First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice

Appeal Reference: EA/2019/0468V

Heard remotely
On 1 February 2021

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

KATE GRIMLEY-EVANS & EMMA YATES

Between

LIAM O'HANLON

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances: -

Appellant: in person
Respondent: Leo Davidson

Cases
Information Commissioner v Dransfield and Devon CC [2012] UKUT 440 (AAC); [2015] AACR 34)

DECISION

The appeal is dismissed

REASONS

1. The Appellant has for some years been making information requests of the Information Commissioner arising out of the IC's handling of a tribunal case in which the Appellant had sought information from Barnet Enfield and Haringey Mental Health NHS Trust (MHT) and the IC had ruled in favour of the MHT. The validity of the Qualified Person's Opinion (QPO) submitted was questioned and the IC suggested that an opinion by the Trust Chief Executive should be submitted to the tribunal which would then meet the procedural requirements of s36 FOIA. The information requests to the IC have resulted in a number of appeals to the FTT and two decisions of the Upper Tribunal arising out of four decisions of the FTT; GIA/1680/2018 promulgated on 29 January 2019 (where he unsuccessfully argued that material subject to LPP should be disclosed) and more recently GIA2726/2019, GIA 663/2020, GIA851/2020 promulgated on 8 October 2020.

2. In the 29 January 2019 appeal the UT considered Mr O'Hanlon's arguments that the tribunal had been wrong in upholding the claim of legal privilege relating to material it held which would relate to an intention to revise the ICO guidance on QPO: -

   14. Mr O'Hanlon also argued that the Commissioner's conduct in the 2015 appeal either prevented the Commissioner from relying on legal advice privilege or should mean that the public interests balance was in his favour. He said that the Commissioner's approach amounted to a personal attack on him and that he was being accused of being dishonest. The tribunal made its view clear on what the Commissioner had done; it was less than approving. I might have been more generous to the Commissioner. I can see the sense in saying to a public authority that its approach had been defective, but it would be more efficient to remedy it while the case was before the Commissioner. That would avoid the need for the Commissioner to remit the case to the public authority, only for it to come back to the Commissioner when the proper approach had been followed. Be that as it may, I will deal with the case on the basis of the tribunal's view, which was favourable to Mr O'Hanlon. On that basis, I can see no error of law in the tribunal's approach, either as regards privilege or the balance of public interests.

3. 14 March 2019 the Appellant made a further request: -

   "The following replicates part of a Request of 29 May 2018 and reflects reliance in Decision Notice FS50777962 of today's date of the fact that that disclosure preceded a disclosure made by an NHS trust so as to post justify an exemption claim which cannot survive such public disclosure

   …

   I now replicate those parts of the May 2018 request which in my view the ICO has one-sidedly attempted to obstruct for no good reason. That obstruction includes extraordinary and unexplained delay which is itself a sign of partiality

…
…1. Information amounting to the text of correspondence between the ICO and Barnet Enfield and Haringey Mental Health NHS Trust (MHT) [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case EA/ 2015/0120; and correspondence submitting such forms to the ICO; and any ICO response to MHT.

2. Information evidencing any internal ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT (believed to have occurred on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to the pleading by the ICO on 29.09.15 that such opinions of the MHT chief executive were reasonable.
….
*7. Information as to any decision made within the ICO and/or by its representatives in the period 30.11 15 to 09.12.15 to concede that the guidance would be revised; and/or to present such a concession by pleading on 09.12.15 that the Commissioner intends to revise. [The words in italics above are from [Redacted] e-mail of 16.05.16 to Information Tribunal Decisions at 18:05 *provided * by order of the Tribunal on 29 May 2018 at 12:10.]"*

4. The request made on 29 May 2018 and the subject of a FTT decision of 11 October 2019 which found that 1 and 7 were protected from disclosure by s42 and (2) was not held.

5. On 25 July 2018 Mr O'Hanlon sought information from the MHT of correspondence from 2014 and 2015 between it and the ICO about the giving of the QPO. The MHT provided some material, relied on s42 for other material, withheld personal information relying on s40 and on s21 for material which the Appellant already had. He complained to the ICO who upheld the MHT's position. He appealed to the FTT which found in favour of the ICO on 4 March 2020.

6. On 28 August 2018 the IC published her revised guidance on s36 FOIA. On 3 November 2018 the Appellant made a request for information about the process. Some information was supplied and other information, relating to the Appellant's appeals, was withheld under s42(1). The FTT upheld that finding on 4 March 2020.

7. In refusing permission to appeal against the 11 October 2019 decision and the two 4 March 2020 decisions the learned judge observed: -

"Mr O'Hanlon is in reality seeking to re-argue the three cases on their merits, which is not permissible where the right to appeal is confined to points of law my assessment is therefore that any appeal to the Upper Tribunal would realistically have no prospects of

success on any material point of law in relation to all three of the applications for permission to appeal"

The ICO handling of the request

8. The ICO replied to the 14 March 2019 request on 15 April pointing out that part 2 was a repeat request for information he had been told was not held which could be considered vexatious. With respect to 1 and 7 noting that this was the subject of an existing appeal commented that: -

   "*It appeared to the ICO that the complainant was attempting, through parallel routes, to keep live a topic that had already been considered several times."*

9. Noting that in the appeal concerning the 29 May 2018 request Mr O'Hanlon had claimed that the MHT had given him the material referred to in part 1 of this request (he declined to produce the material MHT had sent to him to show that privilege no longer applied to the material) the ICO argued that either he had it in which case it was a vexatious request for what he already had, or MHT had not disclosed the information to the complainant and he was attempting to subvert MHT's appropriately applied exemption of the information under section 42, which was also vexatious. Her reasoning was quoted in the decision notice: -

   "12. With regard to part 7 of the request, the ICO noted that the request had come only two weeks after the Upper Tribunal refused to allow an appeal to the Court of Appeal of GIA.1680.2018. This was itself an appeal of EA/2017/0232 which had resulted from a complaint under FS50676914 about request IRQ0663492 and the ICO's review RCC0669497. The ICO noted that the request considered under FS50676914 was substantially similar to part 7 of the current request; that is, it was for internal ICO discussion over the changing of section 36 guidance resulting from the appeal EA/2015/0120, mentioned in the complainant's request."

10. With respect to part 2 of the request, he had been informed that this material was not held, and he had not explained why in a request 10 months later it should now be held. The ICO, in the context of the other parts of the request, considered that this repetition was vexatious.

The Decision Notice

11. The Commissioner, in considering the complaint against her as a public authority holding information, reviewed the issues and concluded that parts 1 and 7 were vexatious and that part 2, in the context of the request as a whole was also vexatious. She concluded-.

    48. The Commissioner is satisfied that all three parts of the complainant's request are part of a long-running and obsessive campaign associated with the FTT's decision in EA/2015/0120 and the ICO's guidance on section 36 of the FOIA. At the time of the

request, EA/2015/0120 had been the subject of a number of requests, complaints to the Commissioner and appeals - to both the FTT the Upper Tribunal. The matter associated with EA/2015/0120 had therefore been fully considered, but the complainant has been unwilling to accept the resulting findings. With regard to the current case, the complainant had already been advised that the ICO either does not hold the requested information or that it engages the section 42(1) exemption.

49. In addition, from paragraph 35 of the Commissioner's decision in FS50777962 the complainant will have been aware that the section 42(1) exemption would almost certainly remain engaged while the matter on which the legal advice in question had been sought is 'live'. He would also have known that he had related requests, complaints and at least one appeal ongoing at 14 March 2019 – i.e. that the matter that is his concern - was still 'live'. The section 42 exemption would therefore have remained engaged to certain information he had requested and the ICO would still not hold the remaining information. There would therefore seem to have been little point in submitting the request to the ICO again, on same day as the Commissioner's decision in FS50777962.

50. The Commissioner therefore considers that the request was of little purpose or value to the complainant. And it certainly has no wider public value. In addition to the reasons given above, therefore, even though the burden of complying with the request may not have been substantial, the Commissioner finds that the request did not warrant the ICO diverting any of its resources into providing a response to it, to any extent. The Commissioner is satisfied that the complainant's request is vexatious and the ICO can rely on section 14(1) of the FOIA to refuse to comply with it.

12. In his appeal Mr O'Hanlon argued that the Commissioner had acted in a biased manner and had not complied with the law in handling his requests for information she held. She had demeaned his requests, not recognising their value. In subsequent pleadings he argued that the Commissioner had created false impressions of fact and sought to justify his request for information from January 12 2017 as legally justified and productive and he argued that issues around the Qualified Person's Opinion were of great importance.

13. In his oral submissions Mr O'Hanlon discussed the original request for information from the hospital, his views on whether the s36 power to give a QPO could be delegated- if so anyone could use s36 and it would be the equivalent of s14, the role of Counsel in the case where the QPO issue arose and the morality of the ICO's conduct. He that it was wrong for his persistence to be described as obsessive, there now remained little to be disclosed from his requests, he asserted there was value in full transparency and he argued that the ICO had not acted in a neutral way, the bias was fatal and the appeal should be allowed.

14. Leo Davidson for the ICO argued that the course of dealing since July 2017 demonstrated the burden Mr O'Hanlon created, he was persistent and it was abundantly clear that he would never be satisfied. There were repeated unsubstantiated allegations of bias, dishonestly and professional misconduct,

he was very quick to accuse staff of bad faith and misleading the tribunal. The requests had already been responded to and there was no value in responding again. The underlying grievance against the ICO of maladministration could have been the subject of a complaint to the Parliamentary and Health Service Ombudsman, errors in the decision-making process through appeal to the FTT and UT, these had been done and were exhausted. He (Mr Davidson) argued that applying the guidance from Dransfield there was a substantial burden on the ICO and there was harassment of staff.

Consideration

15. Four broad issues or themes were identified by Upper Tribunal Judge Wikeley in *Dransfield* as of relevance when deciding whether a request is vexatious: -

    (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).

    These considerations are not exhaustive and are not a check-list however they are useful in assisting the tribunal to focus on the issues raised by a request.

16. The starting point is the value of the information sought. Parts 1 and 2 relate to correspondence during the course of litigation which, at the time this request (as opposed to the previous request) was made was nearly four years old. The litigation itself was of interest to the parties and that litigation had finished, the correspondence about it and the ICO's reflections on it (part 7) has at no time been of any appreciable public interest. It has been of considerable interest to Mr O'Hanlon since it has in one form or another been the subject of repeated requests by Mr O'Hanlon and many hearings. The Upper Tribunal Judges who have dealt with these matters have not shared Mr O'Hanlon's valuation of the importance of disclosure of the material since it has not ordered its disclosure; the January 2019 UT decision with material relating to the s36 issue upheld LPP, the UT dealing with the 2018 version of this request found that either the information was protected by LPP or was not held. As time has passed since the litigation and with the publication of revised guidance on s36 the public interest in these materials has diminished.

17. There has during the course of these dealings been a consistent pattern of accusation of misconduct in various forms against the Information Commissioner, her staff and the lawyers involved. In the introduction to this request, Mr O'Hanlon referred to *"obstruct... That obstruction includes extraordinary and unexplained delay which is itself a sign of partiality"* he has alleged iniquity and professional misconduct. Mr Davidson was correct to draw attention to his alacrity in making unsubstantiated accusation of bad faith and misleading the tribunal, while claiming that he had been demeaned.

18. The tribunal noted that much of Mr O'Hanlon's arguments related back to the original visit to the hospital, an issue he clearly remains deeply concerned about and aggrieved by.

19. The decision notice identified that the ICO had had to deal with 12 distinct items of casework brought by the complainant concerning MHT and/or the ICO's published section 36 guidance and that he was attempting to open parallel routes to the consideration of, substantially, the same information.

20. It is clear that Mr O'Hanlon's concern about the events at the hospital in 2013 have continued to motivate his actions and the outrage he felt on that occasion has transferred to the ICO and her staff. He is motivated by strongly-felt personal feelings about the events at the hospital which has resulted in a series of information requests about the actions of the ICO. During those requests he has made unjustified slurs on the ICO's staff and legal representative in seeking information of no public value, in doing so he has imposed a very substantial burden on the ICO to investigate a number of issues and then defend her decisions in FTT and UT.

21. This is a manifest abuse of a statutory right and is very clearly vexatious.

Signed Hughes

Judge of the First-tier Tribunal
Date: 10 March 2021