IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0226**
GENERAL REGULATORY CHAMBER **Case No. EA/2012/0228**
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notices No: FS50437482, FS50430435, FS50430436 and FS50437483
Dated: 13 August 2012 and 27 September 2012

Appellant:	**Peter Cain**
First Respondent:	**Information Commissioner**
Second Respondent:	**The London Borough of Islington**
Date of hearing:	**2 April 2013 at Field House, London**
Date of decision:	**21 May 2013**

Before

Anisa Dhanji
Judge

and

Alison Lowton and David Wilkinson
Panel Members

Representation
For the Appellant: in person
For the First Respondent: no attendance
For the Second Respondent: Michael Smith, Solicitor

Subject matter
Freedom of Information Act 2000, section 14(1) - whether requests were vexatious

Case law
Ainslie v IC and Dorset County Council (GIA 294 2012); Craven v IC and Department of Energy and Climate Change (GIA 786 2012); IC v Devon County Council and Dransfield (GIA 3037 2011); Wise v. Information Commissioner (GIA 1871 2011)

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Peter Cain (the "Appellant"), against two Decision Notices issued by the Information Commissioner (the "Commissioner"), on 13 August 2012 and 27 September 2012, respectively.

2. The Appellant is a leaseholder of a flat in Thornhill Houses, a building owned by the London Borough of Islington (the "Council"). The Council has a right, under the terms of the Appellant's lease, to collect service charges from him in respect of communal services and repairs. The Appellant disputes the amount of service charges levied by the Council.

3. The Appellant requested access, under the Freedom of Information Act 2000 ("FOIA"), to certain information concerning the service charges invoiced to him and other leaseholders. The Council refused the requests. The Commissioner upheld the refusals and the Appellant has appealed to the First-tier Tribunal challenging the Commissioner's decisions.

4. These appeals have been heard together because of the overlap in the factual matrix and legal issues. Also, the parties are the same in both cases.

The Requests for Information

5. These appeals relate to 4 requests for information. The first Decision Notice deals with three requests for information. One was made on 21 November 2011, and two were made on 5 December 2011. The second Decision Notice relates to a request for information made on 24 January 2012.

6. The specific terms of the requests are not relevant for the purposes of these appeals. Sufficed to say that all requests were for information concerning the service charges for Thornhill Houses. In all cases, the Council refused the requests, relying on section 14(1) of the Freedom of Information Act 2000 ("FOIA"), and confirmed the refusals following internal reviews. In relation to the request made on 24th of January 2012, the Council also relied on section 14(2).

The Complaint to the Commissioner

7. The Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner undertook enquiries, and considered representations made by the Council and the Appellant.

8. In the First Decision Notice, the Commissioner assessed whether the Council had correctly applied section 14(1) by reference to his own

Guidance Note in effect at the time, on vexatious requests. He looked particularly at whether the requests could fairly be seen as obsessive, whether they harassed the authority or caused distress to staff, whether complying with the requests would impose a significant burden in terms of expense and distraction, whether the requests were designed to cause disruption or annoyance, and whether they lacked any serious purpose or value.

9. He noted that the Council had received a large number of requests for information from the Appellant. Most related to the management and calculation of service charges for leaseholders in Thornhill Houses. Some requests had been directed to Homes for Islington ("HFI"). From April 2012, the Council had assumed responsibility for managing housing services. The Commissioner considered that it was appropriate to take into account the requests made to HFI, particularly since those requests involved the same issues.

10. The Council explained to the Commissioner that during the course of its frequent interactions with the Appellant, the Council had considered the requests and complaints made by the Appellant at the highest levels. The Chief Executive of HFI had met personally with the Appellant to discuss his concerns. In dealing with his numerous and sometimes repetitive emails, the Council had attempted to offer the Appellant advice and assistance. The Council said that despite their best efforts, the Appellant continued to bombard them with emails and requests and was invariably dissatisfied with the responses he received which he would often then escalate to an internal review and then an appeal to the Commissioner, or they would prompt further requests and complaints. The Council explained that the sheer volume and frequency of the communications from the Appellant had been very challenging to manage.

11. The Commissioner noted that the Appellant had also complained to the Local Government Ombudsman ("LGO") who had advised the Appellant that if he was concerned about the service charges, he could appeal to the Leasehold Valuation Tribunal ("LVT"), which is set up to resolve residential leasehold disputes in an accessible and informal way. The Commissioner also took into account that if the Appellant was dissatisfied with the Council's response to any requests for information, he had the option to appeal to the Commissioner, and indeed, had done so on a number of occasions.

12. The Commissioner considered that given the other remedies available to the Appellant, the continued pursuit of information about service charges by way of FOIA requests was not justified, nor was the very wide scope, volume and frequency of the requests justified. He considered that the Appellant's approach to the issue had been out of proportion when there were more reasonable steps he could have taken to resolve the issues. In the Commissioner's view, the Appellant had been pursuing a campaign against the Council as a result of his grievance over service charges, and this had developed progressively into a persistent and wide ranging challenge in relation to the charges made to residents for various activities more generally. There was evidence that if the Appellant was not satisfied

with a response, he would make an even more wide-ranging request the next time, rather than focusing on resolving the issues he had already raised. The Commissioner was satisfied that the Appellant's requests were part of an obsessive campaign.

13. The Commissioner also accepted that the Council's staff regarded the Appellant's on-going requests and correspondence as harassing. He noted that in a letter dated 6 December 2011, the Council had expressed concern to the Appellant about the impact of his requests and correspondence on its staff. The Commissioner considered that the Council's expressions of concern had not impacted significantly on the Appellant's behaviour or approach. The Commissioner also considered that the Appellant's general tone and manner had contributed to the harassing effects of his correspondence. In addition, the Commissioner was satisfied that compliance with the requests would impose a significant burden on the Council's resources.

14. For all these reasons, the Commissioner found that the requests were vexatious. He accepted that the Appellant's intention had not been to cause disruption or annoyance and that he genuinely believed that he was acting in the public interest. The Commissioner also accepted that the Appellant may have begun seeking information for a serious purpose, but considered that there had come a point when the actions he had taken and the burden on the Council was disproportionate to the objective the Appellant was seeking to achieve, and that there was an alternative route available by which the Appellant could pursue his concerns over service charges.

15. In the second Decision Notice, the Commissioner reached the same findings as in the first Decision Notice, and for the same reasons.

The Appeal to the Tribunal

16. The Appellant has appealed against the Decision Notices. The Council was joined in the appeals as the Second Respondent.

17. The Appellant requested an oral hearing. Prior to the hearing, the parties lodged an agreed bundle comprising some 317 pages. The Appellant also lodged a separate bundle of some 117 pages. These were documents which the other parties did not consider relevant and therefore, they were not included in the agreed bundle. We have considered them but have found them to be of only marginal relevance. The Commissioner did not attend the hearing, but lodged written submissions. The other parties each lodged a skeleton argument.

18. At the hearing, we heard evidence from Ms Leila Ridley, an Information Compliance Manager, employed by the Council. She adopted her witness statement and was examined and cross-examined by the Appellant. On the panel's suggestion, the Appellant also gave evidence. He had not lodged a witness statement, but much of his Skeleton Argument comprised what might more properly be described as evidence. He was cross-examined by Mr Smith. The panel asked both witnesses a number of questions. We will refer to their evidence, below, as relevant, together with our findings.

The Tribunal's Jurisdiction

19. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

20. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

The Statutory Framework

21. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

22. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA or if certain other provisions apply. In the present case, the Council has invoked section 14. This section does not provide an exemption as such. Its effect is simply to render inapplicable the general right of access to information contained in section 1(1). Where section 14 applies, the public authority does not have to provide the information requested, nor indeed is it required to inform the requester if it holds the information.

23. Section 14 sets out two grounds on which a public authority may refuse a request. The first is where the request is vexatious. The second is where the request is identical or substantially similar to a previous request that the public authority has already complied with. Section 14(1) is concerned with whether the request is vexatious, and not whether the applicant is vexatious.

24. Specifically, section 14 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 a 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 has elapsed between compliance with the previous request and the making of the current request.*

Issues

25. The only issue to be addressed in this appeal is whether the requests were vexatious. If they were not vexatious, then in the case of the requests covered by the first Decision Notice, the information must be disclosed, since no other exemptions have been relied upon.

26. In the case of the request dated 24th of January 2012, covered by the second Decision Notice, the Council has relied also on section 14(2). If the request was not properly refused under section 14(1), then it will be necessary to consider whether it was properly refused under section 14(2). Having found that the request was properly refused under section 14(1), the Commissioner, did not go on to consider section 14(2).

Findings and Reasons

27. In considering whether the requests were vexatious, we need to consider what vexatious means in the context of FOIA. FOIA does not define "vexatious". However, the Upper Tribunal ("UT") has recently offered guidance in three cases as to what the term means - IC v Devon County Council and Dransfield (GIA 3037 2011); Craven v IC and Department of Energy and Climate Change (GIA 786 2012); and Ainslie v IC and Dorset County Council (GIA 294 2012). These cases all concerned section 14(1) of FOIA and/or the corresponding provision under the Environmental Information Regulations 2004 ("EIR"), although the UT considered that there was no material difference in the principles to be applied, whether the legislation under consideration was FOIA or the EIR.

28. All three cases were heard by Judge Wikeley and as he noted, this was the first occasion on which an appellate court or tribunal had been directly faced with the issue of what vexatiousness means in the context of information requests. He treated Dransfield as the 'lead case', and in that decision, he set out helpful guidance on the meaning of "vexatious", which we have summarised below. He stressed, however, that this guidance should not be regarded as being prescriptive.

- "Vexatious" is a word that takes its meaning and flavour from its context. In the context of section 14, "vexatious" carries its ordinary and natural meaning, within the particular statutory context of FOIA. The dictionary definition of "vexatious" as *"causing, tending or disposing to cause … annoyance, irritation, dissatisfaction or disappointment can only take us so far"*. As a starting point, a request which is annoying or irritating to the recipient may well be vexatious, but it depends on the circumstances. (paragraph 24)

- "Vexatious" connotes *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. Such misuse may be evidenced in different ways.

- The Commissioner's guidance that *"the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause provides a useful starting point so long as the emphasis is on the issue of justification (or not)"*. (paragraph 26).

- The purpose of section 14 is to protect public authorities and their employees in their everyday business. Thus, consideration of the effect of a request on them is entirely justified. A single abusive and offensive request may well cause distress, and so be vexatious. A torrent of individually benign requests may well cause disruption. However, it may be more difficult to construe a request which merely

causes irritation, without more, as vexatious under section 14. (paragraph 26)

- An important aspect of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request. (paragraph 26)

- A common theme underpinning section 14(1) as it applies on the basis of a past course of dealings between a public authority and a particular requester, is a lack of proportionality.

29. Judge Wikeley went on to say that the question of whether a request is truly vexatious may be determined by considering four broad issues or themes:

- the burden on the public authority and its staff;

- the motive of the requester;

- the value or serious purpose of the request; and

- any harassment or distress caused to the staff.

30. In paragraphs 29 to 45, he set out further guidance about each of these four themes, which we will refer to below when considering the facts of the present case.

Burden

31. As already noted, these appeals concern four requests made by the Appellant on various aspects of the service charge calculation and management of Thornhill Houses. The requests were made initially to HFI and then to the Council when the Council took back responsibility for managing housing services in April 2012. The Commissioner was satisfied, as we are, that the Appellant's dealings with HFI and the Council are both relevant for the purposes of these appeals, and indeed the Appellant has not suggested that there is any distinction to be drawn based on whether a request was made to HFI or to the Council.

32. The witness statement of Leila Ridley has, annexed to it, a schedule detailing the Appellant's requests. It indicates that prior to the first of the four requests in issue in this appeal (made on 22 November 2011), the Appellant had made about 56 requests starting from February 2011, followed by over 20 requests for internal reviews. The Appellant accepted, at the hearing, that the schedule is broadly accurate, although he pointed out that when he has had to repeat or reframe a request that was not answered, that has been treated as a fresh request. We accept that there has been an element of that and that certain of the Appellant's requests were not answered correctly. We accept that if the requests were closely analysed, there would probably not be as many as 56 discrete requests. However, it is not necessary, in our view, to take a microscopic view of the individual requests. It is clear, on any analysis, that the appellant has made a considerable number of requests on broadly the same subject matter.

33. In relation to burden, Judge Wikeley said this at paragraph 29 of Dransfield:

> *"First the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor."*

34. He emphasised that number of previous requests alone may not suffice to support a finding that a further request is vexatious, but that *"the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious"* (paragraph 30).

35. We are satisfied on the evidence before us, that the Appellant's requests have placed a considerable burden on the Council. The Appellant has been corresponding about the service charge matter for over a year. We take into account here that many of his requests led to complaints and to requests for internal reviews, considerably increasing the overall time involved. We also bear in mind that in addition to his large number of FOIA requests, there have also been requests under the Landlord and Tenant Act 1985 on the same subject matter.

36. Ms Ridley says, and we accept as entirely plausible, that the sheer volume and nature of the Appellant's requests and complaints have had a detrimental effect on service delivery, particularly in the case of the Council's Information Governance Team. We note that this was made clear to the Appellant in HFI's letter from Jeremy Tuck dated 6 December 2011 in which Mr Tuck expressed concern about the *"unreasonable"* amount of effort that had been involved in addressing the Appellant's numerous *"requests, follow-up questions, complaints and statements".* The letter also pointed out to the Appellant that a number of his complaints were complex and required time to consider and to fully review, and that in turn *"the time available to review these, are directly impacted by the sheer volume of all your other interactions and requests".* Mr Tuck went on to say that his team had reached a point of exhaustion relating to their interactions with the Appellant. The Appellant replied by email on 7 December 2011 alleging that Mr Tuck's letter was simply a tactic to hide the information he was seeking. It is clear from that reply that he was not prepared to take on board the concerns expressed by Mr Tuck, or to curtail his request or their scope, nor indeed to modify his approach in any way.

37. We note that at paragraph 30 of Dransfield, when addressing the issue of burden, Judge Wikeley says that *",,, if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against .. a finding that the new request is vexatious".* The present case is not one, however, where the public authority has consistently failed to deal appropriately with earlier requests (albeit that the Appellant may not have been satisfied with the responses received), and is simply complaining about the burden that responding to his requests would create. In addition

to dealing with a number of the Appellant's requests, we note that the public authority has also met with the Appellant to discuss the issue of service charges, and his outstanding requests for information. We are satisfied that they have tried to engage with the Appellant to respond to his information requests and resolve issues with him.

38. As in Dransfield, the future burden must also be considered. The Appellant's failure to utilise the LVT to deal with his concerns about service charges, and his persistence in continuing, instead, with his FOIA requests to the Council, appears to be driven by a belief that the Council has something to hide. We have seen no evidence to support that belief, but the fact that it is what the Appellant nevertheless believes, suggests that it is unlikely that the Council will be able to resolve the issue of service charges to the Appellant's satisfaction through responses to FOIA requests.

Motive, value and purpose

39. For convenience, we have considered these two themes together because on the facts of the present case, as indeed in Dransfield, the issues are closely intertwined

40. Judge Wikeley notes at paragraph 34 of Dransfield that the motive of the requester may well be a relevant and indeed a significant factor in assessing whether a request is vexatious. As he says *"the proper application of section 14 cannot side-step the question of the underlying rationale or justification for the request"*.

41. Clearly, there is a balancing exercise to be undertaken. As Judge Wikeley notes, on the one hand, it is important that public authorities should not be exposed to the irresponsible use of FOIA. On the other hand, a single request may quite legitimately prompt a further request for more information and a series of requests may well be reasonable when viewed both individually and in context as a group. However, in other circumstances a series of requests may suggest that later requests have become disproportionate to whatever the original inquiry was. Borrowing a term used by Judge Jacobs in Wise v. Information Commissioner (GIA /1871/2011), Judge Wikeley describes this as "vexatiousness by drift". As regards the value or serious purpose of the request in terms of the objective public interest in the information sought, Judge Wikeley notes that in some cases, the weight to be attached to that value or purpose may diminish over time and subsequent requests (especially where there is "vexatiousness by drift") may not have a continuing justification."

42. In our view, "vexatiousness by drift" aptly describes the circumstances of the present case. We accept that at the outset, the Appellant may well have had legitimate concerns about the level of the service charges. Indeed, he says, and we accept, that as a result of his requests for information, and the information he has received, it has come to light that certain amounts had been incorrectly charged and this has led to a reduction in the charges. However, in our view, the Appellant's requests have persisted well beyond his original purpose, which he says has been to gather sufficient information to bring a claim in the LVT. Despite having gathered a considerable amount of information, he has not in fact brought a claim before the LVT, and

notwithstanding the advice from the LGO that the LVT has its own power to call for evidence, he has continued to make requests under FOIA. Although his requests may have once had a serious purpose, we consider that that purpose has diminished over time, and that the scope, volume and frequency of the Appellant's requests have become disproportionate to that original purpose.

Harassing or causing distress to the staff

43. Judge Wikeley notes that although a finding of vexatiousness does not depend on there having been harassment or distress of the public authority's staff, vexatiousness may be evidenced *"…by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive…"*

44. Although the particular requests in issue in these appeals may appear entirely benign in their tone and scope, they must be viewed in context. We accept from the evidence of Ms Ridley, that the volume and persistence of the Appellant's requests in relation to service charges, and in some cases the language he has used and the accusations of dishonesty and impropriety that he has made, have been very distressing for the Council's staff. This has been not just because of the number of requests, but also, because of the feeling that he would never be satisfied with any responses they could give him, since underlying his requests has been his conviction that the Council is deliberately withholding information. Ms Ridley's evidence at the hearing was that she, personally, had contemplated resigning from her post because of the distress occasioned by the Appellant's requests and interactions with him in relation to those requests. We consider that this is compelling evidence of the effect that the Appellant's on-going requests have had, albeit that we accept that it was not his intention to cause harassment or distress.

45. For all these reasons, we are satisfied that the Appellant's requests were properly characterised by the Council and the Commissioner to be vexatious. Accordingly we uphold the Commissioner's Decision Notices and dismiss these appeals. Our decision is unanimous.

46. In the case of the request dated 24th of January 2012, having found that it was properly refused under section 14(1), it is not necessary to go on to consider the application of section 14(2).

Decision

47. These appeals are dismissed.

Signed:

Anisa Dhanji
Judge

Date: 21 May 2013