



Neutral citation number:

Case Reference: EA/2022/0058

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

**Heard by: remotely by video conference**

**Heard on: 2 August 2022  
Decision given on 30<sup>th</sup> August 2022**

**Before**

**TRIBUNAL JUDGE HAZEL OLIVER  
TRIBUNAL MEMBER JO MURPHY  
TRIBUNAL MEMBER DAVE SIVERS**

**Between**

**PAUL STEPHEN COSTON**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: Did not attend

**Decision:** The appeal is Dismissed

## **REASONS**

### **Mode of hearing**

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

### **Background to Appeal**

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 10 February 2022 (IC-129500-T2K8, the "Decision Notice"). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information about a Stage 3 complaint outcome requested from the Department for Levelling Up, Housing and Communities ("DLUHC").

3. The following background is relevant to the issues in this case:
- a. In 2013 the appellant made a complaint to the Architects Registration Board (the “ARB”) about an architect who he had engaged to do some work for him. The ARB regulates architects in the UK. It was overseen by the Ministry of Housing, Communities and Local Government (“MHCLG”), which has now been renamed as the DLUHC.
  - b. The ARB investigated the complaint and found no case to answer. The appellant was not satisfied with the outcome. An independent review of the ARB panel’s process found it had conducted itself in accordance with the appropriate rules. Two further complaints by the appellant to the ARB’s Registrar were rejected.
  - c. The appellant established through a FOIA request that the complaint had been presented to the ARB investigations panel using a “Rule 6 Memo”, which summarises the background to the complaint, the architect’s response, and the relevant standards from the Code of Conduct. The appellant was unhappy that his allegations had been rewritten in the Memo without his consent. He sought to reopen the complaint on this basis during 2015. The ARB’s Investigations Oversight Committee rejected the appellant’s allegations. The ARB refused a FOIA request on the grounds it was vexatious.
  - d. The appellant complained about the Rule 6 Memo process to MHCLG. He corresponded with them during 2015 and 2016, and attended a meeting in 2017. In May 2017 MHCLG advised the appellant that they were satisfied the ARB was operating within its rules and statutory obligations.
  - e. The appellant remained dissatisfied, and was invited to meet MHCLG’s Chief Planner to discuss his concerns in July 2017. The Chief Planner concluded there were no grounds to uphold the appellant’s complaint against the ARB. He responded to 16 questions posed by the appellant about the ARB process.
  - f. The appellant complained that the Chief Planner had failed to address his 16 questions. This was dealt with by MHCLG as a Stage 2 complaint. On 12 March 2018 the Director General found there were no grounds to uphold the complaint.
  - g. The appellant made a Stage 3 complaint. The outcome was provided on 29 October 2018 and his complaints were not upheld. The outcome addressed the appellant’s allegations of maladministration at MHCLG relating to the actions of the Chief Planner and how the Stage 2 complaint was dealt with. The outcome also explained that the appellant could take this further by going to the Parliamentary and Health Services Ombudsman. This outcome is the subject of the current FOIA request.
  - h. The appellant had also made a FOIA request to MHCLG on 25 September 2018, asking for information about the complaints process, statutory duties/requirements, and correspondence relating to his case. This was refused on the grounds that it was vexatious. This refusal was upheld by the Commissioner on the grounds that the cumulative impact of the requests for information and other correspondence imposed an unreasonable burden on MHCLG which was disproportionate to the wider value of the request, and responding to the would result in further requests for information and

correspondence and not resolve the ongoing issues between the Appellant and MHCLG. (Decision Notice FS50840432).

- i. The appellant appealed this decision to the First-Tier Tribunal (appeal number EA/2020/0068). We have taken much of the above background information from this Tribunal decision. The Tribunal upheld the Commissioner's decision – in summary, *“Taking into account the whole course of dealing between the Appellant and MHCLG, weighing the burden of his persistent correspondence, complaints and requests for information against the lack of public interest and strong likelihood that his campaign will continue whatever the response, I am satisfied that the Request is an inappropriate use of the FOIA regime which places a disproportionate burden on MHCLG and its staff.”* (paragraph 51).

4. In relation to the request that is the subject of these proceedings, on 14 June 2021 the appellant wrote to DLUHC and requested the following information (the “Request”):

*“With reference to a Stage 3 complaint (your ref: 3899364) I quote from the opening paragraph of your response which was sent to me by [redacted name] in an email dated 29th October 2018:*

*Case 3899364 - Stage 3 I am writing to give you our response to your complaint at Stage 3 of the Ministry of Housing, Communities and Local Government (MHCLG) Complaints' Procedure. I can only address the matter of maladministration under the Complaints Procedure and not any underlying issue. The Department's Complaints Process does not cover actions by other sponsored bodies, such as the Architects Registration Board (ARB)*

*Please note the two sentences highlighted in red above. With reference to these sentences and under the Freedom of Information Act, I would like answers to the following questions:*

- 1) *What is/are the specific "underlying issue(s)" specific to my complaint that the above statement refers to?*
- 2) *What is/are the specific "action(s)" specific to my complaint that the above statement refers to?"*

5. DLUHC responded on 31 July 2021 and stated that no relevant information was held. It maintained this response on internal review.

6. The appellant complained to the Commissioner on 15 September 2021. During the Commissioner's investigation, DLUHC revised its position and relied on section 14 FOIA (vexatiousness) to refuse to reply to the Request.

7. The Commissioner decided that DLUHC was entitled to rely on section 14(1) FOIA:

- a. The Request relates to a substantive matter considered in the previous Decision Notice (FS50840432) and Tribunal decision (EA/2020/0068), which found a previous request by the appellant to be vexatious. The current Request is about a Stage 3 outcome which does not substantially change the relevant factors previously considered. The Stage 3 outcome clearly refers the appellant to his right of appeal to the Parliamentary and Health Service Ombudsman (the “PHSO”) should he remain dissatisfied with DLUHC's actions.

The current Request will only add further burden upon the DLUHC, whilst serving no public value.

- b. The intent of the Request is seeking engagement by DLUHC in respect of two specific questions, and FOIA does not require a public authority to create new information in order to respond to a question. The wording attempts to draw DLUHC into discussion about minor points, which illustrates that the Request is of no public value.

## **The Appeal and Responses**

8. The appellant appealed on 9 March 2022. His grounds of appeal can be summarised as follows:

- a. His Request is wholly justified, patently non-vexatious, and he is entitled under FOIA to have it. The appellant says the information should have been provided within the Stage 3 outcome, at no point during Stages 1 and 2 of the complaints process was any suggestion made that the underlying issue of his complaint could not be addressed, and he is entitled to a meaningful outcome from that process. He cannot use this information to cause burden to DLUHC. This is a ring-fenced complaints process that is not substantively related to reasons why a previous request was found to be vexatious.
- b. DLUHC are misusing FOIA to prevent access to information that should already have been provided without request. The information should have been provided in the original Stage 3 response.
- c. There is clear public interest, as the public have a right to understand what constitutes “action taken” by a public body.
- d. The Commissioner did a one-sided investigation.

9. The Commissioner’s response maintains that the Decision Notice was correct.

- a. The Commissioner disputes that the Decision Notice was one-sided, but anyway this is a full merits review by the Tribunal.
- b. Rather than seeking clearly recorded information, the intent of the Request appears to be the seeking of further engagement by DLUHC in respect of two specific questions. The appellant has stated to the Commissioner that the purpose of the request is to seek “...clarification of the reasons given for failing to address my complaint...”. This remedy is beyond the scope of FOIA, which only provides a right of access to already recorded information. FOIA does not require a public authority to create new recorded information (such as a statement) in order to respond to a question, regardless of whether it is phrased as an information request under the FOIA.
- c. The Commissioner acknowledges that the Appellant has a negative view of DLUHC, but was satisfied that section 14(1) FOIA was engaged. The Commissioner believes that DLUHC have co-operated with his investigation fully and has no reason to believe the DLUHC would mislead or provide false evidence. The appellant now has an appropriate route of appeal through the PHSO and the Commissioner reasonably considers that the Request of 14 June 2021 will only add further burden upon DLUHC.

- d. Although to the appellant there may be a genuine motive in his Request, it is clear from the Commissioner's reasoning in the Decision Notice that there is little wider public interest in the information requested. The Request strongly relates to the appellant's complaint to ARB about an architect in 2013 and the burden placed on and evidenced by DLUHC outweighs any public interest in the information.

## Applicable law

10. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

.....

**2 Effect of the exemptions in Part II.**

.....

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....

**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.

.....

**58 Determination of appeals**

- (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.

11. There is no further guidance on the meaning of "vexatious" in the legislation. The leading guidance is contained in the Upper Tribunal ("UT") decision in **Information Commissioner v Dransfield** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal ("CA") in **Dransfield v Information Commissioner and another & Craven v Information Commissioner and another** [2015] EWCA Civ 454 (CA).

12. As noted by Arden LJ in her judgment in the CA in **Dransfield**, the hurdle of showing a request is vexatious is a high one: "...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.*" (para 68).

13. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.*" (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

14. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

- a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. "*...the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor.*" (para 29).
- b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority.*" (para 34).
- c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).
- d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive.*" (para 39).

15. Overall, the purpose of section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" (UT para 10), subject always to the high standard of vexatiousness being met.

## **Issues and evidence**

16. The issue in this case is whether DLUHC was entitled to refuse to reply to the Request because it is vexatious.

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. An additional bundle from the appellant (which contains a number of documents which are also in the agreed bundle).
- c. Oral submissions from the appellant at the hearing.

## Discussion

18. The appellant explained his position to us at the hearing. He says that he has been trying to obtain straightforward information since October 2018. His basic point is that he believed the DLUHC complaints process would look into his issues with the ARB's process. He was not told that they could not investigate these issues as it involved actions by the ARB, until he received the outcome of the stage 3 complaint.

19. The stage 3 complaint outcome was provided on 29 October 2018. The appellant took us through the following sequence of events.

- a. On 6 November he sent two emails to the complaints officer asking on what basis they believed his complaint was about actions by the ARB, and saying his concern was systemic issues within the ARB complaints process. He chased for a response on 20 November, and again on 7 January 2019.
- b. On 12 March he was advised by email that the next step is the ombudsman, or to email the FOI address if there is a query regarding a FOI. The appellant sent the officer another email on 13 March.
- c. The appellant submitted a formal FOIA request on 19 March 2019, asking "please state which action (or actions) by ARB are being referred to in the opening paragraph". He was sent a formal response on 16 July 2020 (after intervention by the Commissioner). This stated the information was already reasonably available, and provided a link to the complaints procedure. The appellant requested an internal review on 16 July 2020, and after chasing a response was provided on 23 October which maintained the original response.
- d. The appellant complained to the Commissioner, who found that no information is held. The request was reasonably interpreted as any document that lists or describes the actions that may be taken by ARB. The Commissioner said the appellant had inadvertently asked for information different to that which he actually seeks.
- e. The appellant then submitted the current Request, which he says he did to avoid wasting time and money on an appeal. He says this was all part of the same overall request. It was a reworded version.

20. The appellant explained what he thought the recorded information would be. He says that a proper stage 3 investigation would have involved the complaints officer contacting the technical policy division, to ask if the department was responsible for investigating the issue. He believes there would be an email asking about the scope of the stage 3 process, and a response.

21. The appellant explained that he believes the complaints officer who dealt with the stage 3 complaint was aware that his previous FOIA request had been found to be vexatious, and this

affected the complaint outcome. He believes there was a plan to omit information from the stage 3 outcome, and then use FOIA to refuse to give this information.

## **Conclusions**

22. Having considered the appellant's submissions and the information in the bundle of documents, we find that DLUHC was entitled to reply on section 14 FOIA to refuse to answer the Request on the grounds that it is vexatious. This is for the following reasons.

23. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

24. **The burden imposed on the public authority by the request.** The current Request is clearly linked with the extensive history of the dealings between the appellant, the ARB, and DLUHC. We understand the appellant to be saying that this Request is a separate matter, and he is simply trying to understand why the complaints process was limited and did not cover the ARB's actions or process. The burden of answering this single Request is limited. However, we have also considered the cumulative burden, and whether this is likely to be the end of the process. Taking into account the appellant's previous dealings with ARB and DLUHC, we find that any answer is very unlikely to be the end of matters. The Request is asking specific questions relating to a very long-running complaints process with the ARB and DLUHC. The evidence in the documents indicates that the appellant is very likely to come back with further correspondence, questions or FOIA requests even if the current Request is answered. For example, if the response is that no information is held, the appellant is likely to challenge this based on his belief that there should have been relevant internal emails. If some information is provided, the appellant is likely to challenge the DLUHC's actions further with further questions. There is both a cumulative burden to date, and a potential future burden of dealing with the outcome of this Request.

25. **The motive of the requester.** The appellant is seeking to understand why he has been told that the DLUHC's complaints process cannot consider the underlying issues with the ARB. We do have some sympathy for the appellant's position. He thought that the complaints process was doing one thing, but at stage 3 he was told that it was not. It appears that the meeting with the Chief Planner did look into a number of questions about the ARB's process, but was treated as stage 1 of the DLUHC complaints process. Stages 2 and 3 then looked at whether the Chief Planner had acted correctly, rather than re-investigating the ARB's actions or procedure. We can understand why the appellant found this confusing. This is not a case where the requester has an impermissible or inappropriate motive.

26. **The value or serious purpose.** We find that the Request lacks value or serious purpose. We accept that the issue is important to the appellant, as shown by the long history of events. He has argued that it is also important to the public to understand the DLUHC complaints process, and what is "action taken" by a public body. He says that others should not have to go through this confusing process. We do not agree that a response to the Request would be of value to the wider public. We appreciate that the process has been confusing for the appellant. However, the DLUHC website page about the complaints process is clear that this looks at complaints about the DLUHC's own actions. It states that, "We also don't cover actions by...local authorities...other sponsored bodies, such as our executive agencies..." At best, a small number of people who have brought DLUHC complaints following issues with the actions of a sponsored body might find a response helpful – but



the information about the limits of the process is already on the website. We also note that the Request is worded so that it asks about underlying issues for “my complaint”, rather than about the complaints process more generally. It is essentially a request for information about the appellant’s own ongoing issue with the ARB and DLUHC.

27. **Any harassment of, or distress caused to, the public authority’s staff.** The appellant has been persistent at times with some quite strongly worded correspondence, but we have no evidence of particular harassment or distress.

28. **Overall holistic view – is it a disproportionate use of FOIA?** We have taken into account the availability of an appeal to the PHSO. We asked the appellant at the hearing why he was not pursuing this route. He said that he needed to know why DLUHC was saying they did not have responsibility to investigate the issues with the ARB, before he could take the issue to the PHSO. We do not agree. The PHSO is the appropriate body to investigate whether DLUHC has been operating its complaints process correctly, including its responsibility (if any) to investigate actions of outside bodies. He does not need answers to his current questions first. The appellant also says that this is a tortuous route and has to go through his MP, but he confirmed that his MP has said they would support an appeal.

29. The appellant’s fundamental issue is that his complaint outcome is incomplete and/or not sufficiently clear. The PHSO is a more appropriate route in this case than FOIA. This is particularly the case because, as identified by the Commissioner, it is unclear whether this is even a proper request for information. FOIA requires disclosure of **information** that is already held by a public authority – it does not require public authorities to answer all **questions** directed to them about their activities. We feel that the appellant may have misunderstood what FOIA is for. We appreciate that he has been frustrated by DLUHC’s failure to answer his correspondence/questions after the stage 3 outcome. We also have his submission that he believes there would have been internal email correspondence about the scope of a stage 3 investigation – or, there ought to have been this correspondence. However, this is not what the Request asks for.

30. We note that DLUHC has not always dealt well with the appellant’s concerns. They have delayed in responding to correspondence and FOIA requests. We also accept that the appellant genuinely thought the complaints process was doing one thing, when in fact it had a more limited scope. However, we do not accept the appellant’s position that DLUHC is deliberately misusing FOIA to prevent access to information that should have been provided in the stage 3 outcome. The outcome email explains that it can only address maladministration and provides a link to the relevant page on the website.

31. Taking all of the above into account, we find that the Request does reach the threshold of being a manifestly unjustified, inappropriate or improper use of FOIA. In particular, we find that answering the Request is part of a long-running set of challenges and queries by the appellant and likely to lead to further burden on the DLUHC, the Request is of no real value to the public, and an appeal to the PHSO is a more appropriate route for addressing the appellant’s concerns.

32. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 25 August 2022