

IN THE UPPER TRIBUNAL

Appeal No: GIA/886/2017

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal dated 12 December 2016 under reference EA/2016/0100 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1) and 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later Directions by a Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

- (1) There shall be an oral hearing before the First-tier Tribunal of the appeal. The appellant will be entitled to attend that hearing as will the Information Commissioner and the University of Cambridge.
- (2) The First-tier Tribunal should have regard to the points made below.

REASONS FOR DECISION

1. All the parties agree that the First-tier Tribunal's decision of 12 December 2016 ("the tribunal") should be set aside for material error of law on the one ground set out below and the appeal remitted to an

entirely freshly constituted First-tier Tribunal to be re-decided. I agree. In the circumstances, I can give my reasons for allowing the appeal reasonably shortly.

2. It is not necessary for me to deal with the information being sought by Ms Bryce because, as will be seen below, this appeal resolves itself essentially on procedural failure and not anything concerned with substance of what was being sought.
3. In my judgment, the tribunal erred in law (i) in failing to address whether the 11 June 2015 request for information made by Ms Bryce was vexatious under section 14(1) of the Freedom of Information Act 2000 ("FOIA") and, relatedly, (ii) in agreeing with the Information Commissioner that the only issue before the tribunal was whether section 17(6) of FOIA was met.
4. The relevant provisions of FOIA are as follows.

"Section 1.—(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,
- (b) if that is the case, to have that information communicated to him.

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

Section 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.

(6) Subsection (5) does not apply where—

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 50.—(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

Section 57.—(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

Section 58.—(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

5. Although it is not necessary for me to decide this point on this appeal, and I do not do so, I am inclined to the view that the tribunal was correct to identify section 17(6) as containing a procedural rule only. This would seem to follow from the remedy for section 17(6) not being satisfied being limited to a (section 14(1)) notice having to be issued under section 17(5). On this basis, it would seem likely that section 17(6)(a) is satisfied simply on the basis of the public authority relying on section 14 in respect of, here, the 11 June 2015 request, rather than it having to establish for the purposes of s.17(6)(a) that the 11 June 2015 request was vexatious.
6. On the assumption that the scope of section 17(6) is as the tribunal described it, and as I have described it above, that, however, does not rule a complaint *also* arising about whether the (here, 11 June 2015) request was in fact vexatious under section 14(1) of FOIA. Section 50(1) of FOIA enables a person to apply to the Information Commissioner for a decision whether, in any specified respect, a request for information has been dealt with in accordance with Part I of FOIA. Part I contains

both section 14(1) and 17(6), and so on the face of it a complaint can be made about compliance with both.

7. The Information Commissioner in her submission on this appeal now accepts, on reflection, that “the scope of [Ms Bryce’s] complaint before her can be read as encompassing the question of whether or not the [University of Cambridge] had been entitled to rely upon section 14(1) in relation to the [11 June 2015] request”. The Information Commissioner’s *Decision Notice* did not make a specific finding that the University of Cambridge was entitled to rely on section 14(1). She accepts, however, that Ms Bryce’s grounds of appeal against the *Decision Notice* raised, or appeared to raise, whether the University of Cambridge had been entitled to rely on section 14(1). And she further accepts, again rightly in my view, that given the terms of section 58 of FOIA Ms Bryce was entitled to raise this as an issue on her appeal. In the circumstances, the tribunal erred in law in failing to address whether the 11 June 2015 request was vexatious under section 14(1) of FOIA. I agree with this analysis. It is not dissented from by either of the other two parties.
8. If it is now of any relevance or assistance, given the Information Commissioner’s concession detailed above, my understanding of the large amount of correspondence and other papers in the First-tier Tribunal’s appeal bundle which led me to give Ms Bryce permission to appeal was as follows.
 - (i) Ms Bryce’s request for information was in an email dated 11 June 2015 (page 37 of FtT bundle). It would seem that what was treated as Ms Bryce’s section 50(1) complaint was her email to Miss Cragg of 13 October 2015 (page 55 FtT bundle). This said “Should the following unanswered FOI request to University of Cambridge go into the case which Michael Chamberlain is handling regarding vexatious refusals? If not, I want to ensure I have submitted it to you within three months...”. I asked why that was not *also* a complaint to the effect that the request was not a vexatious request or was (as a non-vexatious request) a failure by the

University of Cambridge to meet its obligations under section 1 of FOIA? The Information Commissioner's letter to Ms Bryce of 25 January 2016 (on pages 65-66 of the FtT bundle) can be read as covering compliance with both sections 14(1) and 17(6). I therefore considered that was arguable that in the subsequent correspondence between Ms Bryce and the Information Commissioner's office the complaint was not limited to whether Cambridge University was entitled to rely on section 17(6) of FOIA in respect of the 11 June 2015 request (see, for example Ms Bryce's reference to section 17(6) in the middle of page 140 of the FtT bundle and her view that every request should be considered afresh). And so I considered that the Information Commissioner's *Decision Notice* of 9 March 2016 was arguably erroneous in limiting the scope of the case under section 50(1) to whether the University was entitled to rely on section 17(6) of FOIA.

- (ii) Turning then to the appeal to the First-tier Tribunal, in giving permission to appeal I considered it arguable that the tribunal had erred in law in failing to address whether the decision notice properly addressed the nature of the complaints (plural) made by Ms Bryce. A failure to address a complaint made would in my judgment have rendered the *Decision Notice* not "in accordance with the law". I said that the tribunal had arguably been put on notice that section 14(1) was an issue by the final page of Ms Bryce's grounds of appeal (on page 17 of the FtT bundle). This I considered was how the Information Commissioner had read the appeal: see paragraph 22 of her response to the appeal (page 34 of FtT bundle) where the Information Commissioner speaks in terms of the appeal arguing that the 11 June 2015 request was not vexatious; though later she argued that the appeal concerned section 17(6) alone.

9. For the reasons given above, the tribunal's decision dated 12 December 2016 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal of the General Regulatory Chamber (Information Rights), at an oral hearing.

10. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 23rd November 2017