IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0072**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: **FS50463281**
Dated: **19 March 2013**

Appellant: DAVID MORRIS

Respondent: THE INFORMATION COMMISSIONER

Heard at: Social Security and Child Support Tribunal, New Manor, Newcastle

Date of hearing: 8th September 2014

Date of decision: 6th November 2014

Before
CHRIS RYAN
(Judge)
and
JEAN NELSON
ANDREW WHETNALL

Attendances:

The Appellant represented himself.
The Respondent did not attend and was not represented.

Subject matter: Vexatious or repeated requests s.14

Cases: *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC).

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. We have decided that a request for information submitted by the Appellant to the Department for Business, Innovation and Skills ("BIS") on 3 August 2012 ("the Request") fell within the scope of section 14 of the Freedom of Information Act 2000 ("FOIA") and that BIS was therefore entitled to refuse to comply with it.

2. The Request was made under FOIA section 1, which imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

3. Section 14(1) of FOIA provides that:
   "Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

4. The term "vexatious" is not defined in FOIA but, as we explain below, has been the subject of authoritative guidance by the Upper Tribunal.

Background Facts

5. In early April 1996 the Appellant was pursuing litigation against the British Coal Corporation ("BCC") for injuries he had incurred in an accident while its employee. Shortly before trial the BCC made a payment into court. This created a significant risk for the Appellant. Even if the court found that BCC was liable, he, the Appellant, might have been ordered to pay a significant portion of BCC's costs if he did not achieve an award of damages at trial equalling or exceeding the amount paid in, which was either £50,000 or £50,157.92. (The significance of the small difference between those two figures will become apparent later.)

6. The Appellant decided to avoid the risk and on 22 April 1996 his solicitors served on BCC's solicitors a Notice of Acceptance of the sum in court.

7. The Notice of Acceptance did not include any breakdown of the sum accepted and we have not seen any settlement agreement allocating any portion of it to any of the several heads of damages that were in issue at the time. The Appellant believes that if there had been such an allocation, and if it had attributed any significant portion of the final settlement figure to his claim for loss of redundancy rights, he would have secured a valuable benefit. The benefit would have been a smaller deduction being made in order to reimburse the Government's Compensation Recovery Unit ("CRU") for industrial injury benefit sums previously paid to the Appellant in respect of the accident.

8. The Appellant has tried, over a period of years, to obtain clarification on this point. In the process he has obtained documents establishing that a redundancy figure of £33,000 featured in the calculations shared between BCC's claims agent and its solicitors (as well, possibly, as BCC's insurers), when they were trying to determine the amount that should be paid into court. But nothing has come to light to suggest that the two firms of solicitors representing the parties agreed a detailed breakdown. We have seen correspondence to the CRU from the solicitors who represented BCC in the litigation suggesting that the claims agents and solicitors adopted the deliberate tactic of not providing any breakdown of the payment into court. Whether that was to increase the pressure and uncertainty on the Appellant, or to protect the CRU from a reduction in its recovery, is impossible to determine from the materials we have seen. It is certainly a common enough tactic in litigation to tender a sum in settlement without any breakdown. It leaves the Claimant facing a costs risk (if the ultimate award does not exceed the sum paid into court) regardless of the court's valuation of each individual head of damage. However, the Appellant believes strongly that materials do exist that create sufficient connection between the sum he accepted and the redundancy head of claim to enable him to make a claim to recover some of the money paid to the CRU.

9. The Appellant's efforts to locate those materials have been extensive and have continued for a number of years. They were summarised in an Appendix to the Decision Notice which has given rise to this appeal and do not require repeating here. They culminated in BIS taking the step in February 2008 of refusing to respond to any further requests for information received from the Appellant, relying on FOIA section 14.

<u>The Request and the Decision Notice against which the Appellant appeals</u>

10. The Request was sent to the BIS on 3 August 2012. It read:

> *"With regards to a notice of acceptance letter received by* [the BCC claims agent] *on the 15th April 1996 sent by* [name redacted] *a Solicitor working for British Coal claims …*

> *(a) Has this letter been altered forged or mistakenly recorded or similar. With regards to your internal review dated 11 April 2008 attached.*
> *(b) What was the full amount in Court on the 11 April 1996 with all the parts? With regards to your internal review dated 11 April 2008; I would remind you that section 16 of the FOI Act states you need to give advice and assistance this does not mean lots of gobbledegook and then missing out any payment by another party.*
> *(c) What information does the Department hold regarding the dismissal of* [name redacted] *a senior partner for Solicitors called Nabarro Nathansons now Nabarro's I believe. A firm of Solicitors working for the Department."*

11. The Appellant complained to the Information Commissioner about the BIS refusal to accede to the Request (on the basis that FOIA section 14 justified it in doing so) and on the 19 March 2013 the Information Commissioner issued a Decision Notice, which concluded that some (part b) of the requested information constituted the personal data of the Appellant himself (with the result that it was exempt information under FOIA and capable of being obtained, if at all, under section 7 of the DPA) and that the BIS had been entitled to rely on FOIA section 14 to refuse to disclose the rest. The Information Commissioner based that second part of his decision on the published guidance appearing on his own website at the time. However, the guidance made no mention of, and did not take into account, the views of the Upper Tribunal as they had been expressed, some two months earlier, in the case of *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC).

12. The Appellant appealed to this Tribunal but his appeal was struck out on the basis that it had no reasonable prospect of success. That decision was then set aside by a decision of the Upper Tribunal dated 18 June 2014 on the basis that the Information Commissioner had fallen into error in failing to take *Dransfield* into account and that error had carried through into this Tribunal's approach to the strike out application.

13. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

14. It was not entirely clear to us from the Appellant's submissions whether he limited his case to the section 14 point or wished also to challenge the conclusion in the Decision Notice that part (b) of the Request

should be refused under FOIA section 40(1). He did not deal with it as a separate issue during the appeal. However, for completeness, we state that in our view part (b) quite clearly did constituted a request for information about the Appellant and not anyone else and is therefore exempt information under section 40(1).

Was BIS entitled to rely on FOIA section 14?

15. As we have mentioned, the term "vexatious" is not defined in the FOIA. However, in *Dransfield* Upper Tribunal Judge Wikely said this:

> *"27. The common theme underpinning section 14(1), at least insofar as it applies on the basis of a past course of dealings between the public authority and a particular requester, has been identified by Judge Jacobs as being a lack of proportionality (in his refusal of permission to appeal in Wise v Information Commissioner GIA/1871/2011; see paragraph 17 above). This issue was also identified by the recent FTT in Lee v Information Commissioner and King's College Cambridge at [73] as a relevant consideration. … I agree with the overall conclusion that the FTT in Lee reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure" (at [69])."*

16. Judge Wikely went on to identify four questions which he suggested might help those considering whether or not a request was truly vexatious. They were:
    i. How great a burden did the request impose on the public authority and its staff?
    ii. What was the requester's motive?
    iii. Did the request have value or a serious purpose?
    iv. Was there any evidence of the requester harassing staff members or causing them distress?

    However, he went on to make it clear that those considerations were not intended to be exhaustive and that they should not be treated as a formulaic check-list.

17. The Information Commissioner accepted that his decision notice had not included a consideration of the impact of *Dransfield*, but he argued, in effect, that the error had not affected the outcome.

18. The Appellant explained to us during the hearing that he believed that those to whom he had directed his requests for information were using the discrepancy between £50,000 and £50,157.92, referred to in paragraph 5 above, to block his search for the information he required. We were not able to discern any evidence to support the suspicion. The more logical explanation, which we are inclined to accept, is that it arose in the way described by Rachel Sandby-Thomas, Director General, Legal of BERR in a letter she wrote to the Appellant as long ago as 11 April 2008. Her explanation was that:

a. the amount recoverable by CRU from the proceeds of the litigation increased each week during which benefit payments were made;
b. the total of those weekly payments was calculated up to the 5 April 1996;
c. in the event the payment into court was not made until 11 April 1996;
d. by that date the Appellant had received a further payment of £157.92 and the sum paid into court was increased to cover it.

19. We conclude, therefore, that the Appellant's allegations that crucial information has been deliberately withheld from him, are not supported by the facts and documentation made available to us, even though they are undoubtedly based on strongly held suspicions.

20. The parties both filed written submissions in which they considered each of the considerations proposed as guidance by Upper Tribunal Judge Wikely.

21. The Information Commissioner relied upon the lengthy history of requests submitted by the Appellant since 2007 to support his argument that the burden on BIS has been substantial, even though he conceded that the Request, considered on its own, would not impose a significant burden. The Appellant challenged that argument and suggested that any burden imposed on BIS arose from its own actions and not the persistence of his pursuit of information.

22. The Information Commissioner did not assert that any weight should be attached to the second of Judge Wikely's four relevant factors, namely, the motive of the requester.

23. As to the value or serious purpose of the Request, the Information Commissioner argued that the purpose underlying the requests was a personal, and not a private one, and that the Appellant had, in any event, received all the information to which he was entitled. The serious purpose or value of the Request was therefore outweighed by the burden imposed on BIS. From the Appellant's viewpoint, however, the discovery of the truth about both the precise settlement figure and the (in his contention) not unrelated dismissal of the solicitor's employee gave the Request a very serious purpose.

24. The Information Commissioner invited us to take into account some intemperate language used by the Appellant in correspondence he sent in 2008. He argued that this justified some weight being attached to the possible harassment and distress suffered by the recipients of that correspondence. The Appellant accepted that he had become impatient on some occasions but, seen in the overall context of his enquiries, we would not place any great weight on this factor.

25. Overall, our view is that this is a case where we should be more than normally cautious of adopting the check-list approach against which Judge Wikely warned. The truth of the matter, as it appears to us, is that the Appellant has diligently and determinedly pursued a line of enquiry in which he has genuine belief but which, in truth, is based on an erroneous analysis of the events surrounding the settlement of the litigation and of their potential impact on the level of CRU recovery. That fact alone imposes on the public authority the sort of disproportionate burden, identified by Upper Tribunal Judge Jacob in *Wise,* which justifies a refusal under section 14*.* It has the effect of rendering further pursuit of the Appellant's enquiries an inappropriate use of the procedures established by the FOIA and justified the BIS in refusing the Request under section 14 in the way that it did.

26. Our finding does not amount to a reflection on the Appellant's character. The Appellant was accompanied to the hearing by his wife and daughter, who spoke up for his honesty and determination. He was distressed when the term "vexatious" was applied to him because he saw himself as driven to repeat information requests by replies from BIS which he considered to be attempts at deliberate concealment. In reality, as we have explained, "vexatious" has a particular meaning for the purpose of section 14 and we have applied it in the unusual circumstances of this case, which include the absence of any evidence of dishonesty by anyone involved and the existence of an earlier explanation for the discrepancy in the amount of the payment into court."

Conclusion

27. We conclude therefore that, although the Information Commissioner failed to take *Dransfield* into consideration, he nevertheless reached the correct conclusion in his decision notice and that the appeal should therefore be dismissed.

28. Our decision is unanimous.

Chris Ryan
Judge

6 November 2014