IN THE UPPER TRIBUNAL **Case No.** GIA/1325/2016

ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by Mr Innes, the information requester, against a decision of a First-tier Tribunal made on 22 March 2016. For the reasons set out below I dismiss the appeal.

   Introduction and background

2. Mr Innes has been concerned since at least 2005 to obtain information from the Second Respondent (the Council) in relation to the 11 plus tests taken by children in the Council's area. It appears that he has been concerned, in particular, with the extent to which performance in the tests can be improved by coaching specifically for that purpose, thus possibly detracting from the intention that the tests provide a comparison of pupils' potential academic ability. There is an extensive and complex history of freedom of information requests by Mr Innes on that subject, in some cases proceeding to complaints to the First Respondent (the IC) and further. It will only be necessary for me to refer to a small part of that history in this decision.

3. In March 2010 the Council provided to Mr Innes, pursuant to an information request, 184 pages of spreadsheets, in PDF Form, showing, in respect of each of the years 2007 to 2009, a number of items of information in relation to the 11 plus results of each child taking the test in each school in the Bucks area. For example, the information included the name of the school which the child was attending, and the results of the two tests. As I understand it, at some stage thereafter the same information was provided in relation to 2010. My understanding is that, by way of example, two of those pages, showing the information in relation to about 40 children per page, are at pages 43-4 of the FTT Bundle.

4. Although it is not directly material to this appeal, Mr Innes contended that, even before the addition (with effect from 1 September 2013) of subsection 1A to s.11 of the Freedom of Information Act 2000, s.11 had entitled him to require the information to be provided in the form of an Excel file, rather than merely a PDF file, and he eventually succeeded in that contention in a decision of the Court of Appeal (*Innes v Information Commisioner* [2014] EWCA Civ 1086; [2015] 2 All ER 560) given on 31 July 2014. The information was then provided by the Council in that form.

5. As I have noted, with effect from 1 September 2013 subsection (1A) was added to s.11 of FOIA. That subsection provides that where an applicant expresses a preference for information which "is, or forms part of, a dataset" to be provided

in electronic form, the public authority must, "so far as reasonably practicable, provide the information in an electronic form which is capable of reuse."

6. Prior to the Court of Appeal's decision Mr Innes had then on 19 May 2014 made a further freedom of information request, which is the one at issue in this appeal. It was in the following terms:

> *"It has been indicated to me by the Information Commissioner that the information requested below would indeed fall in the scope of the new data set provisions.*
>
> *Therefore I repeat this request:*
>
> *Could you please provide me with the following information related to 11+ results*
>
> 1) *School*
> 2) *VRTS score*
> 3) *Attitude to Work*
> 4) *Academic Recommendation*
> 5) *1st Test Score*
> 6) *2nd Test Score*
> 7) *Both Test Dates*
> 8) *Plus, if tested by us other than at a school, the test venue and time for each test*
> 9) *Plus, if there has been an application for test modifications, there is a more detail just to record the application process and outcome*
> 10) *Plus "Order of Suitability" for the years that this was included.*
>
> *I require this information for the secondary school entry 2005 to 2012.*
>
> *The information is required for each child at each school in the Bucks area.*
>
> *I require the information in a non-propriety standard such as csv.*
>
> *If your decision is the same as in Oct 2013, then please review that decision.*
>
> *In addition, I would like to make another request. For the years given above, I would like all the additional data (i.e. not part of the data requested above) held in the 2 Microsoft Access data base tables (or anywhere else) concerning any aspect of the 11+ testing process related to each child, again in csv form."*

7. So far as the years 2007 to 2010 are concerned, that request sought the same information as had previously been requested and provided, save that it sought the information in a "non-proprietary standard such as csv", as distinct from the PDF format in which it had previously been provided. The first part of the

request also sought the same information in respect of the additional years 2005, 2006, 2011 and 2012. The second part (i.e. the last paragraph) of the request sought substantial additional information in respect of all years.

8. On 6 June 2014 the Council refused to comply with the request on the ground that it was vexatious within s.14(1) of FOIA. On 2 October 2014 the Council maintained that position on review.

9. Mr Innes applied to the IC for a determination as to whether his request had been dealt with in accordance with the requirements of FOIA. By a Decision Notice (the DN) dated 29 July 2015 the IC found that the Council had been correct to apply s.14(1) to the request. It will be necessary for me to refer later in this decision to some of the IC's reasoning.

10. By the decision now under appeal to me, made on 22 March 2016, the FTT dismissed Mr Innes's appeal against the IC's decision. The Council was joined as an additional party to that appeal.

11. The FTT had the benefit of detailed written statements of their case from the three parties, totalling some 37 pages. It held a hearing on 14 January 2016 at which Mr Innes appeared in person and the Council was represented by counsel. The IC was not represented. On 15 January the chairman of the FTT issued directions requiring Mr Innes and counsel to provide "comprehensive written closing submissions". Counsel for the Council provided written closing submissions running to 12 pages, and Mr Innes provided submissions running to some 14 pages. The result was that the FTT had before it written submissions from the parties totalling some 63 pages, in addition to the oral submissions made at the hearing.

12. I have been provided with the bundle of documents (pages 1 to 202) which was initially prepared for use before the FTT ("the FTT Bundle"). In addition, a number of additional documents which were before the FTT but had not been included in the FTT Bundle have been provided to me in a separate Bundle ("the FTT Additional Bundle"). In the numbering which I propose to use for the purposes of this decision the FTT Additional Bundle is numbered from pages 65 to 205.

13. On 12 February 2016 the FTT members met in order to consider their decision, in the light of all the material then before them. By its reasoned decision issued on 22 March 2016 the FTT dismissed the appeal.

14. Mr Innes' grounds of appeal against the FTT's decision are for the most part contentions that the FTT went wrong in law in failing to provide sufficient reasons for its findings of fact and conclusions. He himself summarised the thrust of his grounds in para. 4:

" For the large part, the [FTT's] Decision contained no reasons for the decisions reached. The Decision's conclusions, running from paragraph 32 to 40 (9 paragraphs for the 7 grounds of appeal), contained the following phrase ….(or similar)

"The Appellant has failed to persuade us ….."

….on no less than 8 separate occasions but *without* any substantive reasoning as to why the appellant had failed to persuade the Tribunal, as if the fact that the appellant had failed to persuade the FTT were reason enough. This despite the fact that clear arguments and points of law were raised in the appellant's submissions both written and oral. This deficiency in the Decision is compounded by the fact that the appealed DN from the [IC] was itself devoid of any substantive analysis or reasoning – in large part relying wholesale on the submissions of the Council without scrutiny."

15. In the closing paragraph of his grounds of appeal to the UT Mr Innes sums up as follows:

"Finally, I really fail to see, after all the time and expense that is involved in performing a FTT hearing, exactly what has been achieved. I really see no value, no benefit whatsoever in the FTT Decision. There is no analysis, no breakdown of the decision making logic, no reasoning. It simply confirms findings of the [IC] without any documented assessment of the appellant's submissions. Even where the Decision does not agree with the DN, the DN is left as it is. This process really has been a complete waste of time and money."

16. On reading Mr Innes' grounds of appeal and the FTT's decision I formed the view that, on the face of those documents (and without more) there might well be substance in Mr Innes' contentions. I therefore gave permission to appeal, so that the contentions could be fully considered.

17. I have received detailed written submissions in the appeal from all three parties, totalling (including the grounds of appeal) some 45 pages. Mr Innes requests an oral hearing of the appeal, but the other two parties submit that it can be satisfactorily decided without an oral hearing. Appeal to the Upper Tribunal lies solely on a point of law. In the light of the nature of the issues, and the detailed written submissions before me, I have concluded that I can properly dispose of the appeal without a hearing, and I therefore refuse Mr Innes' request. In so doing I have taken into account that Mr Innes' grounds of appeal and written submissions have throughout been, if I may respectfully say so, a model of lucidity. He has clearly considered very carefully what points are open to him. He has had the opportunity to reply in writing to the other parties' submissions. I doubt whether there is much (if anything) more that he could usefully have said at a hearing.

18. Section 14(1) of FOIA provides as follows:

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

19. The FTT was referred in paras. 19 to 21 of counsel for the IC's closing submissions to it to the observations concerning s.14 in the decisions of the UT and the Court of Appeal in the *Dransfield* case: [2012] UKUT 440 (AAC); [2015] EWCA Civ 454. I would myself highlight, in the particular context of this appeal, the following passage from the judgment of Arden LJ in the Court of Appeal:

> "68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition [of 'vexatious']. 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. It if 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. ….."

20. In *CP v IC* [2016] UKUT 427 (AAC) at para. 45 Judge Knowles considered that Arden LJ was not intending to say that if there is significant value in the information being sought the request cannot be found to be vexatious. Arden LJ went on to say in para. 68 that "the decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious". If, for example, complying with a request would impose a substantial burden, a request may therefore be vexatious even if the information has some value to the public.

21. In the Upper Tribunal in *Dransfield* Judge Wikeley (at pras. 17 and 27) referred with approval to the statement of the Upper Tribunal in *Wise v IC* (GIA/1871/2011) that:

> "Inherent in the policy behind section 14(1) is the idea of proportionality. There must be an appropriate relationship between such matters as the information sought, the purpose of the request and the time and other resources that would be needed to provide it."

22. The FTT in effect substantially upheld the reasoning in the IC's DN (although see paras. 64-5 below). The FTT rejected a contention by Mr Innes that his letter of request dated 19 May 2014 should be analysed as making two requests, which in relation to questions such as the value of the information and the burden imposed by the request should therefore be analysed separately.

The FTT considered that the letter should be seen as making one request, with the particular consequence that the time and expense involved in complying with the second part of the request should be considered material in determining whether the request as a whole (including the first part) was vexatious.

23. It is in my judgment clear from the conclusions set out in paras. 43 to 50 of the IC's DN that in the IC's view (which was upheld by the FTT) the most important factors in determining the issue of vexatiousness in this case were (a) the potential value to the public of the information sought and (b) the extent of the burden which would be involved in complying with (in particular) the second part of the request. That is consistent with the notion of proportionality which is referred to in the authorities. It was further in accordance with Mr Innes' own approach in his written closing submissions to the FTT, where he said:

> "3. The focus of these submissions is on the *value* of the requested information and on the *burden* on the council in providing this information. I believe that that is where the real issue in this case is."

It is in my judgment therefore appropriate for me to focus particularly on those of Mr Innes' grounds which are founded on the adequacy of the FTT's reasoning in relation to those two issues.

The grounds of appeal: analysis and conclusions

Ground 6

24. It is convenient first to consider Mr Innes' ground of appeal no. 6, which is that the FTT went wrong in law in treating his letter of 19 May 2014 as making one request, rather than two separate requests. He says (para. 50 of his grounds of appeal):

> "There is no justification given for treating a set [of] individual requests as a single request. This interpretation is the most restrictive interpretation of the legislation and appears unjustified when considering that the legislation refers to individual requests and makes no provision for combining individual requests into a single request. This could easily lead to the case where a series of requests in a single communication are all deemed vexatious simply because *only one* of the requests was actually vexatious. This unnecessary and unjustified restrictive approach is not consistent with the constitutional nature of the right."

25. The IC's DN did not, I think, expressly consider the possibility that the letter of 19 May should be analysed for s.14 purposes as making two separate requests. The reasoning referred simply to "the request", and assumed that it should be treated as one compendious request. The FTT's only express reasoning on this issue was in para. 32:

> "Although the Appellant's request is drafted in two parts, for the purpose of this appeal we regard it as one request dated 19 May 2014. In fact the Appellant has also taken this approach except where he seeks to divide the two in the expectation or recognition that one part might be vexatious while the other part not so. For the avoidance of doubt we, taking into account the history and circumstances of exchanges between the Appellant and the Council over a considerable period of time, are of the view that the Commissioner was correct in finding it to be vexatious. In any event, we find both parts of the request are vexatious in all the circumstances. The context and history are relevant as the Commissioner has argued and we look at the request in that regard."

26. It is right also to point out that in paras. 37 and 38 of the FTT's decision, which are part of its "Conclusions", it appears to some extent to deal separately with "the first part of the request" and "the second part of the request". I do not regard that as detracting from its primary conclusion, expressed in para. 32, that for the purpose of a s.14 analysis it should be regarded as one request. Further, I do not regard para. 37, read in the context of the FTT's decision as a whole, as intending to state that the first part of the request was vexatious merely because it partly sought information which had been requested previously.

27. I have been referred by counsel for the IC in this context to the decision of Judge Jacobs in *McInerney v IC* [2015] AACR 32; [2015] UKUT 47 (AAC), and particularly to para. 55 of that decision, where he said:

> *"….. The form in which a request is presented should not dictate how the section is applied. A series of requests could each be considered vexatious when viewed in the context of the series as a whole. Likewise, when presented with what on its face is a single request, the public authority should not be obliged to dissect it to see whether it could be severed. The public authority, and the First-tier tribunal on appeal, should take an overall view of the circumstances as a whole to decide whether what is before it, whether presented as a series of requests or a single request, is vexatious."*

28. However, one must also have regard to the whole of what Judge Jacobs said in relation to what he described as "the severance issue". In my judgment what he said is so dependent on the particular facts of that case, that I do not derive great assistance from it in relation to this case.

29. In my judgment in the present case the FTT was entitled to treat this as one request for s.14 purposes. Although the last paragraph of the letter of 19 May 2014 said that "I would like to make another request", which as a matter of form might be argued to support a contention that there were separate requests, the last paragraph sought information from the same databases in respect of the same years. As counsel for the IC submits, it was in essence an expansion of the first part of the request, to capture related data. Further, I doubt whether the Council, knowing that the second part of the request had been made, could (in

respect of the additional years) properly have complied with the first part of the request without considering the possible data protection implications of complying with the second part of the request: compliance with the second part might have required some details requested in the first part to be redacted. The two parts were as a matter of common sense so interlinked that the FTT was entitled to treat this as one request. Further, although the FTT's reasoning was very brief, and really did not more than state a conclusion, it was in my judgment adequate in the circumstances.

Ground 4

30. I turn next to Ground 4, which counsel for the IC describes as "the only ground of broad importance."

31. S.11(1A) of FOIA provides as follows:

> "Where
>
> (a) an applicant for information makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and
>
> (b) on making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form
>
> the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of reuse."

32. Mr Innes' contention is that where information forming part of a dataset was provided before the date (1 September 2013) when s.11(1A) came into effect, a further request after that date for the same information to be provided in an electronic form that is capable of reuse (i) cannot be vexatious under s.14(1) (or at any rate cannot be so merely because the same information has previously been provided in a different form) and (ii) cannot be regarded as a "subsequent or substantially similar request" for the purposes of s.14(2).

33. I do not consider it necessary to consider section 14(2), because as far as I have been able to discern neither the IC nor the FTT in any way founded their decision on that provision. I take that view notwithstanding the references to a "repeated request" in paras. 26 and 33 of the FTT's decision. Their decisions were that the request was vexatious within s.14(1).

34. In my judgment the IC and the FTT were clearly correct to hold that the whole of s.11, which is concerned with the means by which information is to be communicated, is subject to s.14 in the sense that if a request is found to be vexatious under s.14 then there will be no obligation to disclose it under s.1(1) and therefore section 11 will simply not come into play. As counsel for the IC submits, s.11(1A) does not take the request outside the scheme of FOIA.

35. If, therefore, the burden on a public authority in complying with a request for information is excessive and disproportionate, the request could be held vexatious under s.14 notwithstanding that the information sought was part of a dataset and notwithstanding that the information was sought in electronic form, so that (subject to section 14) s.11(1A) would be applicable.

36. In the present case, therefore, if the burden on the Council of complying with the request as a whole is such that, in all the circumstances, the request is properly considered vexatious, that conclusion is not negated merely because, if there were an obligation to provide the information (i.e. if the request as a whole were not vexatious), s.11(1A) would be applicable.

37. I think that the point which Mr Innes is really seeking to make is that it is not permissible to take into account, in determining whether his request was vexatious, the fact that he was previously provided with the some of the same information in a different form, because s.11(1A) entitles him to have it in a form capable of reuse, as he requested.

38. However, even if his request had been limited to the same information as he had already been provided with for the years 2007 to 2010, and was merely for that information in a format which s.11(1A) now requires, it would still as a matter of law in my view have been possible for the request to be held vexatious, on the ground that as a matter of the structure of the legislation one does not get to s.11 unless there is an obligation to provide the information under s.1. It would as a matter of law be permissible to find that on the particular facts it was vexatious to request information which had already been provided, albeit not in the format now required by s.11(1A). In the present case Mr Innes accepts that he could himself convert to csv format the PDF or Excel data which he has been provided with (although it may not necessarily follow that the same assumption should be made in relation to members of the public generally).

Ground 1

39. I turn then to Ground 1, which is that the FTT did not come close to providing sufficient reasons for its finding in relation to the purpose and value of the information requested. The directly relevant paragraphs in the FTT's decision are paras. 8, 14 to 16, and 38. Para. 38, in the FTT's conclusions, is as follows:

> "The approach to the Commissioner's assessment of the second part of the request is essentially one of the serious purpose of the request as evidenced by the weight to be given according to the value of the information. The Commissioner did acknowledge that the requested information had some value but that this value was weakened by the changes to the system, which have rendered direct comparisons meaningless. The Council confirmed that the changes to the system would render the requested information of little or no[w] value. The Appellant has failed to persuade us that the Commissioner erred in placing little by way of significant value

> to the requested information. We do not accept the Appellant's contention that the requested information has a high absolute value per se."

40. In considering the adequacy of the FTT's reasons in relation to the value of the information it is of course necessary to have regard to (i) the IC's findings on this point, to which the FTT referred and which it considered itself to be upholding and (ii) the contentions which were made to the FTT.

41. The most relevant paragraphs of the IC's DN are paras. 36 to 38, and 44 to 50.

42. In para. 36 the IC summarised the Council's contention as being that the request had no serious purpose or value in that (i) the nature of the 11+ test had changed and "this would render any direct comparisons meaningless" and (ii) the grammar schools which utilise the present 11+ tests are now academies free from local authority control. "[The Council] therefore considers that any conclusions the complainants might reach from any data disclosed would be of no great value now, and the council could take no specific action, in relation to the 11+ test anyway."

43. However, in paras. 37 and 38 the IC said:

> "37. The Commissioner considers that there is a value in older data being disclosed to interested parties. Although it could have no direct effect in the current system an analysis of previous results could feasibly allow interested parties to highlight flaws or areas of concern which the new system might not have addressed. It might also allow an analysis of how the newer system compares with the older one if similar information could be obtained from the academies on their results.
>
> 38. Nevertheless it is fair to say that the changes which have occurred will weaken the argument for the data to be disclosed. The tests administrators have changed, in some cases the tests themselves have changed in order to try to reduce the ability to coach children, and the responsibility for admissions has moved out of local authority control to the schools themselves. The value of the information being disclosed has therefore weakened substantially."

44. In setting out its conclusions in paras. 44 to 50 of the DN the IC did not really add to its stated conclusion, in para. 38, that the value of the information had "weakened substantially", for the reasons there given.

45. I have taken Mr Innes' contentions to the FTT on this point to be set out in paras. 9 to 33 of his closing written submissions (pages 183 to 187 of the FTT Additional Bundle). He contended that "the grammar school selective system and the tests which support the selection process have and continue to be a topic of enormous and relevant public interest." I think that the IC and the FTT accepted that. (Although not material to my decision, I observe that recent policy proposals in this field will, if anything, have heightened this general public interest).

46. In Annex 1 to his grounds of appeal to the FTT he had set out some of the conclusions which he had drawn from information already available, and in

particular from the differences in performance between children at well performing and poorly performing schools.

47. Mr Innes repeatedly asserted that the data which he had asked for would continue to be useful in assessing how the new (CEM) version of the selection tests is working:

> "The new method of 11+ testing (now called the Transfer Test) developed by CEM (Centre for Evaluation and Monitoring) of Durham University which purports to be **coach proof** has been introduced in Bucks and other selective areas. The CEM have declared their product is coach proof but have not been obliged to provide any evidence that this is the case.
>
> The children now taking the 11+ (Transfer Test) are guinea pigs of a new system **where there is much to be learned from comparing childrens' performance with the old (11+), and the new (CEM) version of the selection tests.**
>
> ……
>
> It is very misleading of the Council to suggest that results from the old 11+ test cannot meaningfully be compared with the new by suggesting that too much has changed about the system for grammar entry ……
>
> ……..
>
> The Council view of 'historic 11+ data' seems to typify their wish to keep their head in the sand and ignore any evidence which points to some failure in the 11+ system. In this case whether the CEM transfer tests really have made things better. The issues with CEM testing is just one area where the historic data can be used to investigate matters."

48. In my view the nature of the evidence and of the contentions before the FTT on this issue did not permit any detailed and closely reasoned assessment of the value which might be derived from the requested information, having regard in particular to the changes in the nature of the testing, and to the lapse of time. (I note that the 2005 and 2006 data requested were some 8 to 9 years old by the time of the 2014 request). In particular, the FTT did not have details of the precise changes in the nature of the test, and was substantially in the dark about the nature of much of the information which would be revealed by the second part of the request. As to this latter point, Mr Innes himself asserted, as far as I can see with justification, that he did not know what heads of information were or might be contained in many of the (as alleged by the Council) 240 fields comprised in the databases. The FTT had no more evidence as to that than he had. In addition, it was surely not possible to predict to precisely what uses researchers and others might want to put the information. It was in my view not possible for the FTT to make more than a very broad and substantially uninformed assessment of the extent to which detailed information about the children and their performance in tests taken in past years would be useful in the future, having regard to the lapse of time and the change in the nature of the test and possibly changes in many

other variables. The FTT had to do its best, looking at the matter broadly, on the (in my view necessarily) limited evidence available to it. The weight of the public interest in favour of information being disclosed is of course something which FTTs are routinely required to consider, more usually in the context of the public interest balancing exercise.

49. The FTT's reasoning in para. 38 was certainly very thin. The only two sentences which actually stated a conclusion or reasons were the last two sentences. However, when para. 38 is read as a whole, against the background of paras. 14 to 16, it is in my judgment sufficiently clear that the FTT's intention was to agree with the IC's finding on this point, and for the same reasons. I cannot agree with Mr Innes' general contention (para. 4 of his grounds of appeal) that the IC's DN was itself "devoid of any substantive analysis or reasoning – in large part relying on the submissions of the Council without scrutiny."

50. I have had some concern about the statement in the penultimate sentence of para. 38 that the IC "plac[ed] little by way of significant value to the requested information". It is well arguable that that statement, viewed alone, understates the value as found by the IC, which was that there was "a value", albeit a much weakened one. But in para. 15 the FTT expressly acknowledged that the IC had found that the requested information had "some value". It was of course open to the FTT to disagree with the IC, but in that case it would have had to make clear that it did so, and do its best to explain why. In my judgment the FTT's intention was to agree with the IC's assessment, and for the same reasons.

51. In my judgment the IC's reasons on this point, in effect adopted by the FTT, were adequate, having regard to what was realistic, given the constraints to which I have referred.

Ground 7

52. I turn to Ground 7. The heading to this ground adopted by Mr Innes is: "Request 2 not as burdensome as the Council would claim." Summarised in that way this ground appears to be simply an attempt to challenge the FTT's finding of fact on the issue of the burden which would be involved in complying with the request. Indeed, counsel for the IC submits that "the notice of appeal's treatment of these issues is an analysis of the competing submissions before the FTT, with an assertion that the Appellant is correct." However, in my judgment Ground 7, as developed by Mr Innes, plainly goes beyond that and includes contentions that (i) the FTT did not give sufficient reasons for its decision and (ii) it did not have sufficient evidence before it to come to a properly reasoned finding. In setting out his argument on those points, Mr Innes necessarily has had to explain what his contentions to the ICC were and why he contends that they were not adequately dealt with in the FTT's decision.

53. The directly material paragraphs of the FTT's decision are paras. 28 to 30, and 39, which I find it necessary to set out:

> 28. The Council asserted that the breadth of information fields that have been requested would create unique profiles allowing the identification of children whether by a 'motivated intruder' or by mosaic effect. The Appellant confirmed that any fields and notes, which could potentially identify a child, could be removed from all records without the need to analyse each record. The Appellant based his determination of burden on the "notes" in the data, but the Council and Commissioner considered the matter in terms of "information."
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> 29. However, the Appellant's argument was that the Commissioner has misunderstood how information is stored and extracted in the databases, as any annotations of a field would be added to the specific field for the specific child, not stored in the same field. In this way he distinguished *Department for Education v ICO and McInerny* EA/2013/0270 as the large amounts of personal data in that instance were contained in unstructured and unpredictable ways on pages, requiring each page to be read in order to redact the information. Contrast this with a database, where in only one or two records need be analysed in order to isolate the potential fields in order to exclude them when a report on the whole data set is generated. The Appellant conceptualised the question of burden as assessing which fields should not be released on the grounds of potential identification, rendering the number of children involved irrelevant.
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> 30. The Commissioner informed the Tribunal that he has had sight of screenshots from the database leading him to conclude that identifying information would not be as simple as the Appellant suggests. Whilst the Commissioner accepted the distinctions the Appellant has drawn, he also accepted that the Council would have to examine a large number of entries to determine whether individual children could be identified. The Council also maintained its position that it would need to review information on a child-by-child basis, which is an obviously oppressive task.
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> 39. The Commissioner has accepted that the Appellant did not intend to cause annoyance and disruption but has stated that on the whole the disruption would be disproportionate in all the circumstances. The Tribunal have looked at the spread sheets and screen shots provided by the Council and considered the need to search the records of 58,000 children with up to 240 data fields for each child and the need for redaction throughout. We accept the Council's concern about the burden that would be imposed on them to disclose the requested information. The Appellant has, again, failed to persuade us that the Commissioner erred in finding the burden of disclosure of the requested information in the second part of the Appellant's request exceeded any value that might be provided therefor."

54. In very broad summary, the issue was as to the extent of the work which it would be necessary for the Council to do (if necessary by redaction) in order to ensure that disclosure of the information did not enable identification of the particular child to which part or parts of the data related. As was common ground, the cost of this work was not a qualifying cost for the purpose of the costs limit in s.12 of FOIA, because it was a cost involved in determining whether an exemption

(namely that in s.40(2) of FOIA – personal information) applied, but it was further common ground that it could be taken into account for the purpose of determining whether the request was vexatious. The Council did not claim that any great cost would be involved in relation to the new information sought in the first part of the request (i.e. for the years 2005, 2006, 2011 and 2012), but contended that the potential problem was with the information sought in the second part of the request (in conjunction with that already disclosed, and sought, in the first part).

55. As the FTT in my view considered itself to be upholding the IC's findings in the DN on this issue, it is again important, in considering the adequacy of the FTT's reasoning, to have regard to (i) the IC's findings and (ii) the contentions which were before the FTT.

56. The IC dealt with the parties' contentions in more detail than the FTT did. The most relevant paragraphs of the DN are in my view paras. 23 to 31.

57. The essence of the matter is that Mr Innes contended that the risk of identification of particular children could be minimised with substantially less work than the Council contended. The problem concerned the (as the Council asserted) up to 240 'fields' of information sought, in relation to some 58,000 children, by the second part of the request.

58. The IC and the FTT had before them the 'screenshots' from the two databases of which copies were at pages 95 to 112 of the FTT Bundle, and of which the FTT had the benefit of the more legible copies now at pages 119 to 137 of the FTT Additional Bundle. As regards the submissions to the FTT, I note that, in addition to the contentions in the grounds of appeal and written submissions, Mr Innes and the Council had made a number of contentions on this issue in the email exchanges in January 2016 which are now at pages 104 to 115 of the FTT Additional Bundle.

59. In essence, the issues turned on whether Mr Innes was likely to be correct in asserting that it would not be necessary, as contended by the Council, to examine the individual fields in relation to each child, because (i) fields likely to contain identifying information could simply be excluded in relation to each child and (ii) a process of what he described as 'automation' could be adopted in order, in the case for example of a school with a small number of relevant children, to prevent identifying information being disclosed; a formula or process could be devised and utilised in each such case.

60. The most detailed rebuttal of Mr Innes' contentions seems to have been in paras. 37 to 40 of counsel for the Council's closing submissions to the FTT (p.179 of the FTT Additional Bundle).

61. My impression is that it was difficult for the FTT, on the information before it, to form a view as to even approximately how much work was likely to be involved, and in particular as to the extent to which it would be possible to avoid examining

the data for individual children, a task which would be likely to be excessive. The FTT did not know the nature of the information in (if there were indeed 240 of them) many of the fields, or how it was structured. But it was told by the Council (para. 38 of the Council's closing submissions) that "it is possible to add notes or add information [to the fields] and each would need to be checked to see if information is actually held which relates to a child and could be used to identify the child including through other information in the public domain."

62. It seems to me, as Mr Innes has in effect suggested, that it might have been possible for the Council to evidence its case more convincingly by taking an example of a particular pupil, possibly one who was at a school with a small number of relevant pupils, and showing exactly, by reference to at least some of the fields, what it would be necessary to do in order successfully to anonymise the data relating to that pupil, or even to check whether anything needed to be done by way of redaction. It is possible, of course, that even an attempt to provide such an example might itself have involved a substantial amount of work, which was what the Council was concerned to avoid by invoking s.14. But nevertheless, my impression is that an example might have been helpful and much more convincing. But, in order to avoid disclosing exempt information to Mr Innes himself, it might have been necessary either to present the information to the FTT in 'closed' form, or to do so in already redacted form, in either of which cases Mr Innes would have been hampered in responding to it.

63. At the end of the day I have come to the conclusion that the FTT did not go wrong in law in not requiring the Council to attempt to evidence its case more convincingly. It was entitled to decide the case on the basis of the evidence which it had. On that evidence, it was entitled to accept that the work would be very substantial. Para. 39 of the FTT's decision is, again, very thin in terms of its reasoning, as Mr Innes rightly emphasises. But it seems to me to evince an intention to accept the findings of the IC, and for the same reasons. The FTT had referred to the parties' contentions in paras. 28 to 30. It was not really possible for the FTT, on the evidence before it, to do more than reach a broad conclusion as to whether Mr Innes' suggested methods of avoiding the need to look at multiple individual records and fields were likely to be effective. Against that background, I think that its reasoning, brief as it was, was just about adequate.

Ground 2

64. I turn to Ground 2. Mr Innes contends that, in stating in para. 39 that "the Commissioner has accepted that the Appellant did not intend to cause annoyance and disruption …", the FTT overlooked or misunderstood what the IC said in paras. 40 to 42 of the DN. I think that the third sentence of para. 17 of the FTT's decision, coupled with para. 39, indicates that the FTT did in this respect misunderstand what the IC said in the DN. The reference in para. 17 to the IC

having "accepted that there is weight to the Appellant's denial that he had no intention to cause annoyance and disruption" seems to be a misunderstanding of the IC's statement in para. 42 of the DN that the IC gave "some weight to this argument", which was the Council's argument that the request must have been partially designed to cause disruption or annoyance.

65. However, I agree with counsel for the IC's submission that that does not demonstrate an error of law in the FTT's decision. First, the FTT made clear that it did not itself find that there was an intention to cause disruption or annoyance. The finding against Mr Innes by the IC therefore did not "live on" in the IC's DN. Secondly, and in any event, it is in my judgment sufficiently clear that this factor was of relatively minor significance in the IC's and the FTT's reasoning.

Ground 3

66. I turn to Ground 3. Mr Innes contends that the FTT failed to give sufficient reasons for its decision in that in paras. 32, 33 and 37 it said that the context and history were relevant, but without stating why and what it made of the competing contentions of the parties. In essence, Mr Innes contended to the IC and before the FTT that the Council had asserted, and the IC had apparently accepted, that Mr Innes had made many more requests, and with substantially less justification, than was in fact the case. He contended that much of the correspondence and of his applications to the IC and appeals had been caused by the Council's inadequate responses to his requests.

67. A proper examination of that contention would have required a detailed review of the somewhat complex history. The FTT's reasoning does not indicate that it undertook such an exercise.

68. However, I have again come to the conclusion that this did not render its decision wrong in law. First, there were certain aspects of the context and history which could not be disputed. These included that Mr Innes had previously sought and been given the information in the first part of the request for the years 2007-10, albeit not in csv form. The first part of the request therefore included a request for information for years (2005 and 2006) which were more distant in time than those for which the equivalent information had already been requested and provided; see, in particular, the reasoning in para. 33 of the FTT's decision. Secondly, as I have already said, in my judgment the FTT in substance agreed with the IC's approach in paras. 43 to 50 ("Conclusions") of the DN that the most important factors for consideration in this case were the value of the information and the burden which would be involved in providing it. Despite the references in the FTT's decision to the context and history, that factor was in my judgment considered by both the IC and the FTT to be of relatively little importance. An error (even of law) made in the course of reaching a decision does not necessarily mean that the decision itself is wrong in law.

Burden of proof

69. Mr Innes contends that, in saying, on a number of occasions, that "the Appellant has failed to persuade us that the Commissioner erred ….") the FTT went wrong by in effect placing on him the burden of establishing that the request was not vexatious. I have some sympathy with this objection to the way in which the FTT's decision is worded. It can make it appear that the FTT has started from the position that the IC's findings are correct, and then proceeded to examine whether Mr Innes was able to rebut them. But I do not agree with him that that is what the FTT has in substance done. In my judgment the FTT reconsidered afresh, as it was required to do, whether the IC was right to decide that the request was vexatious. It did not start from the position that it was for Mr Innes to establish that the request was not vexatious, or from the position that the IC's findings were correct unless Mr Innes could demonstrate to the contrary.

Conclusion

70. For the reasons set out above, and contrary to the impression which I formed at the time of giving permission to appeal, none of the grounds of appeal in my judgment demonstrates an error of law in the FTT's decision.

Charles Turnbull

Judge of the Upper Tribunal

7 November 2016