**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2011/0048
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Decision Notice No: FS50301278**
**Dated: 9 February 2011**

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| **Appellant:** | **Mr Paul White** |
| **Respondent:** | **Information Commissioner** |
| **Second Respondent:** | **South Gloucestershire Council** |
| **Heard at:** | **Audit House, London** |
| **Date of hearing**: | **2 June 2011** |
| **Date of decision:** | **27 June 2011** |

**Before**

**Robin Callender Smith**
Judge

and

**Anne Chafer**
**Suzanne Cosgrave**
Tribunal Members

**Attendances:**

For the Appellant: Peter Balchin, Solicitor: Alistairs

For the Respondent: Ligia Osepciu, Counsel instructed by the Information Commissioner (on paper)

For the Additional Party: Wayne Cleghorn, Solicitor: South Gloucestershire Council (on paper).

**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2011/0048
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**
**Subject matter:**

**FOIA**

Vexatiousness or repeated requests s.14

**Cases:**

*Ahilathirunayagam v London Metropolitan University [EA/2006/0070]* and *Carpenter v The Information Commissioner [EA/2008/0046].*

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 February 2011 and dismisses the appeal.

## REASONS FOR DECISION

### Introduction

1. This appeal relates to a series of requests for information from South Gloucestershire Council ("the Council") about staffing levels and service procedures in the Council's taxi licensing department and the costs incurred by the Council in conducting legal proceedings against Mr Paul White ("the Appellant") in respect of the plating of his taxi.

### The request for information

2. In January 2010 the Appellant submitted three separate information access forms to the Council. He wanted information on staffing levels and service procedures in the taxi licensing Department and – in the context of previous litigation involving him and the Council – the costs incurred by the Council in respect of those legal proceedings.

3. Two of the requests were made on 18 January 2010 and the third was made on 29 January 2010.

4. On 19 February 2010 the Council issued a refusal notice in respect of all three of the Appellant's requests. The Council relied on s.14 FOIA on the basis that the Council considered the Appellant's requests to be both vexatious and repeated.

5. The Appellant was advised that the Council would not respond to any similar requests for information for a period of nine months. The Council did not advise the Appellant of its internal review procedures.

The complaint to the Information Commissioner

6. On 9 March 2010 the Appellant wrote to the Information Commissioner ("IC") to complain about the way the three requests had been handled. He objected to the Council's use of s.14 and also to its decision not to respond to similar requests for a nine-month period

7. The IC found the Appellant's requests were vexatious and did engage section 14 (1) FOIA but that they were not repeated and did not engage section 14 (2) FOIA.

8. The IC accepted that the Council was justified in refusing to comply with the Appellant's requests.

9. Specifically the IC made the following findings of fact:

   (i) The Appellant had made the 16 requests to the Council for similar information since 8 September 2008 over the course of some 17 months prior to January 2010.

(ii) The previous requests were often accompanied by voluminous correspondence from the Appellant to the Council checking the status and progress of those requests.

(iii) The language and tone of the Appellant's correspondence with the Council staff addressing his FOIA requests was often abusive, at times attacking the personal integrity certain staff members.

(iv) The Council responded to the Appellant's initial requests in September 2008 in full.

(v) In June 2008 the Council conducted a review of fees charges for providing taxi and private hire licences. During that review all the existing information on Council labour costs and staffing levels was supplied to every licensed taxi driver in the South Gloucestershire area and the Appellant had received that information.

(vi) The information was also made available in the South Gloucestershire Taxi Association's newsletter and was also available online as part of the Council's publication scheme.

(vii) The Appellant already had the information sought in all three of the January 2010 requests.

10. The IC noted that he had already dealt with two complaints by the Appellant relating to previous requests for information from the Council. One of those was resolved informally. The other had resulted in a Decision Notice dated 11 May 2010 (FS50271635). This upheld the Council's decision to withhold certain information concerning a phone call by a Council employee to the Appellant under s. 40 FOIA.

11. The IC found the requests were vexatious because:

- They could fairly be characterised as obsessive;
- They had the effect of harassing the public authority or its staff; and
- Compliance with the requests would create a significant burden on the Council in terms of expense and distraction.

The appeal to the Tribunal

12. The detailed grounds of appeal run to 5 pages. The Tribunal has assumed these were drafted on the Appellant's behalf by his solicitor, Mr Peter Balchin because there is a covering letter from Mr Balchin – attaching them – dated 24 February 2011.

13. These grounds of appeal are characterised by the IC, in the response to the appeal, as a "diffuse narrative complaint about the reasonableness of the Council's behaviour towards the Appellant".

14. Three specific points are made in the 5-page document:

- The IC erred in holding that FOIA permits the Council to decline to respond to vexatious requests for information;

- The IC erred in finding that s.14 (2) FOIA permitted the Council to decline to respond to the requests; and

- The IC erred in finding that the requests were vexatious because

  (i) The Council had not responded to the Appellant's previous requests concerning staff, costs and service procedure in the taxi licensing department properly or at all;

  (ii) As a result, the requests were not obsessive but were reasonably and persistently seeking information not yet obtained; and

  (iii) Compliance with the requests was easy and would not place a significant burden or distraction on the Council.

The questions for the Tribunal

15. Whether the three requests for information made by the Appellant in January 2011 were vexatious in terms of s.14 FOIA.

16. For the avoidance of doubt the provisions of s.14 FOIA (and s.1 FOIA to give it its context) are set out below because – at the oral hearing – Mr Balchin, on behalf of the Appellant, asserted that s.14 FOIA was fundamentally flawed and not compliant with European law.

Section 1 FOIA states:

> "(1) Any person making a request for information to a public authority is entitled –
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of the section and to the provisions of sections….14".

Section 14 FOIA provides as follows:

> "(1) Section 1 (1) does not oblige a public authority to comply with a request for information if the request is vexatious.
>
> (2) Where a public authority has previously complied with the request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval as a lapsed between compliance with the original request in the making of the current request."

Evidence

17. In considering the matter, the Tribunal had excused the attendance at the oral appeal hearing of the IC and the Council, dealing with their points and submissions on the papers filed before the hearing. The Council provided both an open and a closed bundle of information in relation to the relevant requests – including un-redacted documentation available in the open bundle.

18. The Tribunal did not find it necessary to refer to the material in the closed bundle in arriving at its decision.

19. The Appellant attended and adopted his written witness statement dated 23 May 2011. He elaborated on points made in that statement in his oral evidence to the Tribunal. There was clearly some difference between the witness and the Tribunal in terms of understanding of the definitions as he was keen to stress he was not vexatious whereas the s14 provision relates to vexatious requests.

20. He stressed that he was not vexatious in his requests for information and supporting documentation. He made the requests because he thought the Council were not taking his requests seriously enough. He did not think it was unreasonable for him to ask more than once for information that had simply not been provided when the council clearly held the information and documentation.

21. He referred to evidence that had been adduced at Bristol Crown Court. His view was that, on the basis of the information disclosed at the Crown Court, the information he was requesting was easily retrievable.

22. When he made what he described as his second "major request for information and documentation" he then found himself refused that information on the basis that his request was vexatious.

23. He believed that it was not unreasonable for the Council to provide not only the service requests specified in his request but in addition also the audit logs to show how they were annotated with details of telephone calls in return, and when they were entered on the Council's computer system.

Legal submissions and analysis

24. Mr Balchin submitted that, while some weight could be given to the IC's guidance in terms of vexatiousness, it was not applicable in this appeal. The IC was using “self-publicised material" which was subsidiary of the statutory regime already in place in litigation matters generally, both civil and criminal. By section 42 of the Supreme Court Act – now the Senior Court Act – 1981 it was open to the Attorney General to restrain a vexatious litigant from issuing proceedings without permission of the court for an indefinite period. Such orders – and any allegations of vexatiousness – were intrusive and could only be made either by the Attorney General or a member of his staff for someone instructed on his behalf. Evidence to show the key elements of vexatiousness had to be satisfied. This normally required formal affidavit evidence.

25. Under Rule 3.11 of the Civil Procedure Rules, the court could make three types of civil restraint orders as defined by Rule 2.3.1 of the Civil Procedure Rules.

26. He contended that the IC's office appeared to be applying "the threshold in all the proceedings order, namely that Paul White as 'habitually and persistently and without reasonable cause' instituted vexatious…. applications".

27. He maintained that the Oxford English Dictionary definition of vexatious required harassment, aggression, or interference in the unjustifiable claim in a legal action.

28. He also referred to Stroud's Judicial Dictionary which referred to the fact that an application which was based on evidence short of the truth and containing much invention was not necessarily vexatiously bought, or 'vexatious legal proceedings' within the meaning of the s. 51 of the

Supreme Court of Judicature Act 1925 as it now had to be read in conjunction with s.42 of the Senior Court Act 1981.

29. Specifically, his submissions were that:

- The Appellant had not unreasonably initiated numerous applications for information and documents. The documents on the information he required were clear from his witness statement.

- The IC and the Council had never provided any evidence that the Appellant was vexatious.

- The Appellant had not acted obsessively.

- The Appellant's request had been measured, reasonable and would not cause a significant burden in terms of expense or distraction because the documents were clearly available and clearly readily retrievable.

- The Appellant actions did not approach the threshold of vexatiousness set out in *Bock v Bock 1955* or *AG v Foley 2000*.

- The Council had protracted the request and refused to release simple material. They had refused to even adopt a basic complaints procedure.

30. Finally, the IC's response to the appeal was unfounded, unreasonable, unfair to a litigant in person and frivolous.

Conclusion and remedy

32. The Tribunal reminds itself of remarks it made in *Carpenter v IC and Stevenage Borough Council [EA/2008/0046]* when it was constituted identically as for this appeal.

*"50. While the Tribunal finds Mr Carpenter's appeal fails – and finds that his requests were "manifestly unreasonable" even in the light of the public interest test that is part and parcel of this area of EIR -- it notes that at no stage did SBC put the Appellant on warning about his intemperate language or point out that the threatening tone he was adopting could result in him being treated in the way that subsequently transpired.*

*51. The Tribunal reminds itself of the principles that have emerged in relation to Section 14 FOIA:*

*(1) It is important to ensure that the standard for establishing that a vexatious request is not too high (Coggins v ICO EA/2007/0013 Paragraph 19 and Hossack v ICO EA/2007/0024 and Welsh v ICO EA/2007/0088).*

*(2) The various considerations identified in AG22 (summarised at Paragraph 31 of the Decision Notice) are a useful interpretive guide to help public authorities to navigate the concept of a "vexatious request". There should not however be an overly-structured approach to the application of those considerations and every case should be viewed on its own particular facts.*

*(3) When deciding whether a request is vexatious a public authority is not obliged to look at the request in isolation. It could consider both the history of the matter and what lay behind the request. A request could appear, in isolation, to be entirely reasonable yet could assume quality of being vexatious when it is construed in context (Hossack, Betts v ICO EA/2007/0190 and Gowers v ICO and Camden LBC EA/2007/0014).*

*(4) Every case turns on its own facts. Considerations which may be relevant to the overall analysis include:*

*(a) the request forming part of an extended campaign to expose alleged improper or illegal behaviour in the context of evidence tending to indicate that the campaign is not well founded;*

*(b) the request involving information which had already been provided to the applicant;*

*(c) the nature and extent of the applicant's correspondence with the authority whether this suggests an obsessive approach to disclosure;*

*(d) the tone adopted in the correspondence being tendentious and/or haranguing;*

*(e) whether the correspondence could reasonably be expected to have a negative effect on the health and well-being of officers; and*

*(f) whether responding to the request would be likely to entail substantial and disproportionate financial and administrative burdens."*

33. Apart from setting out the s.14 vexatiousness factors, the Tribunal was reminding public authorities that – as a matter of good practice – it is often of assistance if individual requestors are told, in advance of s.14 being deployed, that the public authority takes the view that the point has been reached beyond which further requests will be regarded as vexatious.

34. In the present case the Tribunal has no difficulty in determining to the required standard – the balance of probabilities – that the three requests of January 2010 were vexatious given the lengthy history of this matter.

35. We note, in particular, an earlier Decision Notice following a request for Mr White/Mr Balchin – one of two apart from this appeal - from the IC (FS50271635) dated 11 May 2010.

36. The summary of that notice states:

*"1. The complainant requested details of a specific telephone call made to him by an official working in the Council's taxi licensing department on a specified date. The complainant asked for a transcript of the call or a telephone bill showing the length and time of the call. South Gloucestershire Council stated that it did not make recordings of telephone calls made from or received by its taxi licensing department and it had no record of such a telephone call being made. The Commissioner has considered the matter and his view is that, if it were held, the requested information would constitute the personal data of the applicant. As such, the Commissioner's decision is that the requested information is exempt by virtue of section 40(1) of the Act and that the request should have been considered as a request for personal data under section 7 of the Data Protection Act 1998."*

37. That Decision Notice goes on to state, by way of background:

*"2. The Commissioner understands that at some point in early 2009 there was a court case involving the complainant and South Gloucestershire Council ('the Council'). The court case appears to have resulted from a dispute regarding taxi licensing.*

*3. Following the court case, it was alleged by the complainant and the complainant's solicitor that a Council official had committed perjury by testifying that a telephone call (the call at the centre of this complaint) had been made to the complainant.*

*4. The Commissioner understands that this matter was investigated by the police and that no further action was taken. The Commissioner also understands that the complainant and his solicitor continue to correspond with the Council in an attempt to obtain more information about this matter."*

38. The IC did not require any steps to be taken by the Council in respect of that Decision Notice.

39. The relevance of that previous Decision Notice is that the current Notice of Appeal and the witness' own Statement repeatedly refers to the Council's failure to provide details of a telephone call between a named individual at the Council and the Appellant on 11 October 2007. However none of the requests that are the subject of the Decision Notice in this appeal relate to that telephone call. Also, the Appellant's repeated references to the Data Retention (EC Directive) Regulations 2007 failed to appreciate that the Regulations were repealed with effect from 6 April 2009 and replaced with the Data Retention (EC Directive) Regulations 2009. Both the 2007 and 2009 Regulations apply to "public communications providers". The Council is not a public communications provider.

40. The Tribunal is satisfied – without even having to consider the closed material – that the Council has provided strong evidence that the Appellant's requests represented a pattern of correspondence, often including personal comments, which have had the effect of harassing the Council staff dealing with the Appellant.

41. The IC's conclusion that compliance with those requests would be likely to lead to further correspondence and requests which would have placed an intolerable burden on the Council is one shared by the Tribunal.

42. The Tribunal is satisfied that the three requests made in January 2010 were vexatious.

43. The Tribunal is also satisfied that Parliament – when it enacted FOIA in 2000 – had considered carefully through debate and scrutiny the

full implications of s.14 of the Act in terms of vexatiousness. The Tribunal does not accept the submissions that "vexatiousness" needs to be read against any other standard elsewhere in legislation relating to matters outside FOIA.

44. Our decision is unanimous.

45. The Tribunal considered whether the costs of this appeal should fall on the Appellant. There was little that was achieved, in the Tribunal's opinion, by the Appellant requiring an oral hearing. The matter could have been dealt with on the papers. The other parties chose to take that route without complaint.

46. The Tribunal observes that the Appellant was legally represented and that an attempt was made to introduce additional material and submissions on the morning of the hearing and without notice being given to the other parties as required by previous Directions. The Tribunal declined to consider this material.

47. While the Tribunal has decided not to award costs against the Appellant in this matter – on the basis that the legal advice he received in respect of this appeal may have been optimistic in the extreme – any further costs incurred in any appeal proceedings should come under the most anxious scrutiny of those then reviewing the matter.

48. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days

of the date the Tribunal's decision was sent. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Robin Callender Smith

Judge

27 June 2011