IN THE UPPER TRIBUNAL **Case No. GIA/116/2014**
ADMINISTRATIVE APPEALS CHAMBER

Decision

This is an appeal by the information requester, brought with my permission, against the decision of the First-tier Tribunal ("the FTT") made on 10 October 2013. The question which I have to decide is whether the decision of the FTT involved the making of an error on a point of law.

For the reasons I give below, I decide that the decision of the FTT has involved the making of an error of law. I set aside the decision of the FTT under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and remit the case to the FTT with directions for its reconsideration.

Reasons

Background

1. Dr S ("the appellant") was employed by Imperial College London ("the second respondent") as a lecturer on a probationary basis. A senior colleague acted as her academic adviser until August 2010. From then, a second colleague, Dr M, took responsibility for acting as the appellant's academic adviser. In February 2011 and May 2011 respectively, the appellant brought grievance proceedings against each of the academic advisers. As part of the grievance the appellant complained that students were being "spoon-fed" and alleged that Dr M gave students some of the examination questions before the exams. The appellant repeated the allegations at her final Probation Review in May 2011. An investigation into the allegations, led by the Head of a different Department, was conducted by the second respondent. The claims were assessed as being without foundation in November 2011.

2. Arising from the making of allegations of professional misconduct against Dr M and from her alleged conduct in the course of the investigation, the appellant was subjected to disciplinary proceedings by the second respondent in December 2011. She was dismissed on 11 January 2012. She initiated an internal appeal process. Against this background, on 23 January 2012 the appellant wrote to the second respondent and requested information under the Freedom of Information Act 2000 ("the FOIA") in the following terms:

> "I would like a copy of all the 1st year Progress Tests, and exams and materials for [specified] courses offered at [a specified] Department, during the period 2002-2012, with the individual instructors responsible for the different parts of exams and tutorials mentioned on the documents".

3. She wrote again on 31 January 2012 to make further requests in the following terms:

> "I would like in addition the lecture notes and revision lectures by [Dr M] for [specified] courses offered during the period 2009-2012".
>
> and

> "In addition, I would like a table of the SOLE [student online evaluation] scores of all the instructors at the [specified] Department from 2002-2012. If the identity of the individuals needs to be protected, then you can refer to a particular individual with a symbol, but keep the same symbol for the same individual for the SOLE score information over all the years requested".

4. On 20 February 2012, the second respondent provided some of the information requested on 23 January 2012 but refused disclosure of the remainder, claiming that the material was exempt from disclosure under section 43(2) of the FOIA. On 21 February 2012 the appellant requested an internal review of the refusal.

5. On 28 February 2012, the second respondent refused to comply with the requests of 31 January 2012, claiming exemption to the first part under section 43 of the FOIA and exemption for the second part on the basis that the SOLE scores were personal data under section 40(2). On 28 February 2012 the appellant extended her request for review to include the further refusal. On 14 March 2012 the second respondent upheld its decision to refuse to provide the information, relying on exemptions under sections 43(2) and 40(2) of the FOIA.

6. On 10 April 2012 the appellant commenced proceedings against the second respondent in the Employment Tribunal ("the ET"), claiming unfair dismissal, race/sex discrimination, and detriment for public interest disclosure.

7. The appellant complained to the Information Commissioner ("the first respondent") about the refusal of the second respondent to provide the requested information. She indicated that the third element could be dropped from the complaint (the SOLE scores). She further narrowed the scope of the information she was seeking to:

> "Copies of all first year progress tests during the period 2002-2012, with the individual instructors responsible for the different parts of the progress tests mentioned on the documents".
>
> and
>
> "Copies of the tutorials (rather than all material) for the [specified] courses offered by Dr M (not all instructors), during the period 2009-2012 (not 2002-2012)".

8. By this, she had excluded from the request copies of all exams and materials from 2002-2012, restricted the request to tutorial material prepared by Dr M, and omitted from the request all tutorial material prior to 2009.

9. Subsequently, the second respondent agreed to disclosure of all first year progress tests during the period 2009-2012, indicating that progress tests were only introduced in 2009. The second respondent further maintained that it did not record the names of the individual instructors responsible for the different parts of the progress tests. The appellant indicated that she did not require the first respondent to form a view on that issue.

10. The requested information at issue in the complaint to the first respondent therefore had narrowed to:

> "Copies of the lecture notes and revision lectures by Dr M for the [specified] courses offered during the period 2009-2012".

and

"Copies of the tutorials for the [specified] courses offered by Dr M during the period 2009-2012".

11. In the meantime, in July 2012, the appellant's dismissal was confirmed by the second respondent after the completion of a formal internal appeal process.

12. In relation to the appellant's complaint to the first respondent, the second respondent continued to rely on section 43 of the FOIA. However, on 2 August 2012 the second respondent submitted to the first respondent that the appellant's requests were vexatious, relying on section 14 of the FOIA for the first time. On 17 August 2012 the second respondent directly raised the issue of section 14(1) in correspondence with the appellant.

13. On 14 September 2012 the second respondent set out in tabular form a list of dates, type of request and nature of request made by the appellant to the second respondent between 20 January 2012 and 31 July 2012 in support of this submission. This showed some 44 contacts in addition to the FOIA requests which were the subject of the complaint. Of these, three were data subject access requests under the Data Protection Act 1998 ("the DPA"), one was a supplementary subject access request, five were further FOIA requests, four were supplementary FOIA requests, three were FOIA review requests, one was a supplementary review request, 26 were e-mails variously concerning the DPA requests and the FOIA requests and one a telephone call.

14. The second respondent further provided the first respondent with a copy of a statement made by Dr M in the course of the appellant's disciplinary proceedings, indicating the impact of the appellant's allegations on his health, his family life and his work.

15. The first respondent determined the appellant's complaint on 26 February 2013 (decision notice FS50449944). In making the decision on the issue of whether the first respondent's requests were vexatious, the first respondent considered the nature of the communications from the appellant to the second respondent at the dates on which the requests referred to above were refused – namely 20 and 28 February 2012. This period involved some 14 contacts between the appellant and the second respondent in addition to the two FOIA requests.

16. The first respondent found that the appellant's requests, when considered in the context of the various requests made in January and February 2012, were likely to impose a significant burden, as a result of the volume, quick succession and fairly wide-ranging nature of the various enquiries and requests made by the appellant. The first respondent further considered that the "severity of the harassment felt by" Dr M and the acute distress caused to him, when considered together with the wider burden the requests would place on the second respondent, led to a conclusion that section 14 was engaged. The appellant appealed to the FTT, disputing the finding that her requests were vexatious.

The First-tier Tribunal's decision

17. The FTT disallowed the appeal. In so doing, it found that the appellant's requests for information were vexatious within the meaning of section 14(1) of the FOIA. In reaching its decision, the FTT had regard to guidance given by Judge Wikeley in the Upper Tribunal decision of *Information Commissioner v. Devon CC and Dransfield* [2012] UKUT 440 (AAC).

18. The FTT found that the appellant's DPA subject access requests, which led to the provision of over 8,000 pages, and her FOIA requests, leading to the provision of over 700 pages, together imposed a significant burden on the second respondent.

19. The FTT found that the appellant's purpose in making the request was to dispute her dismissal by the College, finding this to be a serious purpose. It further found that the benefit which the appellant hoped to flow from the request was almost entirely a private and not a public benefit.

20. The FTT noted that, should the ET conclude that the requested material, or some of it, was needed to fairly resolve the appellant's claims, then it was open to that tribunal to make an appropriate direction. It stated that "it would be inappropriate for this Tribunal to justify disclosure in the public interest of material for the purposes of litigation before another Tribunal, when that Tribunal … is in a position to make such an order".

21. The FTT found that the FOIA requests had caused "and no doubt will continue to cause" significant distress to Dr M. The FTT further found that the request was "part of a continued effort by the appellant to discredit" Dr M and that she continued to pursue it as part of a strategy in her employment dispute.

22. The FTT stated its conclusions as follows:

> "[30] The Tribunal is therefore satisfied that the Commissioner has properly characterised this request as vexatious. It has created significant burden on the [second respondent], it has caused, is causing and no doubt will continue to cause significant distress to her second mentor as part of [the appellant's] employment dispute with the [second respondent]. While [the appellant] argues that her request is serious and has value, such value was and is in the context of her employment dispute with the [second respondent]. This Tribunal is in no position to comment on the merits or otherwise of her claims which are now before the Employment Tribunal. Should the Employment Tribunal conclude that this material or some of it is needed in order to fairly resolve those claims then it is open to that Tribunal to make an appropriate direction.
>
> [31] This Tribunal is satisfied that at the time the requests were made they were vexatious in their context by reason of the burden on the [the second respondent] and the distress to the second mentor, she has repeated these extremely distressing and *[sic]* allegations in this Tribunal; the benefit which was sought from disclosure was [the appellant's] private interest in her employment dispute; not the public interest. It was an inappropriate use of FOIA and therefore vexatious".

Relevant legislation

23. By section 1 of the FOIA, a general right of access to information held by public authorities is afforded to requesters. This provides that:

> (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.

24. The right in section 1(1) is qualified by section 1(2), as follows:

> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
> …

25. The information to be provided is further described by subsection (1)(4) as follows:

> (4) The information-
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> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
>
> (b) which is to be communicated under subsection (1)(b),
>
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

26. By section 12, public authorities are relieved of the section 1(1) duty where the cost of compliance with a request for information exceeds an appropriate limit. It provides as follows:

> 12 (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
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> (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
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> (3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.
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> (4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—
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> (a) by one person, or
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> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
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> the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.
>
> (5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

27. By section 14, public authorities are relieved of the section 1(1) duty where a request for information is vexatious. This provides:

> 14 (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
>
> …

The grant of permission to appeal

29. By a determination issued on 6 June 2014, I accepted that three of the appellant's grounds were arguable and granted permission to appeal. The grounds on which I granted permission were whether the FTT had erred in law by:

(a) holding that the appellant's request was vexatious by virtue of the fact that it lacked public interest;

(b) holding that a relevant factor in the case was the prospect of the ET making an order for disclosure of the requested information;

(c) wrongly assessing the burden on the second respondent. In particular, I considered that it was arguable that the FTT erred by taking into account events subsequent to the requests and the distinct application made, and the material provided, under the DPA.

Procedural matters

30. On 26 November 2014 I stayed the proceedings pending the decision of the Court of Appeal in England and Wales ("the Court of Appeal") on appeal from the Upper Tribunal decision in *Dransfield*. Following the decision of the Court of Appeal in that case, I sought further submissions from the parties on 18 August 2015 to be received by 2 October 2015. I subsequently became aware that an application for permission to appeal to the Supreme Court had been made in *Dransfield*. I gave no formal direction arising from that fact, but I deferred the drafting of this decision until permission to appeal was refused by the Supreme Court on 14 December 2015.

Submissions on the appeal

31. On the issue of public interest, the first respondent submitted that, while section 14 is not subject to a public interest balancing test, such as might apply to qualified exemptions under the FOIA, a relevant factor for consideration is whether a request has "a value or serious purpose in terms of the objective public interest in the information sought", citing the Upper Tribunal's decision in *Dransfield*. It was submitted that the FTT properly applied the Upper Tribunal's guidance in asking itself whether the appellant's requests had a serious purpose in terms of the objective public interest in the information sought.

32. The second respondent submitted that FTT did not base its decision on lack of serious purpose or public benefit but rather on the burden of the requests and the severity of the harassing effect on a member of staff. There was no submission that the appellant lacked a serious motive in her request. Whereas paragraph 27 of the FTT's decision referred to the benefit to the appellant being "almost entirely a private and not a public benefit", this language stemmed from the appellant's submissions and confirmed that the FTT found an element of public benefit in disclosure.

33. In response, the appellant referred me to paragraph 31 of the FTT decision where it was stated that the benefit which was sought from the disclosure was the appellant's "private interest in her employment dispute: not the public interest. It was an inappropriate use of the FOIA and therefore vexatious". She submitted that this was a factor in the FTT's reasoning.

34. On the issue of the powers of the ET, the first respondent submitted that FTT did not take into account the fact that the information could be requested from the ET, but rather simply noted that it could be. It was submitted that the FTT was merely indicating that, notwithstanding the fact that the requests were found to be vexatious under FOIA, disclosure of the information might still be directed by the ET.

35. It was submitted by the second respondent that no reliance had been placed by him on the ET proceedings, but rather that reliance was placed on these by the appellant. In any case, the second respondent relied on the decision of Upper Tribunal Judge Williams in *Webber v IC and Nottinghamshire Healthcare NHS Trust* [2013] UKUT 648, regarding alternative means of obtaining requested information, submitting that it was a relevant factor for the FTT to have considered.

36. The second respondent further submitted that the power of the ET to order disclosure was not a factor in the FTT's decision. It was entitled to take into account that there existed an alternative means of obtaining the information. It was merely responding to the appellant's argument that the request had a serious purpose in the light of the prospective ET proceedings.

37. The appellant submitted that, while she introduced the issue of the ET proceedings in arguing that her request had a serious purpose, it was the second respondent who had introduced the argument that the ET proceedings could be used as a means to obtain the information requested (referring to paragraph 22 of the speaking note of the second respondent's representative in the FTT proceedings). She submitted that it was clear that the FTT had decided that "it would be inappropriate for this tribunal to justify disclosure in the public interest of material for the purposes of litigation before another Tribunal when that Tribunal is in a position to make such an order", referring to paragraph 30 of the FTT decision.

38. On the issue of burden, the first respondent submitted that in determining whether a request is vexatious, consideration should only be given to evidence up to the time when the authority should have responded. This should be within 20 working days of a request by section 10 of the FOIA. In reaching his own decision the first respondent says that he followed that approach. The first respondent states that he is unaware when the DPA request was made and indicates that it was not relied upon in his decision. Nevertheless, he submits it can be relevant to context and history, as noted by the Upper Tribunal in *Dransfield* at paragraph 29. He submits that context and history is not limited to previous FOIA requests made by an appellant and that the FTT would be entitled to take it into account to the extent that it formed part of the "previous course of dealings".

39. The second respondent agreed with the first respondent that the relevant time for assessing compliance with the FOIA is the period between the date of the request and the statutory time limit for compliance. The second respondent submits that, in respect of the requests of 23 and 30 January 2012, this was until 20 and 28 February 2012, and that the FTT confined its consideration to the correct time period, referring to paragraph 26 of the FTT decision where it alluded to the burden on the second respondent "at the end of February".

40. The second respondent submitted that it was entirely lawful to take into account the burden of compliance under the DPA. Judge Wikeley in *Dransfield* was right to envisage that non-FOIA correspondence could be important to history and context and there was no reason why this should not apply to DPA requests. Whereas there was no vexatiousness

provision under the DPA, the second respondent submitted that the courts have implied a proportionality threshold in DPA cases, relying on *Ezias v Welsh Ministers* [2011] 1 Info LR 35 at paragraphs 93-94, and *Elliott v Lloyds TSB* [2012] 2 Info LR 69 at paragraphs 88-92. The second respondent further relied upon *Durant v Financial Services Authority* [2003] EWCA Civ 1746, at paragraph 48, in support of the application of a proportionality criterion, noting the discretion of a court's discretion under section 7(9) of the DPA. The second respondent submitted that it was artificial and problematic to exclude DPA requests from consideration.

41. The appellant submitted that she narrowed her requests whenever possible to reduce the burden on the second respondent and limited her requests to information that was essential for her serious purpose. She disputed the burden on the second respondent. In relation to the DPA request, she submitted that she was not aware of the volume of material that the second respondent held and could not be held responsible for the unexpectedly large volume of information provided under the DPA. She submitted that it was an error of law to take into account the DPA burden in assessing the burden from FOIA requests. She sought to distinguish the context of the *Dransfield* case from her own case.

42. After the Court of Appeal gave judgment in *Dransfield*, as indicated above, I invited further submissions from the parties. In the event, the first respondent made no further comment on the *Dransfield* decision.

43. The second respondent submitted that the Court of Appeal decision in *Dransfield* took the appellant's case no further forward. Addressing the three grounds in the present case, the second respondent submitted that the Court of Appeal judgment did not mean that the presence of any public interest precluded the application of section 14(1), that the judgment of the Court of Appeal in *Dransfield* had no bearing on the second ground regarding the ET and did not support the ground regarding the burden on the second respondent.

44. The appellant submitted that the judgment of the Court of Appeal in *Dransfield* is supportive of her case and demonstrates that the threshold for rejecting a request as vexatious is very high. She submits that a key point from the Court of Appeal decision is that the issue of burden cannot be invoked unless the high standard set for vexatiousness is satisfied. She submits that, having accepted that the request for information was for a serious purpose, the FTT was not entitled to take into account the burden of disclosing the information. She further submitted that the FTT made a direct link between the request serving a private benefit and being vexatious, which she submits was erroneous in law having regard to paragraph 68 of the Court of Appeal judgment.

Assessment

45. The first and second respondent each submit that the FTT has not erred in law by finding the appellant's requests for information to be vexatious within the meaning of section 14 of the FOIA. The term "vexatious" is not defined. However, guidance on the interpretation of that term was given by Upper Tribunal Judge Wikeley in *Dransfield*. The Court of Appeal subsequently considered *Dransfield*, dealing with the particular issue of whether a request can be treated as vexatious if it is not in itself vexatious but previous requests have been.

46. *Dransfield* had concerned a request for information from Devon County Council relating to lightning protection systems on a pedestrian bridge. The requester had made ten similar requests since 2005 relating to health and safety matters. The Council submitted that the

most recent request was vexatious. Judge Wikeley introduced the law on vexatious applications as follows:

> "10. It is sometimes said that there is an "exemption" under FOIA for public authorities faced with vexatious requests. This is not strictly accurate. There are, of course, a number of absolute and qualified exemptions, properly so-called (see section 2 and Part II of FOIA), which turn on the nature of the requested information. Section 14, on the other hand, is concerned with the nature of the request and has the effect of disapplying the citizen's right under section 1(1). It follows that the purpose of section 2 and Part II is to protect the information because of its inherent nature or quality. The purpose of section 14, on the other hand, must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA ..."

47. While recognising that one of the main purposes of the FOIA was to provide citizens with a (qualified) right of access to official information and thus a means of holding public authorities to account, Judge Wikeley held that "vexatious" connoted "manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). He then sought to develop four broad issues or themes as an aid to considering whether a request is truly vexatious. He considered four relevant factors to be:

> a) the burden on the public authority including any previous course of dealings;
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> b) the motive of the requester in terms of the wider context of the course of dealings between the requester and the individual public authority;
>
> c) the value or serious purpose of the requester in terms of objective public interest – qualified by the statement that lack of apparent objective value alone cannot provide a basis for refusal unless other factors are present which raise the question of vexatiousness;
>
> d) evidence of 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.

48. Judge Wikeley was careful to say that these four considerations were not intended to be exhaustive or to create a formulaic check-list. He stressed that his observations should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms. Discussing the guidance of the first respondent, he suggested that it might need to place greater weight on the importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of "manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

49. The FTT in *Dransfield* had considered that the Council was not entitled, under section 14, to refuse the request on the basis of past history in the particular case. While it considered that the context and history was relevant, it found the request not to be linked to prior dealings as there was no single underlying grievance. Judge Wikeley found that it had adopted too restrictive an approach in its analysis of what elements of the past history were relevant and he set aside the decision of the FTT.

50. The Court of Appeal in *Dransfield* was concerned with the principal issue of whether a request can be treated as vexatious "if it is not itself vexatious but previous requests have been" (paragraph 6). It noted that the Upper Tribunal had gone on to formulate and apply guidance on the meaning of "vexatious" which had not been challenged in the appeal. In *Dransfield*, in this respect, Arden LJ has said:

> 68. "In my judgment, the UT 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…".

51. At paragraph 69, Arden LJ held that the instinctive view of the FTT, which had involved drawing bright lines between requests which spring from some common underlying grievance and those which relate to the same subject matter, although there is not underlying grievance in common, must be wrong. She stated her view that the distinction was difficult to justify in logic and that there was no statutory mandate for it.

52. *Dransfield* is, therefore, authority for the proposition that the prior dealings between a requester and a public authority may be taken into account when assessing whether or not a request is vexatious in the sense of section 14(1). The Court of Appeal warned against applying bright line rules as to what evidence should be taken into account. It was necessary for the authority to consider all the relevant circumstances in order to reach a balanced conclusion on whether a request was vexatious. 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". Judge Wikeley had said that "vexatious" connoted "manifestly unjustified, inappropriate or improper use of a formal procedure" and that vexatious requests had the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, were typically characterised by the lack of proportionality. Arden LJ said that (in "vexatious") Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one.

Has the decision of the FTT involved the making of an error of law?

53. In this case, I granted leave to appeal on three grounds. These related to the issue of public interest, the relevance of the appellant prospectively obtaining the requested information through ET proceedings and the burden on the second respondent.

54. In the light of the recent Upper Tribunal case of *RS v Information Commissioner and North East Derbyshire District Council* [2015] UKUT 568, I consider that I should say something about what material falls to be taken into account, and at what date, in determining whether a request for information is vexatious. This is not a matter which has exercised the parties in the present case who, it seems to me, largely agreed that matters should have been considered as they were at the date the information request ought to have been responded to. However, the approach of Upper Tribunal Judge Turnbull in *RS v ICO and North East Derbyshire District Council* differs from that and I wish to comment on it.

55. I consider that *Dransfield* has settled the question of whether past dealings with a public authority can be taken into account when assessing the burden on an authority. However, the present case is not one – except in one limited respect – where past dealings formed the basis of the decision. The issue of the vexatiousness arising from the burden on the authority was raised at a late stage in the proceedings and was claimed in respect of dealings which post-dated the requests which are at the heart of this appeal. In essence the second respondent relied on the accumulating burden resulting from subsequent contacts with the appellant in submitting that the original requests were vexatious.

56. I note the observation of the FTT in *Lee v Information Commissioner and King's College Cambridge (*EA/2012/0015) at paragraph 80:

> 80. "We are doubtful that a request can ever be rendered vexatious by something that happens at a later date. We do accept that there might be cases where subsequent conduct enables the true nature and circumstances of a request to be appreciated, because the subsequent conduct gives a more accurate insight into the requester's true purpose and the true circumstances surrounding the request at the time it was made".

57. In granting permission to appeal I considered that it was arguable that subsequent events could not retrospectively alter specific requests so as to render them vexatious, if they would not otherwise be vexatious when they were made.

58. An element of finality is required within administrative decision making. By finality, I mean that it is necessary to have a standpoint from which the relevant circumstances must be judged and certainty as to what evidence can be taken into account in making a determination. Otherwise, any decision will remain open ended and liable to change by changing circumstances. This is particularly relevant in a case such as the present one where the material relied upon to submit that a request is vexatious post-dates the requests which have led to the appeal, and continued to accumulate. I therefore consider that it is necessary for me to address the relevant principles for determining the relevant date for considering factual circumstances in such appeals.

59. In reaching its decision, the first respondent had considered the circumstances as they were at the expiry of the statutory time limit for compliance with the requests for information – namely 20 and 28 February 2012 (decision notice FS50449944, paragraph 23). This approach derives from the requirement of section 50(1) of the FOIA that the first respondent must decide whether a request for information has been dealt with in accordance with the requirements of Part I of the FOIA. Part I includes a requirement under section 10(1) that the public authority must comply promptly and in any event not later than the 20th working day following the date of receipt of a request. The approach is therefore premised on the need to determine, for example, the applicability of an exemption and the public interest balancing test, on the facts and circumstances as they stood when the request should have been

answered. This position is also consistent with section 1(4) of the FOIA which describes the nature of the information to be disclosed.

60. The Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* [2011] UKUT 153 took a slightly different view at paragraph 9. It held that, where the public authority undertook a review procedure, the relevant date for assessing the existence or scope of the duty to disclose is the time when the request was actually dealt with. Adopting the reasoning of the Information Tribunal at paragraphs 35-53 in *Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence* (EA/2006/0040), it accepted that an internal review decision, if any, carried out in accordance with the Information Commissioner's Code of Practice should be taken as the moment when the request was actually answered. The Code of Practice has no statutory effect and public authorities are not required to have a review procedure. However, if they do adopt a review procedure, a requester would have a legitimate expectation that such a procedure would be followed.

61. Moreover, the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* held, responding to submissions that disclosure of personal data would be contrary to Article 8 of the European Convention on Human Rights and the Data Protection Directive, that the effect of disclosure on the rights of the data subjects in the case had to be considered at the prospective date of releasing the information (footnote to paragraph 109).

62. Judge Wikeley in the Upper Tribunal in *Information Commissioner v HMRC & GG* [2011] UKUT 296 (AAC) also found that account could be taken by the decision maker of circumstances that come to light after the date of the information request. In that case, following a change in statutory responsibilities, information held by one public authority at the date of request was held by a successor public authority - HMRC - at the time of decision. Disclosure by HMRC would amount to a criminal offence, whereas this would not have been the case for the original public authority. The question was whether, in determining the steps to be taken under section 50(4) of the FOIA, the current circumstances should be taken into account. Judge Wikeley accepted that, in the light of the potential criminal liability, the second authority was able to rely on an exemption from disclosure. However, I understand him to reason that this should only happen in exceptional cases.

63. The position was summarised by the three judge panel in the Upper Tribunal case of *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and* Foreign and Commonwealth Office [2015] UKUT 68 at paragraph 31 as follows:

> 31. "This date of assessment issue has more recently been the subject of consideration by the Upper Tribunal in *Information Commissioner HMRC and Gaskell* [2011] UKUT 296, [2011] 2 Info LR 11 and *APPGER v Information Commissioner* [2011] UKUT 153 (AAC). It relates to the interpretation of s. 50 of FOIA and in particular the past tense in subsection (1) and its absence in subsection (4). The existing authority is to the effect that the use of the past tense in subsection (1) means that the consideration by the Information Commissioner and the FTT (and the Upper Tribunal if it is deciding the point) is an historical one but subsection (4) gives a discretion not to order disclosure if after that assessment date events have occurred that render disclosure contrary to the public interest".

64. In *RS v Information Commissioner and North East Derbyshire District Council,* concerning the question of whether a request was vexatious, Judge Turnbull has taken

matters further. He considered Judge Wikeley's decision in *Information Commissioner v HMRC & GG.* He interpreted this decision as holding that, in determining what steps to direct, the Information Commissioner could take into account events occurring after the date when the information request was responded to (at paragraph 92).

65. Judge Turnbull held that, similarly, a tribunal determining an appeal under section 58 of the FOIA was not precluded from taking into account events occurring after the date of the Information Commissioner's decision notice. He held that, in determining what steps to direct an authority to take, the FTT – or the Upper Tribunal - was entitled to consider whether, by reason of events down to the date of its decision, the request for information in the case had in effect become vexatious.

66. *RS v Information Commissioner and North East Derbyshire District Council* involved a complex sequence of events, whereby an authority had refused FOIA requests as vexatious on the basis that it had previously disclosed all the information sought. This later proved not to be the case. My understanding of the particular appeal is that, for the reason that new information emerged, the original requests were not vexatious as claimed by the public authority, leading to Judge Turnbull allowing the appeal. However, he decided the case himself on the basis that the new disclosure now made the requests vexatious.

67. There is some authority for Judge Turnbull's reasoning. In the context of an immigration appeal under the UN Refugee Convention and the ECHR *Saber v Secretary of State for the Home Department* [2007] UKHL 57, at paragraph 2, Lord Hope said:

> "The issue of whether a person's removal would be contrary to the United Kingdom's international obligations is always a prospective one, as it must be decided before any steps are taken to effect the removal. Common sense indicates that the final decision, whenever it is made, should be based on the most up to date evidence that is available. Facts which are of historical interest only do not provide a sound basis for a determination that an asylum seeker is entitled to protection now".

68. However, that particular case was concerned with the need to ascertain that a removal of a failed Kurdish-Iraqi asylum seeker could be achieved compatibly with his fundamental human rights and the UK's international obligations against the changing political and military situation in Iraq.

69.*Office of Government Commerce v Information Commissioner & another* [2008] EWHC 774 (Admin) was a statutory appeal under FOIA concerning a request for information about "gateway reviews" in the context of the Identity Cards Act 2006. The requests for information were aimed at discovering the cost of implementing the identity card (ID) scheme, among other things, and were resisted on the basis of exemptions for parliamentary privilege and formulation of government policy. Under section 37 of the Identity Cards Act 2006, the Secretary of State was required to lay before Parliament a report setting out his estimate of the public expenditure likely to be incurred on the ID cards scheme. This was brought into force after the dates of the requests for disclosure and after the Commissioner's decision on a first request, but before the dates of his decision on a second request and before the decision of the Tribunal. Section 37 was not referred to by the Tribunal in its decision. At paragraphs 97-98, Stanley Burnton J (as he then was) said, obiter, that:

> 97. "There was in this context discussion as to whether subsequent changes in circumstances, such as the coming into force of section 37, could be taken into account by the Commissioner. Mr Pitt-Payne submitted that the Act required

> questions of disclosure to be determined on the basis of the facts at the date of the request under section 8. He submitted that "the circumstances" referred to in section 2 are the circumstances as at that date, and that this is made clear by section 50, which requires the Commissioner to decide whether a request for information made to a public authority "has been dealt with in accordance with the requirements of Part I": the tense clearly refers back to the date of the request. He submitted, cogently, that any other interpretation would enable public authorities to benefit by refusing a request and thereby at least postponing disclosure. It is unnecessary to require the Commissioner to take subsequent changes of circumstances favouring disclosure into account: if there are such changes, the complainant is able to make a further request for disclosure. If, on the other hand, the change of circumstances favoured and would lead to non-disclosure, the authority would have benefited from its original wrongful refusal.
>
> 98. It is unnecessary for me to decide whether Mr Pitt-Payne's submissions on this point are correct, since no point had been taken by the OGC on the information available to the public as a result of the reports submitted to Parliament under section 37, but I am not sure that they are. Take a case in which the information requested is relevant to criminal proceedings that are begun after the date of the request, and the disclosure of that information would prejudice the fairness of the trial. In that case, the information was not exempt when requested, but became so under section 31 subsequently. It would be undesirable for the Commissioner to be obliged to require disclosure in such a case. Conversely, if the change of circumstances favours disclosure, the complainant can make a new request. Section 50 is not entirely clear in this respect, in that the past tense of subsection (1) is not repeated in subsection (4) in the phrase "in a case where it is required to do so by section 1(1)", or in the requirement that "the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken". As it happens, in paragraph 85 of the decision the Tribunal took into account circumstances post-dating the original requests for information under FOIA in deciding whether disclosure should be ordered. It seems to me to be arguable that the Commissioner's decision whether a public authority complied with Pt I of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required to be taken by the authority may take account of subsequent changes of circumstances".

70. These *obiter* comments would support the view that legislative changes, which might alter the balance of public interest in a qualified exemption case, might properly be taken into account when steps were being taken to provide information. The comments had been relied on by Judge Wikeley to support his view in *Information Commissioner v HMRC & GG*, that "Parliament can be presumed not to have intended that the Commissioner might have to impose an obligation on a public authority to take the "step" of communicating certain information where that step would, in the circumstances, be e.g. unlawful, impossible or wholly impractical". I agree with Judge Wikeley's approach in that case. However, respectfully, I do not accept that the jurisprudence supports Judge Turnbull's approach that a request which is not in itself vexatious can become vexatious due to events occurring after the date on which the public authority should have answered the request.

71. This matter has not been argued before me and therefore my views must be taken as a tentative approach to this issue. However, there seems to be a substantial difference between a "steps" decision made under section 50(4) in exceptional cases in order, say, to prevent illegality or breach of a fundamental right, and the taking into account of evidence of

events after the date of the public authority's response to the request. Without further analysis, I remain unpersuaded that the legislative framework of information rights appeals requires the course adopted by Judge Turnbull to be followed, which appears to me to be contrary to the existing authorities.

72. However, no such controversy arises in the present case. The parties accept that the burden on the second respondent falls to be examined in terms of the situation at the end of February 2012. For the reasons I have given above, I take the view the factual position as of 14 March 2012 is the relevant standpoint for this appeal as far as the actions of the parties are concerned. I accept that subsequent conduct can also be relevant, but only in so far as it sheds light on the true purpose and circumstances concerning the request at the time it was made.

73. Further, the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* further considered procedural requirements in the context of section 12 of the FOIA, which provides an exemption arising from the cost of compliance with a request for information. It noted that section 17(5) of the FOIA reads:

> 17(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

74. In the present case, the second respondent did not give notice to the appellant of reliance on section 14(1) until 2 August 2012. Nevertheless, while noting the use of the mandatory term "must", the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* accepted that in the light of *R v Secretary of State for the Home Department (ex parte Jeyanathan)* [2000] 1 WLR 354 and *R v Soneji* [2005] 4 All ER 321, this provision did not absolutely preclude late reliance upon section 12 or 14 where unfairness did not result. I agree with that approach. However, it appears to me that this procedural rule would tend to support the view that reliance on section 14 post-dating the section 17(5) time limit (or the review decision, as held in *APPGER*) should be admitted only exceptionally. Where it is raised outside the time limit specified in section 17(5), the decision maker must be satisfied that no unfairness would result (see *All Party Parliamentary Group on Extraordinary Rendition* paragraphs 92-96).

75. Additional material has been submitted by the appellant over the course of these drawn-out proceedings, including material relating to the outcome of her ET proceedings and subsequent Employment Appeal Tribunal proceedings. However, I consider that the outcome of those proceedings – which relates to the merits of her employment case - should not be taken into account by me, for the reasons I have given above. I have not taken it into account in determining this appeal.

Issue 1: The FTT's treatment of the issue of public interest

76. Arden LJ has said 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.

77. The first respondent submits that there is no problem with the FTT's treatment of the issue of public interest, as it addressed the question in terms of whether a request has "a value or serious purpose in terms of the objective public interest in the information sought",

citing the Upper Tribunal's decision in *Dransfield*. The second respondent has submitted that the FTT decided the case on the issues of the burden to the public authority and the severity of the distress caused to Dr M. The second respondent further submits that, whereas paragraph 27 of the FTT's decision referred to the benefit to the appellant being "almost entirely a private and not a public benefit", this language stemmed from the appellant's submissions and confirmed that the FTT found an element of public benefit in disclosure.

78. I recognise that there is some force in the submissions of the first and second respondent. The FTT has referred to the appellant's request having a "serious purpose", albeit continuing "and she has in the dispute raised a number of issues some of which have a public interest element within them", and later stating that "It is clear that the benefit which she hopes to flow from these requests is almost entirely a private and not a public benefit".

79. The FTT's reasons conclude that "at the time the requests were made they were vexatious in their content by reason of the burden on the [second respondent] … and the distress to the second mentor …; the benefit sought from the disclosure was [the appellant's] private interest … not the public interest. It was an inappropriate use of the FOIA and therefore vexatious". From these words, I find it inescapable that, at the least, a factor in the FTT's decision was the perceived lack of any public interest in the appellant's request for information.

80. However, it seems to me that the real issue is whether there was a value or a serious purpose to the appellant's request. A request can have a value or a serious purpose while serving an entirely private interest. Judge Wikeley referred to objective public interest. He later stated at paragraph 14 that "of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14". He continued, "…, unless there are other factors present which raise the question of vexatiousness".

81. It appears to me that the FTT would err in law if it considered that the request was vexatious for lacking public interest alone. However, it determined the appeal on the basis of other factors also. It is therefore necessary to consider these other factors.

Issue 2: The FTT's consideration of prospective disclosure in ET proceedings

82. The first and second respondents each submit that the issue of whether the appellant could obtain the requested information through ET proceedings was not a factor in the FTT's decision. Rather, it was an observation in the context of finding the request to be vexatious. In any event, it is submitted by the second respondent that it is relevant that there is provision for obtaining information through other means than the FOIA, citing *Webber v IC and Nottinghamshire Healthcare NHS Trust.*

83. In *Webber*, a FOIA request for information was made to an NHS Trust by the mother of a man who had died while compulsorily detained in a mental hospital. Information was sought which documented his time in hospital, how he came to be there, his mental state in the hospital, where he had been prior to that hospital, any tapes or videotapes taken during the period of hospitalisation and any other information giving insight as to his time in hospital. The Trust said that it would deal with the request under the Access to Health Records Act 1990 ("the 1990 Act") if the requestor was the deceased's next of kin, or if the next of kin consented. The deceased's sister asserted that she was next of kin and refused consent.

84. The requestor declined to apply to become the deceased's personal representative, although she would have been entitled to do so. The Trust dealt with the request under the

FOIA and refused to provide the information under section 41 (information provided in confidence), which provides an absolute exemption. In this context, Judge Williams (at paragraph 17) held that "it was appropriate to note other ways in which the information sought by the appellant could or might come on to the public record". (I further observe that absolute exemption is available under section 21 of the FOIA in relation to information which is reasonably available to an applicant otherwise than under section 1).

85. I consider that Judge Williams' consideration of the exemption under section 41, and the public interest defence to an actionable breach of confidence, should be distinguished from the position under section 14(1). He was considering the relevance of alternative means of obtaining information to the balance of public interest in the case.

86. Here the issue was whether the request was vexatious. The appellant relied upon the prospect of proceedings in order to show that she had a serious motive in requesting the information. The second respondent advanced the argument to the FTT that "the fact that she says she wishes to obtain documents for use in the employment tribunal can carry little weight in circumstances in which the employment tribunal has its own powers to order disclosure, where appropriate, under the employment tribunal Rules of Procedure 2004" (speaking note to FTT, paragraph 22). The second respondent was thereby implying that the seriousness of the motive of the appellant would be weakened by the possibility of an alternative source of the information sought.

87. The submissions of the first and second respondent are to the effect that the FTT merely indicated that the appellant could seek the requested information from the ET, having refused it under the FOIA. However, it is difficult to ignore the comment in the FTT's conclusion at paragraph 30 that "it would be inappropriate for this tribunal to justify disclosure in the public interest of material for the purpose of litigation before another tribunal when that Tribunal (which is far better placed to understand the issues it needs to resolve) is in a position to make that order". The issue for the FTT was not to consider whether it was appropriate for it to order disclosure – but whether it was an inappropriate use of the FOIA to request it. By this comment, the FTT clearly appears to make the possible availability of the requested information through the ET a factor in its decision.

88. If it did, in my view, it was not entitled to do so. The issue before it was whether the applicant had a serious motive in requesting information. This was the assessment of the merits of her potential claim to the ET and its potential use as evidence in those proceedings. It might well have been that, upon sight of the requested information, she would have decided not to bring or to discontinue ET proceedings. The fact that she might have obtained the same material by way of an application to the ET does not diminish the seriousness of the purpose for which it was sought. In any event she had no right to the requested material through the ET proceedings, but a possibility that an employment tribunal judge might have ordered disclosure.

89. It appears to me that, to the extent that it placed weight on this issue, the FTT has misdirected itself on the question of whether the request was vexatious for lack of serious purpose, or has alternatively taken an immaterial consideration into account.

Issue 3: The FTT's treatment of the issue of burden

90. Part I of the FOIA provides for modification of the obligation to provide information in three main cases. By section 9, the public authority has a right to charge a fee for compliance and the obligation is relieved if the fee is not paid. By section 12, the obligation is

relieved where the public authority estimates that the cost of compliance will exceed a prescribed limit. Therefore, there are other mechanisms within the FOIA to protect the resources of the public authority, as well as the submission that a request is vexatious.

91. I think that it is fair to say that, while the Part II exemptions protect the information, the Part I exemptions are tools provided to the public authority for preventing disproportionate use of the rights available under the Act, so as to protect the resources of the authority from being misused (FTT in *Lee v Information Commissioner*, EA/2012/0015, at paragraph 50). Nevertheless, I observe that, in the Court of Appeal in *Dransfield*, Arden LJ has stated:

> 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 … been carefully calibrated".
>
> Later at paragraph 85 she said that:
>
> 85. "As the UT held, there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request".

92. From these two passages, I understand Arden L J to be saying that the issue of protection of the resources of the authority can be a material factor in determining whether a request is vexatious. However, she is emphasising the high hurdle to be crossed before a finding that a request is vexatious can be based on such a factor.

93. The FTT referred to the appellant's request having "created significant burden" on the second respondent. The evidence showed that the applicant's first requests were made on 20 January 2012. I consider that communications with the second respondent from then to 14 March 2012 were relevant for the purposes of the assessment of whether the requests of 23 and 30 January 2012 were vexatious. In terms of that period, it is not in dispute that the appellant requested information from the second respondent as follows:

20 January 2012	Data Subject Access Request	Seeking information about the appellant including searches of the e-mail accounts of four named individuals from 2007 onwards
23 January 2012	FOIA request No.1	Copies of progress tests, exams and tutorials 2002-12 for specific courses taught by Dr M
23 January 2012	E-mail	Requesting that her name not be disclosed to persons regarding her FOIA request
26 January 2012	DPA	Request for further data under the Data Subject Access

		Request
27 January 2012	E-mail	Asking for the DPA material requested on 26 January to be provided by 30 January
31 January 2012	E-mail	Querying the 40 days required to produce data and complaining about proposed redaction of 3rd party data
31 January 2012	FOIA request No.2	Lecture notes and revision lectures by Dr M 2009-12 and SOLE scores
2 February 2012	Supplementary FOIA request	Seeking model answers for examinations and tutorials previously requested
7 February 2012	FOIA request No.3	Details of academic staff in relevant Department from 2002-12 including dates of hire and of resignation or dismissal due to failure of probation, poor performance or misconduct
8 February 2012	Supplementary FOIA request	Asking for reason of departure of academic staff who resigned, failed probation or were dismissed as above
15 February 2012	FOIA request No.4	Details of dismissal of academic staff for vexatious behaviour or breakdown of working relationships and lack of trust/confidence together with details of membership of Department's Examination Board
20 February 2012	Supplementary FOIA request	Details of Department's external Examination Board membership together with reports made by the Board
21 February 2012	Review request	Request for review of refusal of FOIA request No.1 of 23 January
21 February 2012	Supplementary review request	Confirmation that only interested in course taught by Dr M
23 February 2012	E-mail	Asking for subject access data to be provided by 24 Feb at the

		latest
23 February 2012	E-mail	Questioning redaction of 3rd party personal data
1 March 2012	FOIA request No.5	E-mail seeking clarification of information released and new request for information on number of staff hires
7 March 2012	E-mail	Query re data released under DPA
8 March 2014	E-mail	Requesting information as to how the data searches were conducted and asking for deleted e-mails to be included in the searches
9 March 2012	E-mail	Complaining about the manner in which released data had been sorted
9 March 2012	E-mail	Asking for reconstruction of permanently deleted e-mails and complaining about the redaction of 3rd party personal data
14 March 2012	Supplementary FOIA request	Details of academic staff in the Department and dismissals from the Department
14 March 2012	E-mail	Querying the information supplied about academic staff appointments
14 March 2012	E-mail	Querying why external examiners' details were considered to be personal data
14 March 2012	E-mail	Querying release of SOLE data

94. The issue of burden was addressed by Judge Wikeley in *Dransfield* as involving questions as to the number, breadth, pattern and duration of FOIA requests in terms of the misuse of the FOIA by an individual. However, it is clear that related correspondence can also be considered. In *Dransfield*, there were ten FOIA requests and 40 letters over a five year period, mostly on aspects of health and safety.

95. In granting permission to appeal I considered that it was arguable that a subject access request made under the DPA – which does not have a formal mechanism for screening out vexatious requests – should not be taken into account in assessing the burden on a public

authority so as to render a request under the FOIA vexatious. On this point, the second respondent has made submissions on the issue of an implicit threshold of proportionality within the DPA, citing *Ezias v Welsh Ministers*, *Elliott v Lloyds TSB*, and *Durant v Financial Services Authority*. However, even without consideration of these authorities, I believe that the Court of Appeal decision in *Dransfield* unambiguously settles the particular issue. The Court of Appeal has clearly warned against applying bright line rules as to what evidence should be taken into account when addressing the question of whether a request is vexatious. A rounded approach is required. Thus, I consider that a DPA request can properly be addressed in determining whether a FOIA request is vexatious, to the extent that it is relevant. I accept the general proposition that the decision maker should consider all the circumstances in order to reach a balanced conclusion as to whether a request is vexatious, without artificially excluding particular types of evidence.

96. In the present case there was one request made under the DPA three days before the first FOIA request. The appellant points out, perhaps not unreasonably, that she was not aware of the volume of material which the second respondent held about her. She submits that the response to this DPA request was the production of 2,724 pages to her on 29 February 2012. She made subsequent subject access requests on 24 May 2012 and 24 July 2012, resulting in further material. The FTT stated that the combined DPA requests resulted in the release of 8,000 pages of material to the appellant. It took this into account in assessing the burden on the second respondent.

97. In terms of the burden arising from her FOIA requests, the appellant submits that she made five requests in total (although this does not count supplementary requests). On 20 February, she was provided with 260 pages of examination papers and model answers in part response to FOIA request No.1 and the supplementary request of 2 February. On 1 March 2012, she was given one page in response to FOIA request No.3. The material provided by 14 March therefore amounted to some 261 pages.

98. Subsequently, on 15 March, she was given 15 pages in response to the supplementary FOIA request of 20 February. On 3 April, she was given 459 pages of SOLE scores in response to part of FOIA request No.2. On 4 April, FOIA request No.4 resulted in 1 page. A further 22 pages of progress test were provided on a review on 17 August. The appellant submits that the total number of pages provided under FOIA was 758. The FTT refers to material being provided to her in excess of 700 pages.

99. The appellant submits that after refusing the disputed parts of FOIA requests No.1 and No.2, which are the subject of this appeal, the second respondent continued to provide responses to requests which were submitted after the disputed requests. Furthermore, the appellant submits that she had sought to reduce the burden on the second respondent. Her contact on 21 February 2012 was addressed to narrowing the range of the information sought.

100. Burden was addressed in *Dransfield* as an issue in the context of any linkage between the particular FOIA request and previous demands placed on the public authority by the requester. A public authority which has faced past requests for information can easily refer to the resulting burden and properly link a current request to it. It is a much more problematic issue in a context such as the present case. Can a public authority rely on an accumulating burden, arising after the disputed requests are made? Why would it not simply refuse those later requests on the basis that they are vexatious or refuse the DPA requests as disproportionate, as the second respondent submits they can?

101. For my part, on the basis of the analysis set out at paragraphs [58]-[72] above, I consider that the answer must be that the decision maker should not consider circumstances arising after the relevant date for determination. In this case, for the reasons given above, that was 14 March 2012. It follows that the assessment of the burden on the second respondent should have been confined to its responses by that date, namely, 2,724 pages of the DPA request and 261 of the FOIA requests. By going beyond that date, and taking into account 8,000 pages provided under the DPA and over 700 under FOIA, I consider that the FTT has not addressed the burden on the second respondent in accordance with the law.

102. It also appears to me that there is more to the question of burden than simply looking at the aggregated volume of material which is sought for release. I accept that DPA requests in general are matters which can be properly taken into account. However, the circumstances of a case may mean that they should not be. In the present case the appellant made a DPA request three days before her first FOIA request. This was a request for information held by her employer - the second respondent – about her, including any references to her within the e-mails of four named academics from 2007 to 2012. That is a relatively long period. However, it greatly surprises me that this request generated over 2,700 pages of material. The material was not provided until after the appealed FOIA requests had been made and the appellant clearly could not know what volume of material would be supplied as a result of her request. If she had appreciated that the volume of material which the public authority would have to provide was such that it would claim that her FOIA requests were vexatious, she might well have prioritised her FOIA requests instead. It seems to me that little weight could properly be placed on the factor of burden arising from the DPA request.

103. More generally, I recall Arden LJ's comments regarding the high hurdle to be crossed before a finding that a request is vexatious can be based on such a factor as the protection of the public authority's resources. I doubt that the factor of the burden on the authority on its own could lead to a decision that a request was vexatious. Burden on its own can be addressed by other means, such as section 12.

Conclusions

103. The gist of the submissions of the first and second respondent is that the FTT based its consideration on two factors – the burden of disclosure on the second respondent and the harassing effect on the second respondent's staff member – and on those factors alone. They submit that these factors were sufficient for the FTT to determine the appeal as it had.

104. I accept that in the present case the FTT has placed particular weight on two areas highlighted by Judge Wikeley, namely, the burden on the second respondent and the distress caused to a member of the second respondent's staff. However, these are not ends in themselves but merely pointers to indicate whether the request is a vexatious one.

105. I consider that the FTT has taken into account a question of whether the appellant's request had a public interest. I consider that it has misdirected itself on the question of the appellant's motive, by introducing the issue of her requesting the information sought by her through her ET proceedings. I also consider that it has misdirected itself in terms of the issue of burden.

106. I have not considered the issue of the distress caused to Dr M. The FTT clearly accepted the evidence of the harassing effect of the requests on DR M. However, Judge Wikeley's guidance should not be viewed as a formulaic check-list whereby conclusions on one issue can lead to a decision that a request is vexatious. The FTT's conclusions on that

issue may well have validity. However, all the relevant factors must be considered, not just one in isolation.

107. As the FTT's decision has involved the making of errors of law and as these were material to the conclusion it reached, I conclude that I must set aside the decision of the FTT and I set it aside accordingly.

Disposal

108. These proceedings have dragged on for a long period of time to the point where it is now four years since the requests which were the subject of this appeal were made. I acknowledge that I have made my own contribution to that delay. However, while the appeal has come to me on the issue of whether the requests of January 2012 were vexatious, even if I was to find that they were not, the issues of exemption from disclosure under section 40(2) and section 43 of the FOIA will arise to be determined. These issues will require further submissions to be made.

109. Further, while I have sought to address the question of what factual circumstances can properly be determined on appeal in terms of maintaining some principle of finality in decision making, I recognise that some of the material sought by the appellant may well have been disclosed in the course of the ET proceedings she has brought. This, and the passage of time, may affect the attitude of the parties to the issues which were originally in dispute.

110. In these circumstances, I consider that I am not in a position to decide the appeal myself, but must remit the appeal to the First-tier Tribunal with directions for its reconsideration. I give directions as follows:

a. The appeal shall be reconsidered by way of an oral hearing before the First-tier Tribunal;
b. The tribunal determining the appeal shall be newly constituted, without the participation of either of the surviving members of the FTT who made the original decision;
c. The tribunal shall clarify whether there has been any change in the attitude of the parties to the issues in dispute and proceed accordingly;
d. The tribunal shall firstly deal with the issue of whether the second respondent's submission that the requests were vexatious was made in time in accordance with section 17(5) of the FOIA;
e. If not made in time, the tribunal shall give consideration to the question of whether the second respondent's submission that the requests were vexatious should nevertheless be accepted for determination, having regard to the overriding objective and any unfairness to the appellant which may result;
f. If the tribunal accepts that the issue of whether the requests were vexatious requires consideration, I direct that the tribunal shall determine this issue with reference to the factual circumstances as they were on 14 March 2012, taking account of later changes in circumstances only to the extent that it might shed light on the issue of whether the original requests were vexatious at the time that they were made;
g. The tribunal shall take note of the decisions of the Court of Appeal and of the Upper Tribunal in *Dransfield* in reaching any decision on vexatiousness, recalling 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";

h. The tribunal shall be careful to address the overall question and not consider Judge Wikeley's four headings as a formulaic check-list;
i. If holding that the requests were not vexatious, the tribunal shall proceed to determine whether the information requested is nevertheless exempt from disclosure on the basis of section 40 or section 43 of the FOIA.

(Signed on the original) **Odhrán Stockman**
Judge of the Upper Tribunal

(Dated) **10 March 2016**