**First-tier Tribunal**
**(General Regulatory Chamber)**
**Information Rights**

**Appeal Reference: EA/2018/0212**

**Heard at Hereford**
**On 1 March 2019**

**Before**

**JUDGE DAVID THOMAS**

**TRIBUNAL MEMBERS STEPHEN SHAW AND GARETH JONES**

**Between**

**PHILIP SMART**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

## Decision

The appeal is dismissed. Bishop Anthony Educational Trust (the Trust) has complied with its duties under the Freedom of Information Act 2000 (FOIA) and no action is required of it.

*NB Numbers in [square brackets] refer to the bundle*

# Introduction

1. This is the appeal by Mr Philip Smart against the rejection by the Information Commissioner (the Commissioner) on 18 September 2018 of his complaint that the

Trust had wrongly refused to disclose certain information to him under section 1(1)(b) FOIA.

2. Mr Smart opted for an oral hearing and attended alone. The Commissioner did not appear. The Trust was not a party to the appeal.

## Factual background

3. In 2016, Mr Smart was elected as parent governor in 2016 of the school of his daughter, who is now 8. The school is St Thomas Cantilupe Church of England Academy (St Thomas Cantilupe) in Hereford. St Thomas Cantilupe is one of a number of academies run by the Trust. It is not a public authority for the purposes of FOIA but the Trust is.

4. The Trust subsequently amended its Articles of Association so that in future parent governors would be appointed rather than elected. Mr Smart freely admitted at the hearing that the change was provoked by his time as governor. He successfully challenged the process by which the change was made by making complaints to the Education and Skills Funding Agency and the Parliamentary and Health Services Ombudsman.

5. In March 2016, Mr Smart was excluded from the school premises. The exclusion continues, though it is reviewed every six months. He has to drop his daughter at the school gates and cannot attend Sports Day, for example. He told the Tribunal that he is desperate to be a normal parent again.

6. Mr Smart has run a voluntary advice agency in Hereford and sometimes acts as a Mackenzie friend in court cases. He acknowledged that he had frequently crossed swords with the local council and judges in these roles.

7. The Trust instructed Michelmores to represent it in relation to data protection requests made by Mr Smart. Mr Russell Holland, a barrister with the firm, was his main point of contact.

8. At the hearing, Mr Smart produced a full version of letter dated 8 January 2014 from Dr Janneke Zinkstok, a consultant psychiatrist with the Adult Attention Deficit Hyperactivity Disorder Service at the Maudsley Hospital in London (a single page from the letter was in the bundle **[183]**). Dr Zinkstok advised that Mr Smart met the diagnostic criteria for ADHD 'because of a history of lifelong hyperactive and impulsive behaviour, and poor concentration, organisation and distractibility, which has led to educational difficulties and probably contributed to an episode of substance abuse late teens/early twenties'. In addition, there was evidence of Oppositional Defiant Disorder in childhood, which could continue in adulthood in the form of traits of a cluster B personality disorder (such as dissocial personality disorder): this might contribute to some of Mr Smart's problems. Mr Smart also met the criteria for alcohol dependence syndrome and polysubstance misuse, both

currently in remission. He had been to prison twice in the 1990s, once for the possession and supply of amphetamines and the other time for assaulting a police officer.

9. The Commissioner had objected to Mr Smart producing new evidence at the hearing (at which she was not present). However, she is not prejudiced by admission of Dr Zinkstok's full report.

## The request, the initial response and the review

10. On 20 October 2017, Mr Smart made a request of the Trust. It was multi-part and it is convenient to present it in tabular form with the Trust's initial response, its review decision, the Commissioner's decision and the subsequent position:

| No | Request | Initial response | Review | Information Commissioner | Subsequent position |
|---|---|---|---|---|---|
| **1** | Who is your officially appointed Data Protection Officer for St Thomas Cantilupe Primary School Academy? | Disclosed | N/a | N/a | N/a |
| **2** | Can I have a copy of the job description for the said officer? | A job description is not going to be provided because it is considered that in light of your past behaviour (as set out to you in correspondence) that this request is vexatious and part of a pattern of conduct by you of seeking information for vexatious purposes. | Vexatious | Vexatious | Mr Smart challenges in the appeal |
| **3** | What role does Michelmores play in dissemination, processing and control of the Data Protection Act [1998] (DPA) for St Thomas Cantilupe? | Michelmores is the legal adviser for the Bishop Anthony Education Trust | Michelmores is the legal advisor for the Trust | Not held | Mr Smart challenges in the appeal |
| **4** | How many times have Michelmores been asked to deal with DPA requests from St Thomas Cantilupe parents in 2014, 2015, 2016 and 2017? | The fact of whether or not legal advice has been sought on any particular matter or the nature of such advice is legally privileged (LPP: s42) | LPP: s42 (advice and litigation) | The Commissioner assumes section 42(2) claimed (relieving the Trust of duty to confirm or deny whether information | Trust now refuses to disclose **[144]** relying on ss12 (cost of compliance) and 14. Trust also disputes LPP ruling but not challenging that |

| | | | | | |
|---|---|---|---|---|---|
| | | | | held). No LPP because no legal advice (request was for numbers) so disclose or issue fresh response | (Michelmores' email of 9 Oct 18) |
| **5** | Who is the officially appointed Data Protection Officer for the Trust? | Disclosed | N/a | N/a | N/a |
| **6** | What role does Michelmores play in dissemination, processing and control of DPA for the Trust? | Michelmores is the legal adviser for the Bishop Anthony Education Trust | Michelmores is the legal advisor for the Trust | Not held | Mr Smart challenges in the appeal |
| **7** | How many times have Michelmores been asked to deal with DPA requests from Trust parents in 2014, 2015, 2016 and 2017? | The fact of whether or not legal advice has been sought on any particular matter or the nature of such advice is legally privileged: LPP | Not held in recorded form [s42 also referred to (advice and litigation)] | Again, the Commissioner assumes section 42(2) claimed. No LPP because no legal advice (request was for numbers) so disclose or issue fresh response | Trust now refuses to disclose **[144]** relying on ss12 (cost of compliance) and 14. Trust also disputes LPP ruling but not challenging that (Michelmores' email of 9 Oct 18) |
| **8** | ***Contacts 7.1 If you have any enquiries in relation to this policy, please contact either the Trust CEO or the Academy Principal/Headteacher who will also act as the contact point for any subject access requests***. I therefore have the following questions to ask why was my SAR dealt with by the criminal known as Russell Holland and his equally criminal firm Michelmores? | This is not a freedom of information request. Even if it was a freedom of information request it is vexatious. | Not held in recorded form [s14 also referred to] | Not a FOIA request but a complaint | Not challenged |
| **9** | On further inspection I note the Policy also makes no mention, that you in any way reserve the right to appoint a private third party, such as Michelmores to manage your data protection matters. It does however state that any sharing with a third party will not be done in secret but will instead | This is not a freedom of information request. For the reasons set out in previous correspondence it is considered to be vexatious and therefore the response is limited to the Trust stating its position that it has | Not held in recorded form [s14 also referred to] | Not a FOIA request but a complaint | Not challenged |

| | | | | | |
|---|---|---|---|---|---|
| | be done in an open honest and transparent manner:<br>***5.1.2 Inform individuals when their information is shared, and why and with whom it was shared***.<br>I would also like you to explain why you failed to adhere to section 5.1.2 of your own Data Protection Policy? | acted appropriately at all times | | | |

11. The Trust did not conduct its initial review until after Mr Smart made a complaint to the Commissioner (see below). Even then, because of the problems it had experienced with him, Mr Holland asked the Commissioner to act as conduit for the review, which the Commissioner did by her letter of 1 March 2018 **[77]**.

## Proceedings before the Commissioner

12. It is clear from Mr Smart's complaint to the Commissioner **[43]** that what he regarded as Michelmores' unwarranted intrusion into his private relationship with St Thomas Cantilupe and the Trust was what was troubling him. His argument was that the Trust had improperly delegated its data protection responsibilities to the firm and that it was not engaged in giving legal advice.

13. Mr Holland replied to queries from the Commissioner on 26 July 2018 **[99]**. In relation to request 2, he said this:

> '*… we have set out in previous correspondence to the ICO the history of this matter. Mr Smart is a parent of a child at the school who has been engaging in persistently vexatious behavior (sic) against the Trust and/or its representatives for some time (over 2 years). There are over 1,000 e-mails in the file in relation to this matter. Mr Smart has made complaints to [EFSA], the Police, engaged in inappropriate correspondence, made inappropriate posts on social media, has reported staff to the Police and threatened to attend the homes of staff. This led to the police issuing a PIN notice [a warning issued where there are allegations of harassment], forbidding him from any direct contact with the CEO. He has been banned from Trust sites and has been classed as vexatious. He has personally attended Michelmores Officers (sic) to protest, repeatedly referred to me as a criminal and in recent correspondence he has threatened to come to my home in order to conduct a citizens arrest. While we can provide additional detailed information the Trust is of the view that the ICO has been provided with this information previously and it is plain that Mr Smart is behaving in a vexatious manner. If information is provided to Mr Smart about a particular member of staff then based on his past conduct it is anticipated that it is likely that he may then make a complaint about that member of staff and/or otherwise criticise that member of staff on social media and/or in correspondence. … the undoubted reality is that Mr Smart has repeatedly sought to make vexatious complaints and/or taken other action all of which has had an extremely negative impact*

*on the Trust and its staff. The Trust is therefore of the view that it is in the public interest for the well being of the Trust and its staff to be prioritised*'.

14. In relation to requests 3 and 6, the Commissioner transmitted the Trust's review via its letter to Mr Smart of 1 March 2018: 'This information does not exist in written from and therefore this is not a freedom of information request. However, we comment that Michelmores is the legal advisor for [the Trust]'. Mr Holland argued that requests 3 and 6 (as well as 8 and 9) were general and that the information did not exist in written form.

15. He later added, in an email on 24 August 2018 **[105]**, that Michelmores provided all clients with a scope of work and terms of business. The scope of work was legally privileged (because it set out the work to be done); the terms of business was a generic document which was available online and which included standard terms in relation to data protection. The terms are in the bundle **[108]**.

## The Commissioner's decision

16. The Commissioner gave her decision on 18 September 2018. In relation to request 2, she set out the legal position and summarised briefly the Trust's position. She noted: [1] '… Mr Smart has demonstrated some behaviours that meet her criteria above; namely evidence of a personal grudge, unreasonable persistence and unfounded accusations. He has, on occasions, also corresponded with [the Trust] in terms that are somewhat threatening. The Commissioner has noted the disparaging terms in which the complainant has described a particular individual associated with Michelmores, in his request for information'. The Commissioner saw little, if any, wider public interest in the request and concluded that it was vexatious.

17. In relation to requests 3 and 6, the Commissioner said [2] that the fact that they were general, as the Trust contended, did not prevent them falling within FOIA. However, she accepted that the terms of business was the only document which had some relevance to the requests. If the Trust needed advice or action from Michelmores with regard to a particular data protection matters, a discreet scope of work would be produced outlining the work the firm would do. She was satisfied, therefore, that the Trust did not hold information falling within the scope of the two requests.

## The Grounds of Appeal

18. In his Grounds of Appeal, Mr Smart argued:

    i. the Trust must hold information about the role Michelmores play in the dissemination, processing and control of data for the Trust and St Thomas

[1] Para 29
[2] Para 16

Cantilupe. It was in the public interest to know why the Trust, which employed its own data protection officer, also employed a private legal firm to deal with his private data without his permission. This was a reference to requests 3 and 6

ii. it was not vexatious for him to ask for the job description of the data protection officer. There were 1693 such requests on the WhatDoTheyKnow website. The request was in the public interest because it affected more than 3,000 parents and their children. This was a reference to request 2

iii. the Commissioner's decision was discriminatory and unlawful because she had failed to consider the impact of his disabilities on his correspondence and conduct. In addition, she had believed everything the Trust told her without giving him an opportunity of responding.

19. Leaving aside the third ground, at this stage Mr Smart was therefore only challenging the Commissioner's decision on requests 2, 3 and 6. The Trust had disclosed the information under requests 1 and 5. The Commissioner had agreed with it that requests 8 and 9 were not FOIA requests (as Mr Smart has not subsequently disputed). In relation to requests 4 and 7, the Commissioner ruled that the Trust was not entitled to rely on LPP and ordered it to confirm or deny whether it held information falling within the scope of the requests and to either disclose it or issue a fresh response. The Trust subsequently relied on section 12 (cost of compliance) and/or section 14 (vexatiousness) for those requests.

20. Mr Smart sought permission to amend his Grounds of Appeal to challenge the Trust's new position on those requests. However, the Registrar decided that it would be a disproportionate burden on the Tribunal to expect it to investigate the full circumstances of the requests. It was better that they be dealt with via another internal review request, as the Commissioner had suggested. Mr Smart has not challenged the Registrar's decision, nor the decision she made at the same time not to join Mr Holland or the Trust's chief executive as parties.

21. Mr Smart did, however, explain the purpose of requests 4 and 7 at the hearing. He suspected this was the only occasion on which Michelmores had been used as it had in his case. If so, he felt that that would buttress the claim for discrimination he wanted to bring.

## The hearing

22. Because of Mr Smart's conditions, the Tribunal made adjustments at the hearing. For example, it gave him the choice of layouts of the court room (with greater or less formality) and offered him breaks.

23. He read out this statement at the start of proceedings:

'*First, and I believe most importantly I fully accept that the email history between the Barrister Russell Holland and I, has undoubtedly fluctuated sharply. It has gone from one extreme to another, from cordial to confrontational and back again and for that I apologise, as it is now clear to me that my style of emailing has been unhelpful in the extreme.*

*I make no attempt to justify my style of emailing but I offer this explanation of my behaviour as a way of understanding and out of respect for the tribunal. The reason this emailing has happened is a combination of factors. It is the result of my disabilities, my complete lack of respect for the Barrister and the evidence of wrongdoing perpetrated by the Barrister against me.*

*I am aware that my case is without doubt similar in style to:*

*Oxford Phoenix Innovation Ltd v The Information Commissioner and Healthcare Products Regulatory Agency (2018) UKUT 192 (AAC).*

*As the requester in this case also used abusive and/or aggressive language of the type I have employed on occasion. The difference between that requester and I is the fact that I have mental health issues that do seriously impact on my behaviour and should be considered before deciding to class me as vexatious.*

*As I have already pointed out I was merely asking for a simple "Job Description" as I believe this could be used to help me build up a case of disability discrimination against the Barrister and the Public Authority.*

*All the other information I seek is required for the purpose of detecting crime. Crime I believe has been perpetrated against 3000 other parents and I not by the Public Authority but by the Barrister acting unlawfully.*

*I still contend that the use of this Barrister was and is improper and he has done everything in his power to make matters worse by taking advantage of both his client and I. His bill for dealing with me must be somewhere north of £20,000 and that is money that did not need to be spent and would have better benefited the children!*

*I once again apologise for the part I have played in this situation as I am partly to blame for this unnecessary financial waste'***.**

## Discussion

### Ground 3: alleged procedural errors by the Commissioner

24. It is convenient to deal with this ground first.

25. Mr Smart makes two criticisms of the way the Commissioner dealt with his complaint. First, she failed to make adjustments appropriate in light of his disabilities. This is a reference to section 20 of the Equality Act 2010, which in certain circumstances requires reasonable adjustments to be made for disabled people. Second, she did not give him an opportunity of commenting on criticisms made of him by the Trust. These are both matters of procedure rather than substance.

26. The Tribunal recently, in *Peters v Information Commissioner*, [3] considered briefly whether it had jurisdiction to deal with contentions of procedural irregularity by

[3] EA/2018/0152

the Commissioner. The issue was the same as Mr Smart's second criticism. The Tribunal said this:

> 52. *However, whether the audi alteram [partem] principle [which says that each party should have the opportunity of commenting on the other's case] applies in the present context is not a straightforward question. The Tribunal's jurisdiction derives from section 58 FOIA:*
>
> *'(1) 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.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based'.*
>
> 53. *The jurisdiction is a strange one because, on the one hand, the Tribunal is asked to identify whether the Commissioner has made an error of law (or should have exercised a discretion differently) whilst, on the other, caselaw makes it clear that an appeal is a complete rehearing and the Tribunal may reach a different decision even if it does not identify an error of law (or inappropriate exercise of discretion): it may make a different, determinative finding of fact, even though a finding by the Commissioner is reasonable on the evidence. Nevertheless, in the present context a key question is whether the failure to give Mr Peters an opportunity of commenting on Mr Smallcombe's email constitutes an error of law. That in turn involves considering whether the public law principle under which a material procedural error constitutes an error of law applies to the Commissioner.*
>
> 54. *The Tribunal tends to the view that it does because the Commissioner is a public body (herself subject to FOIA, for example) and is performing at least a quasi-judicial function. However, the Tribunal has not heard full argument on the issue and Mr Peters, prejudiced though he was by the Commissioner's investigation, is not prejudiced in the appeal because he has had the opportunity of commenting on the points made by Mr Smallcombe. The Tribunal has taken full account of those comments and, because this is a full rehearing, it is not limited to considering whether the Commissioner's decision was a reasonable one on the facts known to her.*
>
> 55. *It should be said, however, that an unsatisfactory consequence of the nature of the Tribunal's de novo jurisdiction is that the content of the Commissioner's procedural duties is never determined: the Tribunal can always cure a procedural error which she makes. It is hoped that when the opportunity arises the Upper Tribunal will give guidance on the procedure adopted by the Commissioner'.*

27. That applies with equal force in the present case. As with *Peters*, the fact that Mr Smart was denied the opportunity of commenting on some of what the Trust told the Commissioner before she made her decision has had no effect on the outcome of the appeal, because he has been able to make comments in the appeal and the Tribunal has taken full account of those comments. But his frustration is understandable.

28. With regard to his complaint about a lack of adjustment for disabilities, the Tribunal can again cure any deficiencies in the process adopted by the Commissioner by ensuring that it makes appropriate adjustments such that the requester is given every opportunity of presenting his case to best advantage. This the Tribunal has sought to do in the present case. The question whether it has jurisdiction to hear the complaint is therefore again academic. In any event, the Tribunal accepts that the Commissioner did make appropriate adjustments. In her Response, she said this:

> *'23. In January 2018 the Appellant informed the Commissioner, during a telephone conversation, that he suffers from health matters that contribute to his behaviour and he hoped that a reasonable adjustment would be made should his health issues manifest themselves during that telephone conversation. Subsequently, in April 2018 the Appellant informed the Commissioner that he suffered from a personality disorder and that without regular updates as to the progress of the Commissioner's investigation, he can become anxious and stressed. Consequently, the Commissioner made a reasonable adjustment to ensure that the Appellant is provided with regular contract. At the time of her Decision Notice, therefore, there was nothing before the Commissioner to indicate how the Appellant's health matters might be material to his complaint concerning BAET's compliance with its obligations under FOIA'*.

29. The Tribunal accepts all this. [4] There is therefore no basis to this complaint.

**Ground 2 (job description of St Thomas Cantilupe's data protection officer)**

***The law on vexatiousness***

30. Section 14(1) FOIA provides: 'Section 1(1) [which gives a requester a qualified right to information] does not oblige a public authority to comply with a request for information if the request is vexatious'.

31. It is trite law that, for section 14(1) to apply, it is the request which must be vexatious, not the requester. Although the motives and behaviour of the requester may be relevant, vexatiousness looks at the effect on a public authority of having to deal with a request. The central question is: is the public authority vexed by the request?

32. The leading case is the Court of Appeal decision in *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another*

[4] The Trust disputed that Mr Smart had disabilities but said that it had proceeded as though he did

(collectively *Dransfield*). [5] The only substantive judgment was given by Lady Justice Arden. She cited, [6] with apparent approval, this passage from the decision of Judge Wikeley in the Upper Tribunal: [7]

> *'27. … I agree with the overall conclusion that the [Tribunal] in Lee [Lee v Information Commissioner and King's College Cambridge] reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".*
> *28. Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms'.*

33. Arden LJ then said:

> *68. In my judgment, the UT [Upper Tribunal] was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross [Counsel for the Commissioner] to accept that proposition, which of course promotes the aims of FOIA.*
>
> …

[5] [2015] EWCA Civ 454 (14 May 2015)
[6] Paras 18 and 19
[7] *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) (28 January 2013) http://www.bailii.org/uk/cases/UKUT/AAC/2013/440.html

> *72. Before I leave this appeal I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy [Kennedy v Charity Commission [2014] 2 WLR 808] (para. 2 above), been carefully calibrated'.*

34. There is, therefore, a high hurdle for a public authority to cross before it may rely on section 14(1). All the circumstances of the case have to be considered. On one side of the equation, these include the burden on the public authority, the motive of the requester and any harassment or distress caused to staff by the request. On the other side is the value of the information to the requester or the public at large. However, it is not a simple weighing of the two sides of the equation. Where information has value, that is likely to be a particularly important factor, because of the need to promote the aims of FOIA to facilitate transparency in public affairs, accountability of decision-making and so forth.

35. However, the fact that a request has value is not determinative. In *Parker v Information Commissioner*, Upper Tribunal Judge Knowles said: [8] 'The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. It is clear from the Court of Appeal's decision that the public interest in the information which is the subject of the request cannot act as a trump card so as to tip the balance against a finding of vexatiousness'.

***Application of the law to the facts of the case***

36. The four themes identified by Judge Wikeley in *Dransfield* – burden, motive, value and harassment/distress – are neither exhaustive nor determinative but they do provide a useful starting-point and the Tribunal will therefore consider them along with the relevance, if any, of Mr Smart's conditions.

i. **Burden**

37. There is no question that Mr Smart has caused very considerable burden to the Trust, St Thomas Cantilupe and Michelmores. On the holistic approach mandated by the Court of Appeal in *Dransfield*, the burden on all these parties is relevant. Similarly, it is not simply the burden which would be caused by processing the present request which is relevant: all the work generated by Mr Smart on related matters should be taken into account, as is the further work which the Tribunal accepts would be generated were the Trust to provide the job description.

[8] [2016] UKUT 0427

38. Mr Holland explains in his email of 26 July 2018 to the Commissioner that Mr Smart has generated over 1,000 emails as well as making complaints to various bodies relating to his difficulties with the school, the Trust and Michelmores. That represents a high burden. Mr Smart has threatened judicial review proceedings against St Thomas Cantilupe in relation to the ban from entering the school premises, although in the event he has not proceeded with the threat, he says because the Trust would not confirm that it would not seek costs against him. Mr Smart was entitled to make complaints – and some have been upheld – and to contend there were grounds to bring a judicial review. However, this remains relevant background to whether he was misusing FOIA with his requests.

**ii. Harassment/distress**

39. This is closely linked to burden.

40. There can again be no doubt that, whatever Mr Smart's intentions, individuals have felt harassed and distressed by his conduct. In light of his *mea culpa* at the hearing, there is no need to detail that conduct. There are oases of reasonable emails and constructive attempts to resolve matters, but they are far outweighed by conspiracy theorising and invective. Mr Smart has gone so far as to try to doorstep Mr Holland at his work and home. An email he sent Mr Holland on 13 February 2017 **[248]** gives the flavour:

> '*I have been to Michelmores in Bristol and to No 5 Chambers today looking for you, in a desperate attempt to get some answers and to challenge your crooked behaviour head on.*
> *I aim to come to Exeter soon, to protest outside Michelmores officers with a loud hailer and possibly some banners, signs and/or leaflet explaining about your crooked behaviour and the crooked behaviour of your clients towards my family and I….*'

41. In another email to Mr Holland, on 28 April 2017 **[258]**, he at least brought literary levity to the long, unpleasant exchange of correspondence by quoting a Martial epigram: 'Et delator es**,** et calumniator**;** Et fraudator **es**, **et** negotiator; Et fellator es**,** et lanista: miror Quare non habeas, Vaccerra, nummos', which translates as 'You're an informer and a mudraker, a con-man wheeler-dealer, a gigolo and an educator in evil. All that, Vacerra, and amazingly, you're still broke'.

42. It is little wonder that the Trust has used Michelmores to represent it in relation to Mr Smart's data protection requests. That has afforded a measure of protection to its staff and the school's, while unfortunately placing Mr Holland in the firing line. In light of the accusations which Mr Smart has made against Mr Holland, it is important to make the point that the Tribunal has seen no evidence that Mr Holland has acted in anything other than a professional manner, in the face of considerable provocation.

### iii. Motive

43. Mr Smart told the Tribunal that the purpose of his request, including the second part, was to build a case for unlawful discrimination against the Trust. He resents the fact that, as he sees it, he is being unfairly singled out by the Trust's decision to instruct lawyers to deal with his data protection requests (he attributes the singling out to his disabilities).

44. The Tribunal accepts that this is the purpose for the request. Arden LJ made it clear in *Dransfield* that a request could have reasonable foundation even if the requester wanted the information simply for their own purposes.

### iv. Value

45. As explained above, the value of a request is a particularly important factor. In the Tribunal's judgment, request 2 has little or no value, whether assessed against its stated purpose or otherwise. In light of Mr Smart's behaviour, the Trust was entirely justified in using solicitors to represent it in relation to his data protection requests. He is annoyed that he has to deal with Michelmores but a claim for discrimination would not get off the ground.

46. In any event, it is not at all clear how the job description of St Thomas Cantilupe's data protection officer would help his case. When this was put to him at the hearing, Mr Smart was unable to say how it would: rather, he wanted to see the job description *in case* it could help. In other words, it is what lawyers call a 'fishing expedition'. That is not sufficient to impress the request with value.

### v. The relevance, if any, of Mr Smart's conditions

47. Mr Smart argues, in effect, that his conditions should not be held against him when assessing vexatiousness.

48. In her Response **[24, 32]**, the Commissioner said that Mr Smart had (at that time) not provided any medical evidence but, in any event, 'it would not necessarily follow that his conduct was not therefore vexatious within section 14(1) FOIA. At most, it might have provided a medical explanation for a complainant who acted unreasonably; it would not have made intrinsically unreasonable conduct reasonable as a result'.

49. Philosophers and evolutionary biologists have long wrestled with the free will: determinism dichotomy: to what extent are any of us responsible for our actions? Mr Smart argues that his free will is particularly circumscribed because of his conditions: he has little choice but to behave in the way he does.

50. Fortunately, the Tribunal does not have to resolve the extent to which Mr Smart's conditions affect his behaviour (though it accepts that they have some effect). As

explained above, it is the effect of a request on a public authority which, in the final analysis, determines whether a request is vexatious. Behaviour and motive can be relevant but only as part of the overall effect on a public authority of having to process a request. To repeat: for section 14(1), it is a request which must be vexatious, not the requester. Making all due allowance for Mr Smart's conditions, the Tribunal has no doubt that request 2 has vexed the Trust, and with every justification.

51. In any event, Mr Smart does not argue that he has no control over the way he behaves. The very fact that he now recognises that he has at times behaved in an unacceptable manner and has resolved to turn over a new leaf means that he believes that he can control his behaviour at least to a degree. He told the Tribunal that he is now a Christian and clearly believes that his new-found faith along with the support he is receiving received will help him overcome some of the effects of his conditions.

***Conclusion on request 2***

52. For these reasons, the Tribunal has concluded that request 2 was vexatious. It was a 'manifestly unjustified, inappropriate or improper use of a formal procedure', the phrase found in caselaw. In fact, as the Commissioner noted, it is unusual for a public authority to rely on section 14(1) for part only of a request. [9] The Trust might have relied on it for the whole request.

**Requests 3 and 6: did the Trust hold information about Michelmores' role?**

***The law***

53. Under section 1(1)(b) FOIA, a requester has a right to information held by a public authority, subject to the various exemptions and the question of vexatiousness.

54. Section 3(2) FOIA contains a partial definition of whether information is held. It provides:

> *'For the purposes of this Act, information is held by a public authority if—*
> *(a) it is held by the authority, otherwise than on behalf of another person, or*
> *(b) it is held by another person on behalf of the authority'*

The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be information held by the authority's lawyers. It follows that Mr Smart would, in principle, be entitled to information held by Michelmores on behalf of the Trust.

[9] The Trust also later relied on section 14(1), as an alternative or in addition to section 12 (cost of compliance), in relation to requests 4 and 7 **[144]**

55. Information must also be held in recorded form. This is because the definition of 'information' in section 84 FOIA is '(subject to sections 51(8) and 75(2) [not relevant]) … information recorded in any form'. 'Recorded form' implies a degree of permanence. Information which is simply in the mind of someone is not held in recorded form.

56. As the Commissioner said, the fact that a request is expressed in general terms does not of itself mean that it is not a proper FOIA request. However, the more general a request, the less likely it is that information in recorded form will be held.

57. Whether requested information is held is to be determined on the balance of probabilities.

***How Michelmores' formal relationship with clients is recorded***

58. Mr Holland has explained that Michelmores issue two documents to clients. One is a generic terms of business. This is relevant for Mr Smart in that it includes a section on how the firm will process personal data relating to its clients, but it is available on the firm's website, such that the exemption in section 21 FOIA (information accessible to requester by other means) would apply. The second is a scope of work, which sets out the work which it is agreed the firm will do following a particular set of instructions from a client.

***The requests: a reminder***

59. Mr Smart asked what role Michelmores played in the dissemination, processing and control of the DPA for, first, St Thomas Cantilupe and, second, the Trust.

***The Trust's evolving position and the Commissioner's ruling***

60. Michelmores' initial response, on behalf of the Trust, was that it acted as its legal advisor. It did not claim that it did not hold the requested information in recorded form. The Trust's review decision was: 'This information does not exist in written from and therefore this is not a freedom of information request. However, we comment that Michelmores is the legal advisor for [the Trust]'. In his email of 27 July 2018 to the Commissioner, Mr Holland said of each of the two requests: 'This is a general question and the [information/advice] does not exist in written form'. In his 24 August 2018 email, he said that '[t]here is no document which sets out the role of Michelmores in relation to those matters asked'.

61. The Commissioner ruled, first, that the general manner in which the requests were framed did not mean that they were not proper FOIA requests and, second, that the Trust did not hold the requested information in recorded form.

*Analysis*

62. As the House of Lords made clear in House of Lords in *Common Services Agency v Scottish Information Commissioner*, [10] requests should be construed liberally; otherwise, the constitutional importance of the Act recognised by the Supreme Court in *Kennedy v Charity Commission* [11] and the Court of Appeal in *Dransfield* is liable to be negated. This is particularly important where (as here) the requester is unrepresented. Under section 16(1) FOIA, a public authority has a duty to provide advice and assistance to a requester and the code of practice issued by the Secretary of State under section 45 explains that that includes clarifying ambiguous requests.

63. It is therefore important to ask what Mr Smart really wanted to know. The answer is that he wished to ascertain what Michelmores did for the school and the Trust in relation to data protection requests. His assumption was that Michelmores were themselves processing data held by the two bodies and he wanted to know exactly what that involved. He thought that such processing would be unlawful and wanted to do something about it. But first he needed the information.

64. In fact, however, Michelmores told him, in its initial response, that they were simply acting as the Trust's legal advisors in relation to data protection requests. Acting as legal advisors is, of course, what solicitors do. It is common for them, as part of their role as legal advisors, to act as conduit between their client and a third party and Mr Smart knew why Michelmores were doing so in this case. [12]

65. It is clear that Mr Smart does not accept the answer he was given. He believes that Michelmores were doing more than acting as legal advisors. But the sole function of FOIA is to give requesters a (qualified) right to information held by public authorities. It is not its function to test the veracity of the information; a requester must use other fora for that.

66. It follows that the Trust's initial response was sufficient: Michelmores' role in relation to the dissemination, processing and control of the DPA for the school and the Trust was to act as legal advisors. That was the information it held in relation to the two requests. It should have stayed with that initial response. Michelmores subsequently claimed that no further information was held. On the face of it, it is surprising that there is not the normal scope of work. However, if there is, and it gives more detail about Michelmores' role as legal advisors, the exemption in section 42 FOIA (LPP, specifically legal advice privilege) would apply, as Mr Holland argued in his email to the Commissioner of 24 August 2018. That is a qualified exemption but high authority stresses the importance of confidentiality between clients and their lawyers for the obtaining of legal advice, especially where,

[10] [2008] UKHL 47
[11] 2015] 1 AC 455, [2014] 2 WLR 808, [2014] WLR(D) 143, [2014] EMLR 19, [2014] 2 All ER 847, [2014] HRLR 14, [2014] UKSC 20, [2015] AC 455 http://www.bailii.org/uk/cases/UKSC/2014/20.html
[12] See, for example, the email from Michelmores to Mr Smart on 17 June 2016 **[161]**

as here, the advice is recent and remains current. [13] There would be no public interest in the publishing of more detailed information about Michelmores' role.

67. In short: the Trust did hold information (in recorded form) covered by requests 3 and 6 and the Commissioner was wrong to decide that it did not. However, the Trust has in fact provided the information: its role was that of legal advisers. If it held further information in recorded form within the scope of the requests, the exemption in section 42(1) FOIA would apply.

## Conclusion

68. For these reasons, the appeal is dismissed. The decision is unanimous.

69. Mr Smart indicated at the hearing that his priority was to get the appeal over and done with, so that he could put his relationship with his daughter's school on a positive footing. The Tribunal hopes that that will indeed be possible, not least for his daughter's benefit. His path to redemption may be a rocky one but acknowledging the need for change is always the most important step and Mr Smart should be commended for taking it.

Signed David Thomas

Judge of the First-tier Tribunal
Date: 2 May 2019
Promulgation date: 3 May 2019

[13] See, in the latter connection, *Kessler v Information Commissioner and HM Commissioners for Revenue & Customs* EA/2007/0043 and *Kitchener v Information Commissioner and Derby City Council* [2006] UKUT EA 2006