



Appeal number: EA/2016/ 0231

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**X**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Ms ALISON LOWTON  
Mr ROGER CREEDON**

**Sitting in public at Field House on 14 March 2017**

**The Appellant appeared in person, the Respondent did not attend**

## DECISION

1. The appeal is dismissed.
2. On the Appellant's application, the Tribunal directs pursuant to rule 14 (1) (b) and rule 2 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 that the Appellant shall be referred to only as X in this Decision.

## REASONS

### *Background to Appeal*

3. X made information requests to the London Borough of Richmond Upon Thames ("the Council") on 14 April and 6 May 2016 in the following terms:

*"Under the FOI request, please send me a copy of*

- 1. The internal policy and procedure staff at the London Borough of Richmond Upon Thames Adult and Community Services Mental Health should use to carry out a Care Act 2014 Assessment*
- 2. Please provide a copy of the internal procedure staff must follow in terms of a request for the assessment to be conducted in a CCTV room, or facilities for video recording the assessment in the past the staff had manipulated the assessment*
- 3. Please send me a copy of the policy social and health care service has for its staff to make sure that they respect and protect human rights of the residents in the borough who use their services*
- 4. Please send me a copy of the policy of the positive steps staff must take to ensure the human rights of service members aren't breach*
- 5. Under the FOI please send me a copy of the council procedures to investigate allegations of abuse by staff inflicted in vulnerable adults at risk of abuse by staff".*

4. X also made a request under the Data Protection Act 1998, with which we are not concerned in this appeal.
5. The Council refused the information requests in reliance upon s. 14 (1) of the Freedom of Information Act 2000 ("FOIA") on 13 May 2016. X complained to the Information Commissioner ("the Commissioner") the same day, but the Commissioner advised X to await the outcome of an internal review. The internal review confirmed the Council's reliance upon s. 14 (1) FOIA and the Commissioner investigated X's complaint thereafter.

6. The Respondent issued Decision Notice FS50629339 on 31 August 2016, upholding the Council's decision. It recorded that the Appellant has made 28 information requests to the Council over the previous three years, all of which had been responded to, and that a link to the Safeguarding policy requested had been provided to X on six occasions.
7. The Decision Notice explained that in the context of the Council's own complaints policy, it now considers X to be "vexatious", in having pursued complaints against the Council dating back to 1995. It also recorded that X's allegations had not been upheld by the Local Government Ombudsman, who had investigated them in 2006, 2011, 2014 and 2015 and had declined to become involved any further. Also, that X had been unsuccessful in litigation against the Council in the High Court.
8. The Decision Notice recorded at paragraph 19 that the Council had applied s. 14 (1) FOIA to X's previous requests in 2013 and that X had not appealed that decision. The Council had responded to the receipt of further requests but had then "warned" X in February 2016 that it was considering applying s. 14 (1) to future requests. This it did when the requests referred to above were submitted.
9. The Decision Notice concluded that, based on a detailed chronology of requests provided by the Council, the Commissioner was satisfied that X's requests related to a long-running dispute with the Council in which X had repeatedly asked for information which had already been disclosed. The Decision Notice noted that X's complaints had been investigated by the appropriate agencies but not upheld and concluded that X's requests took up significant resources and time in X's effort to re-open a dispute in which the Council had been found not to be at fault. This situation served to deprive the requests of serious purpose or value for the wider public, although it was recognised that these matters are important to X. The Decision Notice concluded that X's requests constituted a mis-use of FOIA in all the circumstances, and the Commissioner was satisfied that the Council was correct to apply s. 14 (1) FOIA to the requests detailed above.

#### *Appeal to the Tribunal*

10. X's Notice of Appeal dated 28 September 2016 submitted that disclosure of the policies requested was necessary in order to found a case for judicial review against the Council. X submitted that there was "no evidence" and "no creditable evidence" of disruption or distress to the Council arising from these requests and that the Council had unlawfully treated the requests as vexatious because of X's status under the Council's own complaints policy. X wished to cross examine Council staff about this. X submitted that the Decision Notice was wrong to uphold the Council's approach because there was a serious purpose to the requests, and they were in the public interest.
11. The Commissioner's Response dated 8 November 2016 maintained the analysis as set out in the Decision Notice. It referred the Tribunal to comments made by the Local Government Ombudsman about the repetitive nature of X's correspondence with the

Council. The Commissioner noted that the Council had designated X as vexatious under its own complaints procedure in 2010, which was five years after the correspondence began.

12. X requested an oral hearing, which the Commissioner did not attend. The Commissioner asked the Tribunal to take her written submissions into account. The Tribunal heard X's oral submissions over the course of a morning. We acknowledge that X found the hearing difficult and at times distressing but we thank X for persevering with it and setting out the basis of the appeal so clearly. The Tribunal had before it a bundle comprising nearly 200 pages. At the hearing, X handed up one further document which was a letter from the Council dated 7 February 2017 apologising to X for failing to properly record X's needs and provide X with a support plan, an apology apparently instigated by the Local Government Ombudsman.

13. X told the Tribunal about suffering from a serious mental health condition which X believes is connected to the Council's historical conduct. X stated that this disability is recognised under the Equality Act 2010 so that X is entitled to reasonable adjustments. X did not provide any evidence of a formal diagnosis to the Tribunal or suggest that any particular adjustments were required to facilitate the hearing of the appeal but, having regard to the overriding objective, the Tribunal (a) agreed to X's request for anonymity (see paragraph 23 below); (b) arranged for X to have a dedicated quiet waiting room at Field House (which was not in fact used because X arrived late, having become confused about a change of venue); (c) allowed X to sit wherever they wanted in the hearing room and (d) adopted a facilitative and informal approach to the hearing, offering breaks (which were not taken) and encouraging X to take their time to make their best possible case. We note that the Tribunal office had also taken steps to assist X by providing hard copies of all the pre-hearing correspondence although it was unable to grant X's request to appoint an intermediary to assist with the appeal.

14. X had filed a witness statement dated 10 January 2017. This asserted that the information request should be treated as genuine and not vexatious as it was relevant to an application for pre-action disclosure in connection with Judicial Review proceedings. X stated that it was a requirement of the Administrative Court to show that X had requested voluntary disclosure by the Council before seeking an order for disclosure and that FOIA was an appropriate route to take in this context. The witness statement also complained of a breach of Article 14 ECHR by both the Council and the Commissioner and suggests that the Commissioner was required to issue a Safeguarding Alert once it became aware of the circumstances of X's case. It also complained that the Council had disclosed its policies by providing a link to a website and the link had not worked. The witness statement suggested that the Commissioner was wrong to rely on the Council's chronology as she should have required "hard evidence" to be produced.

15. The Tribunal explained to X that it found the written documents X had produced prior to the hearing difficult to follow because X had "cut and pasted" other peoples' documents into them and it was not clear whether X was adopting these statements or including them only so as to provide a further commentary on them. In those

circumstances, the Tribunal took X through the Grounds of Appeal, the Response and the witness statement, asking X to clarify their case in relation to each.

16. During the hearing, X's case expanded beyond what had previously been put in writing. In particular, X submitted that the Commissioner was wrong to have accepted the Council's chronology of previous requests by X as accurate as this was disputed evidence which X had not been given the opportunity to challenge. X suggested that the Commissioner's staff had made their lives easier by simply accepting and rubber stamping the Council's case. Further, that the Commissioner should not have considered the history of X's dealings with the Council and status under its complaints policy. X also told the Tribunal that the Commissioner had discriminated against X in the Decision Notice by failing to take into account the fact that X had a mental disorder which affects their behaviour. X referred to the "inequality of arms" between themselves and the Commissioner, as the Commissioner has a lawyer, and suggested that the Commissioner's staff had been unhelpful to X during the investigation.

17. The Tribunal explained to X that the grounds of appeal did not state that the chronology was disputed, so the Commissioner could not have known this. X said that the Commissioner should have asked about this as X hadn't seen the Council's chronology. The Tribunal showed X the page in the bundle where the Council had sent the chronology to X. When asked by the Tribunal what parts of the chronology were disputed, X said that "*some of the information is probably incorrect*". X said that these were not repeated requests for the same information as a fresh request for the new policy had been made only after the law had been changed. X disputed that repetitive requests were made. When the Tribunal took X to an example of an apparently repeated request, X said that it was permitted to ask for information again if the request was not answered in 20 days. When shown an example of where X had apparently not waited 20 days (requests numbered 30 and 31 on page 117 of the bundle) X said that probably this was due to stress about the Judicial Review proceedings and the need to demonstrate that an informal request for disclosure had been made. X also said that sometimes a request was made again to be more specific.

18. X told the Tribunal that the application for permission to bring Judicial Review proceedings had been refused but that permission to appeal had been given. X said that the refusal had been X's lawyer's fault for making the application out of time and that X was now self-representing for the appeal.

#### *The Law*

19. S. 14 FOIA provides as follows:

*"14. Vexatious or repeated requests*

*(1) Section 1 (1) does not oblige a public authority to comply with a request for information if the request is vexatious".*

20. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 AAC, the Upper Tribunal interpreted "vexatious requests" as being manifestly

unjustified, or involving inappropriate or improper use of a formal procedure. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic approach. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider "*all the relevant circumstances*".

21. The powers of the Tribunal in determining this appeal 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."*

22. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with X.

### *Conclusion*

23. In determining X's request for anonymity, the Tribunal had regard to rules 14(1) (b) and 2 of its Rules (referred to at paragraph 2 above). X told the Tribunal that it would cause stress and anxiety for X's name to be made public and that it would affect X's conduct of the appeal. The Tribunal decided that the hearing should be held in public but that it would be fair and just to anonymise X in the Tribunal's Decision so as to ensure that X was able to participate fully in the proceedings without worrying about being identified. It is important for X to understand that anonymity may not be granted in any further hearings before this Tribunal as each panel will make its own decision on that matter.

24. We note that the Council "warned" X about its possible future reliance on s. 14 FOIA prior to the decision which gave rise to this appeal. We are puzzled by the legal status of this "warning" and we hope it is helpful if we draw the parties' attention to s.

17 (5) and (6) of FOIA in respect of the permissible treatment of a pattern of vexatious requests.

25. We note here the Upper Tribunal and Court of Appeal's emphasis on the need to take a holistic approach to any request in respect of which s. 14 FOIA has been applied. That approach has a particular resonance in X's case for several reasons, which we consider below.

26. Firstly, as noted above, the Council provided to X and to the Commissioner a chronology of X's information requests dating back to 2005 and the Commissioner proceeded to rely on it for the purposes of the Decision Notice. In any case where the history of the requester's dealings with the public authority is clearly disputed, we take the view that the Commissioner's staff would need to take steps to satisfy themselves of the accuracy of a chronology provided by the public authority, for example, by sampling the documentary evidence on which any disputed entries are based. In this case, we find that the accuracy of the chronology was not clearly put in issue by X until the oral hearing. Despite having been provided with the chronology at an early stage and having made extensive submissions in writing, X did not inform the Commissioner's staff that the Council's history as set out in the chronology was disputed. When asked by the Tribunal to explain how its accuracy was disputed, X did not have a clear submission to make, initially denying that it had ever been provided and then submitting that the Commissioner's staff should have raised the issue.

27. Whilst we recognise that X is a litigant in person and has additional needs and whilst also being careful not to suggest that X should have made a forensic analysis of the chronology, we do consider it relevant that no challenge to accuracy was made until the hearing itself. This indicates that the accuracy of the Council's account of the history of X's requests was not uppermost in X's mind when appealing the Decision Notice. In circumstances where the accuracy of the history of dealings between the parties is not raised by the Appellant as a matter of factual dispute and there is no other reason to doubt it, we conclude that it is both reasonable and proportionate for the Commissioner to rely on a chronology provided by the public authority without examining the underlying documentary evidence on which it is based.

28. In X's case, we conclude that the Commissioner was entitled to rely on the Council's chronology as part of "*all the relevant circumstances*" in reaching her conclusion because (a) she was aware that it had been provided to X; (b) there was no challenge by X to its factual accuracy in the Grounds of Appeal; and (c) it was supported by the Council's submissions and other documentary evidence, for example from the Local Government Ombudsman. We record here that we were also not persuaded by the other matters raised by X for the first time at the hearing, namely the allegations of discrimination and unfair treatment by the Commissioner. We note that the Council was required to make a written apology to her in February 2017, but this post-dates the requests made in this appeal and relates to a separate matter so this did not affect our Decision.

29. Secondly, X asserted that the Commissioner was wrong to take into account X's status as vexatious under the Council's complaints policy. Whilst agreeing with X that the Council's own policy and its reliance on s. 14 FOIA involve different tests, we can find no indication in the Decision Notice that the two processes were conflated. We consider that it was appropriate for the Decision Notice to take into account X's status under the Council's complaints policy when considering the case holistically. That is not of course to say that X's status in relation to complaints is determinative of the Council's case for applying s. 14 FOIA, as each requires a different approach.

30. Thirdly, X submitted that the conduct of a requester with a mental health condition should be assessed differently in the context of s. 14 FOIA than the conduct of other requesters, because their particular behavioural difficulties should be taken into account. We consider that there may be some force in this argument because "considering all the relevant circumstances" of a case might well require a decision maker to refer to such matters, for example where requests are repeated due to forgetfulness attributable to a medical condition. However, in X's case the evidence was that if requests were repeated (which was not accepted) it may have been due to anxiety about the prospects of other litigation, or in order to clarify them. In the absence of any medical evidence as to the nature of X's disorder or the effect it might have on X's behaviour, we do not consider that the Commissioner was wrong to proceed in this case on the basis that the indicators of vexatiousness should be considered in the same way for X as for any other requester.

31. Turning to the indicators of vexatiousness in this case, the Decision Notice finds at paragraph 22 that X's requests relate to a long-running dispute with the Council, that many of the requests are repetitious in nature, and that X has continued to ask for information already provided. We have already found that the Commissioner was entitled to rely on the Council's submissions and chronology in reaching this conclusion. The Decision Notice also refers at paragraph 23 to the investigation of X's complaints by independent bodies and findings that the Council was not at fault. In these circumstances, the Decision Notice found that X's motive in making these requests was to seek to sustain dialogue with the Council about matters which have been concluded and that the requests are likely to continue because X is mis-using the FOIA regime for a purpose which is not one of serious value to the public. X's own submissions to the Tribunal confirmed that the purpose of making these requests was to continue with litigation against the Council.

32. The Decision Notice concludes at paragraph 27 that the Council has already dedicated significant resources to X's past requests and that responding to the requests in this appeal would cause disproportionate and unjustified levels of disruption, irritation and distress to the Council.

33. In all the circumstances, and having considered X's case carefully, we find no error in the Decision Notice's approach to the issues. The conclusions reached in the Decision Notice are conclusions which we reach ourselves taking into account the history of the matter and the indicators of vexatiousness. We agree with the Information Commissioner that X's requests were manifestly unjustified, and



involved the inappropriate use of a formal procedure. In all the circumstances we agree that the Council's reliance on s. 14 (1) FOIA was appropriate.

34. This appeal is accordingly dismissed.

**ALISON MCKENNA**

**DATE: 27 March 2017**

**PRINCIPAL JUDGE**

**DATE PROMULGATED: 28 March 2017**

