



Tribunals Service

Information Rights

GENERAL REGULATORY CHAMBER

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2010/0171

BETWEEN:

BERNARD FIGG

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION OF THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Determined on the Papers by: Alison McKenna, Tribunal Judge
Tony Stoller, Tribunal Member
Jean Nelson, Tribunal Member

On: 7 February 2011

At: Tribunals Service
Fox Court
London

Date of Decision: 14 February 2011

Subject Matter:

Section 14(1) Freedom of Information Act 2000

Decision of the Tribunal

The Appeal is hereby dismissed.

Reasons for Decision

The Information Request

1. On 9 September 2009, the Appellant made a request to the Isle of Wight Council (“the Council”) for information under the Freedom of Information Act 2000 (“FOIA”), in the following terms:

“I am writing to request information under the FOI Act regarding the officers the Council employs (enforcing officers) who issue fixed penalty notices on the Council’s behalf.

I require details of any representations, complaints etc. which have been made to the Council regarding the conduct of their enforcing officer, in the issuing of a FPN¹. Including details of any allegations that have been made, including but not limited to:

- 1. The enforcing officers honest in their version of events being brought into question;*
 - 2. The enforcing officer being rude;*
 - 3. The enforcing officer making threats;*
 - 4. The enforcing officer targeting individuals;*
 - 5. The enforcing officer issuing FPNs out of spite;*
 - 6. The enforcing officer assaulting individuals;*
 - 7. The enforcing officer stating they were not intending to issue a FPN but changing their mind on being informed that a complaint was to be made regarding their conduct;*
 - 8. The enforcing officer not giving their name when requested to do so*
 - 9. The enforcing officer failing to mention in their notes, which are legal evidence, that witnesses were present, even if a witness was presented to the officer at the time and it was clearly stated that they were a witness;*
 - 10. The enforcing officer fabricating evidence”.*
2. The Council responded to the Appellant on 30 September 2009 and refused to comply with his request, relying upon s.14 (1) FOIA on the basis that the request was vexatious. The Council’s decision was upheld at its internal review on 8 October 2009 and on 18 October 2009 the Appellant complained to the Respondent.

The Decision Notice

3. On 16 September 2010, the Respondent issued Decision Notice FS50274270, in which he concluded that the request had been vexatious and that the Council had properly applied s.14 (1) FOIA in this case.

¹ Fixed Penalty Notice

4. The Respondent's key findings were that:
- (i) The Appellant's request could fairly be described as obsessive because of the nature of the Council's previous interaction with the Appellant in relation to dog wardens, FPNs and the area of beach concerned on the Isle of Wight. The Respondent found that the relevant history included 29 requests for information and 5 internal appeals between May 2008 and this request in September 2009, including 4 complaints and 14 requests for information so far that year (see the Decision Notice at paragraph 21).
 - (ii) The Respondent also concluded that the request was obsessive because it was designed to elicit information in relation to a complaint that was reasonably regarded by the Council as having been determined (see the Decision Notice at paragraph 34).
 - (iii) The Respondent concluded that this request could reasonably be seen as harassing the Council because its purpose could reasonably be seen as an attempt to prolong the consideration of a grievance that the Appellant had against the Council and its enforcement officer and as an attempt to "trap" the Council into making an admission which the Appellant thought might assist him in another context (see the Decision Notice paragraphs 36 and 51).
 - (iv) The Respondent concluded that the request lacked serious purpose or value given that it followed other complaints about the FPN incident and that it was the Council's job, rather than the Appellant's to collate the evidence it held in relation to complaints (see the Decision Notice paragraph 66).
6. The Respondent did not consider that complying with the request would impose a significant burden on the Council in the absence of evidence to that effect. He also found that the request was not intended to cause disruption or annoyance to the Council in the absence of evidence to that effect. The Respondent's Decision Notice made, at several points, a clear distinction between the Appellant's activities as a private citizen and those as a "representative" of others concerned about dog bans on the Isle of Wight and a distinction between his communications with the Council about this matter rather than in respect of unrelated issues. The Respondent concluded that the issue was not clear cut but that, on balance, he was satisfied that the Council had applied s.14 (1) of FOIA correctly.
7. The Respondent acknowledged in the Decision Notice that there was a dispute between the Appellant and the Council as to whether the information request was made during a period when the Appellant was still pursuing his complaint about the FPN under stage two of the Council's own complaints procedures. The Council had submitted that its letter to the Appellant of 24 August 2009 had concluded stage two of the FPN

The Powers of the Tribunal

8. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The Issue for the Tribunal

9. The Tribunal is an independent judicial body which must decide in this case whether the Respondent acted in accordance with the law in concluding that the Council had correctly applied s. 14 (1) of FOIA to the Appellant’s request of 9 September 2009. The burden of proof lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the decision made by the public authority and upheld by the Respondent was wrong. In making its decision, the Tribunal can only consider evidence which is relevant to the issue before it.

The Law

10. The relevant law in this appeal can be stated very shortly. Section 1(1) of FOIA states that a person who has made an information request to a public authority (in this case, the Council) is entitled to be informed in writing whether it holds the information requested and, if it does, is entitled

Mode of Hearing

11. The Appellant requested that this matter be determined on the papers. The Respondent agreed with that request. The Tribunal was satisfied that it could properly determine the issues without an oral hearing. The Tribunal had before it an agreed bundle of papers running to over 160 pages, including a redacted document which the Tribunal had previously exercised its discretion to exclude from the bundle on the basis that the redacted part was irrelevant to the issues before it, but which was subsequently re-admitted to the bundle at the Appellant's request.

The Parties' Submissions

(i) The Appellant's Submissions

12. On 11 October 2010 the Appellant lodged a Notice of Application with the Tribunal. He included with it copy correspondence with the Council and the police, photographic evidence, his criticisms of the FPN appeal panel, details of inaccurate dog-ban signage, witness statements, extracts from legislation on dog control orders, and his second stage complaint request.

13. In summary, his Grounds of Appeal were:

- (i) That the Respondent had considered irrelevant evidence, supplied to him by the Council, of the Appellant's past conduct;
- (ii) That the Appellant was not given an opportunity to challenge the evidence upon which the Respondent relied in reaching his conclusions;
- (iii) That the Appellant had made the information request for the legitimate purpose of pursuing stage two of the Council's own complaints process;
- (iv) Further, that, if he were still pursuing a complaint under the Council's own process, it was unjust for the Council to prevent him from obtaining the further evidence he required by deeming his information request vexatious;
- (v) The request was also for the legitimate purpose of informing the dog-owning community which uses his website (this appears to contradict the evidence given to the Respondent and recorded at paragraphs 22 and 44 of the Decision Notice);

- (vi) That he was unable to refer the matter to the Local Government Ombudsman until the two stages of the Council's internal complaints process had been exhausted.

14. The Appellant also provided the Tribunal (in accordance with the Tribunal's directions) with a submission dated 23 January 2011. He appended to these a copy of his "blog" in relation to an unrelated issue, which he had apparently e mailed to the elected representatives of the Council on 43 successive days. The Tribunal did not consider this relevant to the issue before it as the correspondence pertained to an unrelated matter, namely the conduct of his then-elected representative on the Council. The Appellant expressed in his submissions his concern that the Tribunal itself might consider him "obsessive" when he only wished to be thorough in his submissions. The Tribunal wishes to reassure the Appellant that his conduct in relation to his appeal to the Tribunal is not a relevant matter for them to consider. The Tribunal is concerned only with the question of whether the Respondent's decision was correct on the question of whether his request to the Council was vexatious. The Tribunal reminds the Appellant that it was the request that was deemed vexatious on this occasion and not him personally.

15. In summary, the arguments advanced by the Appellant in his submissions and which are relevant to the issue before the Tribunal are:

- (i) that the Respondent relied on incorrect evidence supplied by the Council and that the Council misled the Respondent in order to undermine the Appellant's credibility, in particular by linking his "BernsBlog" campaign about his Councillor to the FPN correspondence;
- (ii) that the Respondent drew adverse inferences from the Appellant having withdrawn an earlier complaint to the Respondent when a previous (unrelated) information request to the Council was treated as vexatious;
- (iii) that at the time he made his information request he was still dealing with the second stage of the Council's complaints process in relation to the FPN, whereas the Council erroneously considered it to have concluded (see paragraph 7 above);
- (iv) that his necessarily protracted correspondence with the Council about incorrect dog-ban signage had not been treated as vexatious and had resulted in the Council accepting its error and offering him a compensatory payment for his time and trouble in pursuing the issue;
- (v) that the Council's communications with the Respondent referred to the Appellant's e mails as unreasonable and/or derogatory without any supporting evidence, so that the Council may be seen to have attempted to undermine his credibility with the Respondent;
- (vi) that the Respondent had found the evidence of vexatiousness to be "borderline", so that the Respondent should have determined the complaint in the Appellant's favour.

16. The Appellant also made a number of submissions which the Tribunal found were not relevant to the issue before it. The Tribunal has not therefore taken account of these submissions, which include: the use of the word “protected” by the Council in relation to the beach at Ryde; the publication of the Appellant’s initials by the Council on a website without his permission; the “blacklisting” of his e mail address by the Council’s computer system and his efforts to circumvent this; the Council’s incorrect dog-ban signage in Ryde; the failure of his Councillor to respond to his correspondence and the reasons for initiating his “*BernsBlog*” e mail campaign; the discussions between the Respondent’s officer and the Council’s officer regarding the possible availability of alternative FOIA exceptions in relation to his original information request; that the information he had requested has effectively been supplied in correspondence disclosed to him as he is now aware that he is the only complainant about enforcement officers; his reasons for not attending a meeting with the Council when offered the opportunity to do so; the arguments advanced by the Council which were rejected by the Respondent in determining the complaint (as evidence of bad faith on the part of the Council) and his views on the independence of the FPN appeal panel.

17. The Appellant sent the Tribunal some additional submissions on 2 February 2011, apparently as a rejoinder to the Respondent’s submissions. These submissions were not permitted by the Tribunal’s directions, which had provided for the parties to exchange and file simultaneous submissions rather than for the making of sequential submissions. The Appellant’s additional submissions exhibited some material which had not been included in the agreed hearing bundle and which the Respondent had not therefore been given an opportunity to comment on. The Tribunal considered whether it should disallow these additional submissions and evidence as they had not been permitted by the directions. The Tribunal was mindful of the overriding objective in rule 2 of its procedural rules, which requires it to deal with cases fairly and justly, and in the circumstances the Tribunal concluded that (a) the additional evidence was in fact irrelevant to the issue before the Tribunal as it consisted of copy correspondence between the Appellant and the Local Government Ombudsman in relation to a quite separate matter; and (b) that as the Appellant is unrepresented and must be assumed to be unfamiliar with Tribunal procedures, it would consider his additional representations so as to be sure that he had been afforded every opportunity to put his case to the Tribunal.

18. In the event, the Tribunal found that the additional submissions repeated earlier arguments to the effect that:

- (i) The Respondent had wrongly concluded that the Appellant has completed stage two of the Council’s complaints process; and
- (ii) The Tribunal should allow his appeal.

(ii) The Respondent's Submissions

19. The Respondent served a Response to the Grounds of Appeal dated 11 November 2010 in which he argued that:

- (i) The Grounds of Appeal suggest that whilst the Appellant is not challenging the Respondent's approach to the determination of the material issue, he does appear to dispute the Respondent's findings in respect of obsessive behaviour, harassment of the Council and that the request lacked value.
- (ii) The Respondent submitted that the findings in the Decision Notice in respect of these points were correct in the light of the evidence;
- (iii) The Respondent had not taken account of a previous complaint considered to have been vexatious by the Council; he had applied the correct approach in considering whether the request of 9 September 2009 only (and not the requester) was vexatious.

20. The Respondent provided the Tribunal with a skeleton argument dated 25 January 2011 (in accordance with the Tribunal's directions), in which he made the following points:

- (i) The term "vexatious" in s. 14(1) FOIA applies to the request and not to the requester, however, the full history and context of this request should be taken into account by the Tribunal.
- (ii) "Vexatious" is not defined in FOIA, but the Respondent's general approach is to ask himself a series of questions, namely: whether the request could fairly be seen as obsessive; is it harassing to the public authority or does it cause distress to its staff; would complying with the request impose a significant burden on the public authority; is the request designed to cause disruption or annoyance; and does the request lack any serious purpose or value. It is suggested that the Tribunal should ask itself the same questions;
- (iii) The Respondent referred the Tribunal to a number of decisions of differently constituted panels of the First-tier Tribunal on the question of vexatiousness;
- (iv) The Respondent referred the Tribunal to his Awareness Guidance 22, on "Vexatious and Repeated Requests";
- (v) The Respondent's conclusion that the request was obsessive was not based on the volume of correspondence alone. This is important because the Appellant is the webmaster of a website for dog owners on the Isle of Wight, and might therefore reasonably be expected to enter into more frequent correspondence with the Council on this subject than a person without his interests. However, the Respondent found that the Appellant was, in making the request, dwelling on an issue which had either already been dealt with or could have been pursued through other channels. In particular, the Respondent took into account the history of the matter which is that the Appellant had

- (vi) The Appellant had, before his request was made, availed himself of the Council's two stage complaints process (this is of course disputed – see paragraph 7 above). The Appellant had been offered a “time and trouble” payment in respect of incorrect signage which he had brought to the attention of the Council and he had been informed that he could make a complaint to the Local Government Ombudsman on 24 August 2009.

The Tribunal's Conclusions

21. In reaching its conclusions in this case, the Tribunal has borne in mind that every case involving an alleged vexatious request should be viewed on its own facts. The Tribunal was satisfied that the approach taken by the Respondent in considering the facts, and the series of questions he considered, had addressed the relevant issues in this case.
22. The Tribunal concluded that the history and context of the communications between the Appellant and the Council were relevant, but only in so far as they related to the subject matter of this information request. The Tribunal concurs with the Respondent's approach of disregarding the history of the Appellant's interaction with the Council about matters other than the conduct of the enforcement officer (see paragraph 41 of the Decision Notice). The Appellant argues that the fact the Respondent received evidence about his other complaints means that the Respondent's consideration of his complaint was inherently unfair. The Tribunal rejects this argument. It is clear that the Respondent received a significant amount of evidence but appropriately considered what evidence was relevant for him to take into account. Furthermore, it is evident from the Decision Notice that the Respondent disregarded a number of areas of evidence which he had decided was immaterial to the complaint before him.
23. The Tribunal would not expect the Respondent to invite the Appellant to comment on all the evidence before him before reaching his conclusions and issuing his Decision notice. The right of appeal to the Tribunal gives the Appellant his opportunity to comment on the Respondent's evaluation of evidence.
24. As mentioned at paragraph 7 above, there is a dispute between the Appellant and the Council as to whether, at the time he made this information request, he was still entitled to pursue his complaint about the enforcement officer to stage two of the Council's complaints process. The Respondent concluded that there was no material reason why the Council should be expected to wait for an undetermined period of time for further submissions from the Appellant (see paragraph 34 of the Decision Notice).

25. The Tribunal has considered the history of the matter and finds as follows:

- The Appellant was issued with a FPN on 17 June 2009, which he appealed against. He also submitted a complaint under the Council's complaints procedure about the enforcement officer who had issued the FPN, on 20 June 2009.
- The appeal was heard by an Appeal Panel on 24 June 2009 and rejected. A letter from the Council dated 26 June 2009 informs the Appellant of this and also states that the Appellant's allegations about the conduct of the enforcement officer had been considered as part of the appeal process. In this respect, the Tribunal makes a different finding from that of the Respondent (see the Decision Notice paragraph 32).
- The Council's 26 June letter rejects the complaint at stage one and informs the Appellant that unless the Council heard from him within two weeks it would consider the matter closed.
- There followed several e mails from the Appellant stating that he intended to take the matter to stage two of the Complaints process, however he did not make any substantive representations to the Council and on 24 August 2009 the Council wrote to the Appellant stating clearly that it now considered stage two to have been completed and that he could now complain to the Local Government Ombudsman or take legal proceedings if he remained dissatisfied.

26. The Appellant appears not to have accepted this statement at face value and, of course, made this information request subsequent to that letter. He now argues that he was pursuing a legitimate aim in making the information request, namely collating evidence to allow him to take his complaint about the enforcement officer to stage two of the Council's internal complaints process. The Tribunal finds it difficult to accept the Appellant's line of argument in this respect, for the following reasons. Firstly, the Tribunal has looked at the Council's published complaints procedures and notes there is nothing in it allowing the sending of holding replies, the collation of further evidence or of delaying the stage two submission for these purposes. The Appellant appears merely to have assumed that this was a permissible approach. The Tribunal agrees with the Respondent that the Council is entitled to take the view that its complaints procedure should be completed within a reasonable time frame and that in the absence of a substantive stage two application it was entitled to decide that the opportunity to take the matter further was now closed. Secondly, the Appellant had been informed clearly on 24 August of the next steps he could take. It does not seem to the Tribunal that it was open to the Appellant to continue to insist on a further consideration of his complaint by the Council in the face of that letter, and the Tribunal further considers that the Appellant was not disadvantaged by the curtailment of the internal process because he could have taken his complaint to the Local Government Ombudsman at that point. The Tribunal agrees with the Respondent that, viewed in this context, the request lacked serious purpose or value because it sought to prolong a process which had been concluded.

27. The Tribunal finds that the Appellant's insistence that he was entitled to engage further with the Council in relation to his complaint about the enforcement officer constitutes additional evidence of obsessive behaviour on his part. The Tribunal finds that there was a persistent effort by the Appellant not only to re-open issues that had been decided in another forum (the appeal panel) but also a persistent attempt to pursue those issues through a process which he had been told very clearly was no longer open to him.
28. The Tribunal concludes that it was reasonable for the Council to treat the information request as vexatious in this context. This is not only because the request sought to re-open issues that had already been decided and sought to pursue a process which the Appellant had been told was exhausted, but also in view of the tone of the request itself, which is unfortunate in that it implies guilt in the phrasing of the questions. In format, the information request adopts a somewhat forensic style which assumes that the Appellant is entitled to use FOIA to "trap" the Council into making admissions that might assist him in his complaint. The Tribunal agrees with the Respondent that these factors are evidence of obsessive behaviour by the Appellant and that this is indicative of vexatiousness. The Tribunal also agrees with the Respondent that the terms of this request could reasonably be seen as harassing the Council and that this is also indicative of vexatiousness.
29. The Appellant argues that another reason why the Respondent was incorrect to conclude that the information request had no serious purpose or value was that he requested the information as a "representative" of his on-line community of dog owners on the Isle of Wight. The Tribunal observes that there was no indication of this in the relevant correspondence, and that this argument apparently contradicts what the Appellant told the Respondent, as recorded in the Decision Notice. The Tribunal finds that even if the information requested was intended for a wider audience, it does not invalidate the Council's determination that the request was vexatious when viewed in the context of the Appellant's FPN appeal and subsequent correspondence. There is no reason why another concerned member of the dog-owning community on the Island could not have made a request for similar information in moderate terms.
30. The Appellant argues that the Respondent found his case "borderline". The Tribunal finds that this is an incorrect statement. The Respondent concluded in paragraph 68 of his Decision Notice that "... *the Commissioner does not consider that the issue of vexatiousness is clear-cut. However, based on the evidence that has been provided to him and taking all the contributory factors into account, the Commissioner has found that the arguments in favour of applying section 14 (1) are of sufficient weight to deem the request as vexatious*". The Tribunal finds that this is a different conclusion from the Appellant's suggestion that the issue was "borderline".

31. For the above reasons, the Tribunal upholds the Respondent's decision and dismisses this appeal. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the First-tier Tribunal for permission to appeal to the Upper Tribunal, within 28 days of the receipt of the decision against which they wish to appeal. Such an application must identify the alleged error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making such an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Alison McKenna
Tribunal Judge

Dated: 15 February 2011