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**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2019/0334/P**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice Nos: FS50835684  
Dated: 14 August 2019**

**Appellant: Mr M Boyce**

**Respondent: The Information Commissioner**

**Decided on the papers**

**Date of decision: 28 May 2020**

**Before  
HH Judge Shanks**

**Subject matter:**

Freedom of Information Act 2000 (FOIA)

Section 14: vexatious requests

## **DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. On 12 October 2018 the Appellant, Mr Boyce, made a FOIA request addressed to the Parliamentary and Health Services Ombudsman (PHSO) in the following terms:

**The PHSO refuse to publicly state whether their review process of final decisions is legally allowed for or not, and consequently whether it is legally challengeable (judicial review) or not. Reviews of final decisions therefore appear to be not legally allowed for or to be legally challengeable. However, what is certainly legally allowed for and what is certainly legally challengeable ... is a fresh/new complaint/investigation. Instead of complainants requesting a review of their final decision, it would make more sense for them to simply request a fresh/new investigation if the complainant believed that serious mistakes were evident in the final report or new evidence had arisen since then. That way the complainant is on sure legal ground instead of being sent down the misleading dead-end that is the sham review process. A new/fresh complaint is not only legally allowed for, but would also allow a proper investigation. The sham review process as well as being not legally allowed for and not legally challengeable also does not look at the substance of the original complaint. It is a triple shammy.**

**[1] Over the last twelve months (October 2017 – October 2018) how many complainants have requested a fresh/new investigation after receiving their final report?**

**[2] How many of those complainants were successful in receiving fresh/new investigation?**

**[3] Over the last twelve months ... how many complainants have themselves requested a fresh/new investigation after receiving a review of their final report?**

**[4] How many of those complainants were successful in receiving a fresh/new investigation?**

**[5] Please also provide the most recent PHSO Board Meeting Minutes for 2018.**

2. The PHSO responded on 31 October 2018 saying that, taking into account previous correspondence from Mr Boyce, the request was considered vexatious under section 14 of FOIA. On the same day Mr Boyce requested a review of the decision under FOIA. The decision was confirmed by the PHSO following a review on 4 December 2018.
3. In the meantime, Mr Boyce had already complained to the Information Commissioner on 1 December 2018. The Commissioner issued a decision notice on 14 August 2019 upholding the PHSO's view that his request was vexatious. On 7 September 2019 he appealed to this Tribunal against the Commissioner's decision notice.
4. The parties submitted that the appeal should be decided on the papers and I agree that that is appropriate. Further, having regard to the current pandemic and the Senior President's Practice Direction of 19 March 2020 I consider it is appropriate that it is determined by a judge sitting alone. I have considered an open bundle of relevant documents running to 171 pages, Mr Boyce's second submission sent on 26 October 2019 and, as requested in his second submission, the papers in a related case (EA/2019/0032) concerning a request made of the PHSO on 31 July 2018, in particular his fourth submission in that case; I have reached my own view on the basis of this material as to whether the Commissioner's decision is correct.

### **The relevant law**

5. Under section 1(1) of FOIA a public authority is generally obliged to disclose information which it holds on request. However, section 14(1) of FOIA provides:

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

6. The proper interpretation of this provision has been considered authoritatively by the Upper Tribunal and Court of Appeal in the *Dransfield* case ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454) and by the Upper Tribunal in *CP v Information Commissioner* [2016] UKUT 427 (AAC) and *Cabinet Office v IC and Ashton* [2018] UKUT 208 (AAC). The following propositions are well established:

- (1) The issue is whether the request is vexatious and not whether the requester is vexatious;
- (2) Parliament has not defined the word “vexatious”: it is an inherently flexible concept; it connotes a “manifestly unjustified, inappropriate or improper use of a formal procedure”;
- (3) In considering whether such misuse of the procedure is established in any case all relevant circumstances must be considered and a balanced conclusion reached based on an objective standard;
- (4) In deciding whether a request is vexatious four factors are likely to be relevant: (a) the burden on the public authority and its staff; (b) the motive of the requester; (c) the value or serious purpose of the request; and (d) any harassment or distress of and to staff; but this is not an exhaustive list of relevant factors and should not be treated as a formulaic check list;
- (5) The previous behaviour of the requester and the number, breadth and pattern of previous FOIA requests may be relevant in considering whether a request is vexatious by, for example, throwing light on the requester’s motivation for making the request in question or by placing the burden involved in answering that request in its proper context;
- (6) A clear public interest in the subject matter of the request is a consideration which needs to be balanced against other factors, but it is not

a “trump card” which always tips the balance against a finding of vexatiousness (see: in particular paras [25] and [26] of the *Cabinet Office* case).

### **Relevant background to requests**

7. Under the Parliamentary Commissioner Act 1967 (which is the relevant Act for these purposes) the PHSO has a wide discretion as to whether to investigate a relevant complaint of maladministration leading to injustice and how to carry out the investigation. The outcome of any investigation is a report sent to the relevant MP under section 10(1) of the Act. There is no express provision in the legislation allowing or requiring the PHSO to carry out any further review once he has issued a report and, on general principles, the position would be that once a report is delivered the PHSO would be considered *functus* (i.e. his functions under the legislation are regarded as complete). However, it seems that in practice the PHSO has provided for reviews to take place in certain limited circumstances after the delivery of a report. It is right to say that the legal status and possible outcome of such a review are not entirely clear but it is suggested that a review may lead in principle to a completely fresh investigation and report if circumstances required. It is clear that the question of internal reviews has been under consideration by the PHSO and by the Public Administration and Constitutional Affairs Committee (PACAC) over the last few years and has been the subject of legal advice to the PHSO.
  
8. So far as Mr Boyce himself is concerned, I have pieced together the story as best I can from the papers. It seems that he had a claim for working tax credit which was mishandled by HMRC. He appealed successfully and was awarded compensation by the Adjudicator’s Office, which deals with complaints about the conduct of HMRC. Although the published advice was changed as a result of points he made, Mr Boyce remained unhappy with the way the Adjudicator’s Office dealt with his complaints about advice contained in various HMRC documents relating to back-dating of working tax credit claims and he took this up with the PHSO.

9. He received the PHSO's final report rejecting his complaint against the Adjudicator's Office on 31 October 2017. He was not happy with the PHSO's decision and on 19 November 2017 he requested a review. He was told it would take at least 12-16 weeks for the PHSO's customer care team to decide whether to conduct a review.
  
10. On 3 December 2017 he sent the PHSO a letter before claim relating to a proposed judicial review claim. He was told by the PHSO on 16 December 2017 that he had three months from the date of the PHSO's decision to bring a judicial review claim and that the Court would not extend the time because a request for a review had been made. He made an application for judicial review on 19 January 2018.
  
11. On 9 February 2018 the PHSO lodged his grounds for opposing the application. There is an extract from the grounds at pp 127-9 of the first bundle of documents in the EA/2019/0032 case (Mr Boyce's document 12A): the PHSO informed the Court that Mr Boyce has requested a review and states that this may to some extent afford him the relief he seeks and invites the Court to stay the claim pending his decision on whether to carry out a review and (if so) the outcome of the review; but it asks in the alternative (and in any event) that the Court dismiss the application on the grounds that it is unarguable for the reasons set out (which I have not seen).
  
12. On 21 February 2018 Lavender J considered the papers and refused Mr Boyce permission to seek judicial review. The judge pointed out that given the wide discretion given to the PHSO a claimant "faces a high hurdle in seeking to persuade a court that [the PHSO] has acted unlawfully" (which is the test for judicial review). The judge concluded that it was not arguable that the PHSO had made an error of law in Mr Boyce's case in concluding that the Adjudicator's Office had followed its own procedures and had taken appropriate steps to investigate his original complaint. He also decided that Mr Boyce's application was "totally without merit", meaning that he was not entitled to request a hearing to reconsider whether he should have permission to apply for judicial review. No order for costs was made. It appears that this decision was not communicated to

the parties for over a month although they were aware that the papers had already been considered by a judge.

13. On 9 March 2019 the PHSO's legal team informed Mr Boyce that the customer care team had decided that his request for an internal review should be granted. He was also informed at some stage that the review process would take ten weeks.
14. Before the internal review was carried out Mr Boyce was notified of Lavender J's decision by letter dated 28 March 2018.
15. It is plain that Mr Boyce felt (and continues to feel) very aggrieved by this course of events (see in particular his contemporaneous notes on *whatdotheyknow.com* at pp 80 to 86 of the bundle in this case). He considered that the PHSO had pushed him prematurely into applying for judicial review causing him to incur £2,000 in costs and worry and stress. He clearly regarded it as wrong that the PHSO should on the one hand entertain a review while at the same time maintaining to the Court that his application for judicial review was totally without merit. He considered that the outcome of any internal review would inevitably go against him in the light of the judge's decision, meaning that there had been a successful "stitch up". And he said that the process was a "sham that masquerades as justice".
16. I have not been able to find a copy of the review outcome in the papers but it seems from a note left by Mr Boyce on *whatdotheyknow.com* on 25 June 2018 that he had received it a few weeks before then and that the document offered apologies and stated that the PHSO had made mistakes in the decision but did not offer any further action.
17. Between March and October 2018 Mr Boyce made a series of requests addressed to the PHSO under FOIA on the same general theme as those I am concerned with in this appeal. They are set out at pages 54-56 of the bundle in this case (though the dates on those pages appear to be wrong in places and I note that it may be that there were others, for example the requests at page 138 in the bundle). Including the five requests in issue in this appeal, there are 28 individual requests listed at pages 54-56 in the period up to 12 October 2018. They include two requests for documents including "legal briefing notes" relating to the review process which

were made on 31 July 2018 and which the PHSO refused to answer under section 42 of FOIA on the grounds that they were subject to legal professional privilege; those requests are the subject of a separate appeal (EA/2019/0032) which I am not concerned with though, as indicated, I have considered the documents in that appeal as requested by Mr Boyce.

18. During the period March to October 2018 Mr Boyce was openly expressing his views about the issues in strong terms on the *whatdotheyknow.com* website. I set out a selection of relevant statements with dates and (where appropriate) context:

**[23 March 2018: see page 64 in bundle]**

**... even if they [PHSO] play that card [presumably a reference to section 12 of FOIA] I will not let this go. I will refine the request down until it does fall within cost, and then keep sequentially repeating it until I have all the information. This is not one they are going to win – at least not without one hell of a fight.**

**[15 May 2018]**

**Hi Richard**

**...**

**Forget any notion of fairness when it comes to the PHSO. They will fight tooth and claw to cover-up wrongdoing by the establishment...**

**... now, like me, that you are already deeply involved with this pernicious organisation I would urge you to fight them as tenaciously and bloodily as they will fight you.**

**The review of your decision will be a stitch-up, you can bank on that. They will tell you that it will be conducted fairly and objectively – utter cobblers.**

**...**

**My caseworker was barely literate and could not even tie his own shoelaces**

**...**

**[16 May 2019]**

**The PHSO have clearly lied to PACAC and PACAC knows this. When I spoke to the clerk of PACAC on the phone to ask if they would investigate this issue he said- not a chance, and he was nasty with it too!**



**[15 June 2018]**

**The PHSO have demonstrated that they cannot be trusted to deliver a fair, transparent and unbiased service ...**

**This unaccountable quango is wasting tens of millions of pounds of tax-payer money every year and is rewarding failure on an industrial scale. How much longer can this farce continue?**

**[19 June 2018]**

**The PHSO is an organisation that is rotten from top to bottom, and sadly they are being allowed to get away with it by PACAC. They operate with a mixture of gross incompetence, utter disregard and misconduct of the most serious nature. They HAVE to be stopped because they are causing untold distress to people who deserve to be treated fairly and with dignity and respect. Rob Behrens [the Ombudsman himself] sits in his ivory tower picking up his enormous tax-payer funded salary as he fiddles while Rome burns. I will not rest until I have done everything I can to bring this pernicious organisation to account, and I know I am not alone as many others on this site feel the same way and are also prepared to not just sound-off about this injustice, but are prepared to act to end it.**

**[26 June 2018]**

**The PHSO is ‘not working properly’ (a euphemism for a disgraceful shambles) at every level:**

**Caseworkers are not properly trained and some are barely literate. Some may care, but others couldn’t care less;**

**Casework managers are lazy, incompetent and work to actively endorse poor decision-making by their caseworkers, however egregious it may be;**

**The Customer Care Team, although usually very friendly and outwardly helpful on the phone, are woefully understaffed and undertrained.**

**Senior CCT staff are astonishingly indifferent and incompetent;**

**The PHSO legal team are nothing but legal amateurs who play fast and loose with the law like it’s a big game. They have unlimited access to fancy lawyers at tax-payer expense;**

**Mr Behrens and Amanda Campbell [the CEO] both sit in unaccountable splendour, the former larking around doing radio interviews with all and**

**sundry about nothing, and the latter just doing nothing, when they should be taking control**

**[5 July 2018; in response to the PHSO in relation to his response to a request about the template cover letter for decisions]**

**You are clearly being deliberately obstructive now...**

**The July 2017 template is clearly failing to inform complainants of their right to request a review of their final reports. This is a deliberate omission ... of the most serious nature ... I will repeatedly ask my MP to ask PACAC to investigate this serious matter ...**

**[9 August 2018]**

**It is now very clear that the PHSO refused to supply ... requested information because it would further expose their sham review process. ... The sham review process exists only to deceive and attempt to mollify complainants. It is now time for them to finally admit this and admit that they have been deceiving people for many years.**

19. Although the relevant date for considering whether Mr Boyce's request was vexatious was obviously the date of the request, subsequent events may cast light on the situation as at that date. It is therefore noteworthy that Mr Boyce continued to make statements of a similar nature to those set out above after being informed that his request was considered vexatious. On 31 October 2018 he stated:

**Section 14 of the FOIA is being used by the PHSO to try to shut me up and to close down my entirely legitimate and reasonable enquiries. It will not work. You see me as a threat to your professional reputation, but YOU are doing the damage to your reputation by not being open and honest, and by being unfair and unreasonable. It is wrong to try and stop me trying to hold you to account for things that you are doing that are not fair and are not right. I will be contacting ICO after you have responded and then probably the First-tier Tribunal.**

**The public will make up their own mind as to whether my enquiries in this area are unjustifiably disruptive ...**

On 5 December 2018 he stated:

**They certainly do regard my requests as ‘trouble’. My requests are entirely legitimate, entirely fair, and not too burdensome, but as you get closer to what an organisation has to hide then the shutters always come down. The PHSO is a thoroughly dangerous organisation that works only to protect the establishment and to cover-up wrongdoing by those in power. We will put an end to this.**

And, in the context of these proceedings, he states quite openly in his second submission made on 26 October 2019 that he stands by his position that the PHSO’s review process is a “blatant sham” which is “dangerous and corrupt”, that he has suffered outrageous and blatant injustice from the PHSO and that it is “a rotten organisation” which has supplied him with “inaccurate, inconsistent and down-right false information”.

### **Consideration of relevant factors**

20. ***Burden on public authority and staff:*** Between March and October 2018 Mr Boyce made at least 28 individual FOIA requests on the same general theme as those in issue in this appeal. Although there is no suggestion that individually they involved a particular burden on the PHSO and his staff, it is plain that a large number of requests are likely to involve a large amount of time and effort to deal with over the relevant period. Requests [1] to [4] of the FOIA request of 12 October 2018 seek numbers of cases in various categories over a twelve-month period. The PHSO has not put in specific evidence but it seems likely that obtaining the answers to these requests would involve a trawl for information on individual cases throughout his organisation.
  
21. ***Motive of requester:*** Mr Boyce clearly feels that he personally has been the victim of grave injustice in all this. I do not doubt the sincerity of his feelings but I do question how justified they are when things are looked at objectively. As Lavender J pointed out in his decision, Mr Boyce’s initial complaint about HMRC resulted in a successful appeal in relation to his working tax credit, compensation for the way his claim had been handled and changes to the published advice as a result of points he had made. His complaint about the Adjudicator’s Office’s investigation of his complaints about the published advice was rejected by the

PHSO and Lavender J considered that there was no basis for suggesting that the PHSO had made any error of law in his investigation. The advice given by the PHSO in relation to the time limits for bringing an application for judicial review notwithstanding Mr Boyce's request for an internal review was correct and helpful; it was Mr Boyce's decision to bring the claim for judicial review. The PHSO properly invited the Court to stay the judicial review claim pending any internal review but Lavender J decided the application was hopeless on the merits and took the decision to reject it accordingly at the earliest stage. The test for a successful judicial review (namely whether the PHSO had made an error of law in carrying out the investigation and/or making the report) involves, as the judge put it, a "high hurdle", particularly given the very wide discretion which the legislation gives to the PHSO. Although some of Mr Boyce's submissions appear to be based on the proposition that a judicial review and an internal review are somehow the same thing, there is no such hurdle when the PHSO considers whether to carry out an internal review: the two processes may proceed in parallel and impinge on each other but they are quite different.

22. Notwithstanding the lack of objective justification for his feelings of injustice, it is clear from his conduct and statements that Mr Boyce considers that they entitle him to wage a campaign against the PHSO. This is a campaign that he is prepared to fight "tenaciously and bloodily" to the end and in fighting it he will make maximum use of FOIA and its procedures. It is reasonable to infer that this campaign has become something of an obsession for him and that it would continue in a similar vein even if the requests we are concerned with in this appeal were answered in full.

23. ***Value and serious purpose of request:*** On considering the papers it is plain to me that the position in relation to the PHSO's internal review process is in a muddle and needs sorting out, although it is fair to say that the lack of express provision for such a process in the legislation has made life difficult. Further, it is plain that, given that the PHSO's very purpose is to investigate maladministration by public authorities, there is a weighty public interest in disclosure of any substantial information bearing on the review process. The information requested by Mr Boyce on 12 October 2018 is relevant statistical information about how

complaints made to the PHSO about his investigations have been dealt with over a twelve-month period. I consider that, objectively speaking and looked at in isolation, the request was of some value and had a serious purpose.

24. *Harassment and distress to staff.* I refer to the statements put in a public forum set out above, all of which are closely connected to the subject matter of the FOIA requests in issue. They speak for themselves. Mr Boyce makes really fundamental attacks on the PHSO's integrity and competence for which I can see no justification. Many of the statements involve personal attacks on the Ombudsman himself (and his CEO), but they go wider and involve attacks on his staff and on their integrity and competence. The request itself unnecessarily repeats Mr Boyce's view that the review process is a sham. Although there is no evidence of direct insults or harassment aimed at individual members of staff it is reasonable to infer that the staff who are administering the Ombudsman scheme may well feel harassed and upset by having to deal with Mr Boyce's requests which, as I infer, are part of his unjustified campaign, knowing of his publicly expressed views about themselves and the organisation they work for.

### **Conclusion and disposal**

25. I have considered whether Mr Boyce's FOIA request was "vexatious" taking account of all the relevant circumstances. I accept his points that dealing with the request itself would not involve a great burden and that it had some value and serious purpose and that there was some public interest in the disclosure of the information he was seeking. However, that must be balanced against my strong conclusions (a) in relation to his motivation in making the request and (b) that it is part of an unjustified and obsessional campaign in which he will use whatever methods he considers helpful to him and (c) its effects on the staff and the organisation. Overall, I have reached the clear conclusion that Mr Boyce was using the FOIA process in a way that was manifestly unjustified, inappropriate or improper and that his request was rightly categorised as "vexatious".

26. I am therefore satisfied that the Commissioner reached the right conclusion when she decided that Mr Boyce's FOIA request of 12 October 2018 was vexatious and I dismiss his appeal.

HH Judge Shanks

28 May 2020