes of the meeting. There may be applicable exemptions to disclosure, but that does not mean that the request can be labelled as vexatious. It is completely understandable that the Appellant is interested in seeing what record there is of a meeting which he instigated, but did not attend.

27. We should emphasise that our decision is based on the particular nature and circumstances of this request. Our decision does not mean that the Department would be necessarily be unsuccessful in relying on s14 FOIA if further requests are made by the Appellant in pursuing the issues which are important to him. As the case-law set out above demonstrates, the decision on each FOIA request has to take all the circumstances in relation to that particular request into account, when considering whether it is vexatious.

CONCLUSION

28. On that basis, we would allow this appeal. Our understanding is that as a result of our decision, the Department must now comply with the request for information, unless one of the exemptions in FOIA is made out.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: July 2018.

(Case considered by Panel on 13 July 2018).