



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2021-001701-GIA
[2023] UKUT 312 (AAC)**

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

Mr E Williams

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing: 27 February 2023, Rolls Building, London
(conducted remotely, at the request of both parties,
using the Cloud Video Platform).

Attendances:

For the Appellant: Mr Williams represented himself.

For the Respondent: Mr R Hogarth, of counsel, instructed by the
Information Commissioner's Legal Service
(Regulatory Enforcement) Directorate.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal, taken on 17 February 2021 (case reference EA 2020/0015), did not involve a material error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Background and grounds of appeal

1. The Upper Tribunal's grant of permission to appeal against the First-tier Tribunal's read as follows:

"3. The tribunal refused Mr Williams' appeal against the Commissioner's decision that his request for information was vexatious within the meaning of section 14 of the Freedom of Information Act 2000 (FOIA). The request for information was made to the Independent Office for Police Conduct (IOPC) and concerned certain information relating to police involvement in the death of Andre Moura in July 2018, that death occurring, it is said, either during or soon after Mr Moura's arrest by the police.

4. Mr Williams' request for information was made on 19 August 2019. The full request was set out at paragraph 4 of the tribunal's reasons but, in summary, extended to "all image evidence" connected to Mr Moura's arrest held by the IOPC as well as "medical report(s)".

5. In refusing Mr Williams' request, the IOPC relied on section 14 FOIA (vexatious request). The Tribunal's statement of reasons makes no mention of the IOPC nor the Commissioner having relied on any specific FOIA exemption such as the 'law enforcement' qualified exemption from disclosure provided for by section 31 FOIA, nor the investigative information exemption under section 30. The Tribunal's decision therefore involved no balancing of public interests as would have been required had the request been treated as one for information subject to a qualified exemption from disclosure under FOIA.

6. The Tribunal instructed itself by reference to what are probably the leading authorities on section 14 vexatiousness namely the decision of the Upper Tribunal and, in turn, the judgment of the Court of Appeal in the *Dransfield* litigation (Upper Tribunal citation: [2012] UKUT 440 (AAC); Court of Appeal citation: [2015] EWCA Civ 454).

7. After a detailed examination of the background, the tribunal's findings begin at paragraph 65 of its statement of reasons:

(a) in Mr Williams' case there was no evidence of harassment or distress and none of his correspondence could be viewed as rude or patronising (paragraph 65);

(b) the evidence did not support a finding that Mr Williams' motive in making the instant request or other requests to IOPC was to cause annoyance or disruption "although that may be the result" (paragraph 66);

(c) so far as Mr Williams' knew, the IOPC investigation was ongoing at the date of his request for information (paragraph 69);

(d) Mr Williams' request stemmed from "a genuine concern about the circumstances surrounding the arrest of Mr Moura and from a genuine concern about the IOPC's repeated refusals to make reports and information public". Viewed in isolation, Mr Williams' request "can be seen to have a genuine and serious underlying purpose" (paragraph 70);

(e) if the wider context were considered, it showed that Mr Williams "has the benefit of multiple responses from the IOPC highlighting the reason why the IOPC will not disclose reports or information while investigations or proceedings are still ongoing" (paragraph 71). Despite this, Mr Williams "persisted in making the [present] request" which undermined his argument that the request had a serious purpose which demonstrated an intransigent approach which showed disregard for the previous responses he had received" (paragraph 72);

(f) there was no value in the public having access to the information at the time it was requested, since at that time either the IOPC investigation was ongoing or a referral had been made to the CPS, and "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 to any section of the public" (paragraph 73);

(g) there was no reasonable foundation for thinking that the information requested could be of value to the public, at the date of the request, because its release at that time would be likely to jeopardise the chances of offenders being brought to justice (paragraph 74);

(h) given the context, including the history of requests for information, in persisting with his request despite knowing an IOPC investigation or CPS referral was current, Mr Williams engaged in a manifestly unjustified and inappropriate use of FOIA (paragraph 75);

(i) Mr Williams previous requests to IOPC imposed a significant burden. Since his requests have been made while IOPC investigations have been ongoing, the burden on the IOPC had become disproportionate and wholly unreasonable (paragraphs 76 to 79);

(j) the instant request was vexatious “in the sense of being a manifestly unjustified, inappropriate or improper use of the FOIA” (paragraph 80).

8. In essence, Mr Williams argues that the Tribunal's finding that his request was vexatious deprived him of the opportunity to show that the public interest in disclosing the information sought outweighed the public interest in maintaining any specific DOIA exemption from disclosure. [*Mr Williams argues that*] The Tribunal's decision effectively immunises the IOPC from FOIA. In support of this argument, shortly before the hearing Mr Williams supplied a copy of the IOPC's refusal to comply, on the ground of vexatiousness, with a separate request for information. The IOPC's determination, dated 1 October 2018, has been added to the Upper Tribunal bundle (pages 34 to 43).

9. The tribunal's decision might have been free of legal error had a Tribunal previously found, in relation to a similar request, that the public interest in maintaining any specific FOIA exemption in relation to information held by the IOPC for the purposes of an ongoing investigation outweighed the public interest in disclosing the information (under, for instance, section 31 of FOIA). Indeed, the IOPC's own representations to the Commissioner argued in the alternative that the information sought was qualified exempt information in respect of which the public interest in maintaining the exemption from disclosure prevailed. Arguably, the Tribunal erred in law by failing to explain why a request for information which it found, at least in isolation, to have a serious and genuine underlying purpose was vexatious in the absence of any earlier Tribunal determination balancing the public interests for and against disclosure of similar information held by the IOPC, that is information connected to an ongoing investigation. I grant permission to appeal on that ground.”

Legal framework

2. Under section 1(1) of the Freedom of Information Act 2000 (FOIA), any person who makes a request for information to a public authority is entitled to be informed by the authority whether it holds information of the description specified and, if so, to have that information communicated to the person. This, however, is subject to the provisions of section 14 of FOIA (section 1(2)).

3. 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.”

4. In *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal:

(a) held that vexatiousness connotes “manifestly unjustified, inappropriate or improper use of a formal procedure” (at [27]);

(b) said that, in considering whether a request was truly vexatious, it may be helpful to consider four broad issues or themes, namely (1) the burden placed on the public authority and its staff; (2) the requester’s motive; (3) the request’s value or serious purpose; (4) any harassment or distress to the authority’s staff. However, this was not an attempt to provide an exhaustive nor prescriptive test, and it was important to bear in mind that Parliament, in enacting FOIA, chose not to define “vexatious” ([28]);

(c) regarding the burden of a request, said that the “number, breadth, pattern and duration of previous requests may be a telling factor” [29];

(d) regarding motive, said, “what may seem an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority” [34], and held that “section 14 serves the legitimate public interest in public authorities not being exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources. In that context it must be relevant to consider the underlying motive for the request” [35];

(e) regarding value or serious purpose, said that the following question should be asked, “Does the request have a value or serious purpose in terms of the objective public interest in the information sought” [38].

5. Regarding the burden of a request, the Upper Tribunal subsequently held, in *CP v the Information Commissioner* [2016] UKUT 0427 (AAC), that “the context and history of the particular request, in terms of the previous course of dealings between the individual request and the public authority...must be considered in assessing whether the request is properly to be described as vexatious”.

6. When the *Dransfield* case came before the Court of Appeal ([2015] EWCA Civ 454), Arden LJ held:

“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” [68].

7. The general right of access under section 1(1) FOIA is also subject to section 2. Section 2 is concerned with the various categories of “exempt information” provided for by Part II of FOIA. The section 1(1) duty to communicate information does not apply where the request is for exempt information (not being absolutely exempt information) if or to the extent that, in all the circumstances of the case, “the public interest in maintaining the exemption outweighs the public interest in disclosing the information” (section 2(2)).

8. The categories of qualified exempt information include:

(a) “information if it has at any time been held by the authority for the purposes of (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence” (section 30(1)(a)(i));

(b) information whose disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for the purpose of “ascertaining whether any person is responsible for any conduct which is improper” (section 31(1)(g)).

The arguments

The Commissioner

9. The Commissioner draws attention to the case law authorities' emphasis on "the importance of adopting a holistic and broad approach" when assessing vexatiousness, which the Commissioner submits is "quintessentially a matter for the first-instance judge" and with which a second-tier tribunal should be slow to interfere. Even greater caution should be shown where, as in this case, the first-instance tribunal's decision is impugned for inadequate reasons. The holistic nature of a proper assessment of vexatiousness renders it impossible to "trace an inexorable logical path" from a particular circumstance to the final answer. This should be borne in mind when assessing the adequacy of the First-tier Tribunal's reasons.

10. The Commissioner argues that the First-tier Tribunal's reasons were not inadequate on account of a failure to explain why a request which, considered in isolation, had a serious and genuine underlying purpose was in fact vexatious. That purpose stemmed from Mr Williams' genuine concern about the circumstances of Mr Moura's arrest, but the Tribunal rightly refrained from considering purpose in isolation when assessing vexatiousness.

11. Mr Hogarth, for the Commissioner, submits that the authorities do not merely recommend taking the full context into account, they require this to be done. The breadth of the contextual evidence before the First-tier Tribunal in this case is partly illustrated by the IOPC's detailed February 2019 letter to Mr Williams which, in Mr Hogarth's words, contained a macro review of some eight prior FOIA requests none of which were the subject of a complaint to the Commissioner. The Commissioner submits that the Tribunal carefully identified relevant contextual considerations most of which favoured categorisation of the present request as vexatious:

(a) Mr Williams had the benefit of multiple previous IOPC responses explaining its refusals to disclose information, including reports, while investigations or proceedings into alleged police misconduct were ongoing. Nevertheless, he persisted in making requests for information relating to matters under investigation (paragraph 71 of the Tribunal's reasons)

(b) it is noteworthy, submits the Commissioner, that the Tribunal knew that none of the IOPC's previous refusals were the subject of a complaint to the Commissioner, and that, in those cases, Mr Williams' requests were refused by the IOPC in application of

a FOIA qualified exemption from disclosure. Rather than test the IOPC's understanding of the FOIA qualified exemptions, Mr Williams "continued to ask the same question, knowing that he would get the same answer". This was the context to the Tribunal's finding that Mr Williams had "an intransigent approach with disregard for any of the previous responses he has received" (paragraph 72);

(c) the present request's apparent serious purpose, if viewed in isolation, was weakened by the Tribunal's legitimate finding that "there was no value in the public having access to this information at that particular time" (paragraph 73), which was "a time where realising the information to the public is likely to jeopardise the chances of any offenders being brought to justice" (paragraph 74).

12. At the hearing, Mr Hogarth drew my attention to the ruling of Upper Tribunal Judge Knowles QC (now Knowles J) in *CP v the Information Commissioner* [2016] UKUT 427 (AAC) that Arden LJ's reference, in *Dransfield*, to a request with "no reasonable foundation" should not be read as a finding that, where there is significant value in a request, it cannot be considered vexatious. The present appeal should not be approached on the basis that a request with an apparently reasonable foundation cannot properly be considered vexatious.

13. In relation to the burden of dealing with Mr Williams' requests, the Commissioner points to the First-tier Tribunal's finding that he had made a number of similar requests to the IOPC (paragraph 76 of the Tribunal's statement of reasons), and evidence of a significant burden having been placed on the IOPC over an extended period of time in dealing with these requests most of which involved internal reviews (paragraph 78). According to the Commissioner, the Tribunal's burden analysis "is properly read as the point at which it takes a balance between, on the one hand, the value and purpose of the Request...and the burden of the Request on the other". Addressing that balance, the Tribunal found that the burden of dealing with "repeated requests for reports and related information at a point when investigations are continuing has become disproportionate and wholly unreasonable" (paragraph 79). The use of "has become" shows, submits the Commissioner, that the instant request was viewed by the Tribunal as 'the straw that broke the camel's back'.

14. In the light of the context, as identified by the First-tier Tribunal, the Commissioner argues that it gave adequate reasons for finding that a request with an apparently serious purpose was nevertheless vexatious. The serious purpose of the present request weighed less heavily in the balance than it otherwise would have due to the

surrounding circumstances. It was outweighed by the substantial burden placed on the IOPC by the aggregate of Mr William's similar requests for information.

15. The Commissioner further submits that the absence of a First-tier Tribunal decision balancing the public interests for and against disclosure of a request to the IOPC for information connected to an ongoing investigation (a decision about the application of a FOIA qualified exemption) is immaterial. The Tribunal did not assume that information falling within the present request would necessarily be exempt and, moreover, took into account factors and circumstances that would have been relevant had this case involved application of the qualified exemptions from disclosure provided for by section 30 or 31 of FOIA.

16. Mr Hogarth concedes that the First-tier Tribunal's reasons do not exemplify how disclosure of the information sought might have prejudiced an IOPC investigation. However, in a section 14 case, the decision maker is not required to consider competing public interests in the same depth as is in a qualified exemption case. If the Tribunal's reasons are considered in context, Mr Hogarth argues that it clearly did provide adequate reasons for its prejudice finding. The contextual factors included the Tribunal's acknowledgement that criminal proceedings might follow an IOPC investigation, the IOPC's published disclosure policy, the disproportionate expenditure of IOPC resources likely to result from pre-emptive disclosure, and the long history of disclosure dealings between the IOPC and Mr Williams in which matters of public interest were addressed at length. There was no mystery, submits Mr Hogarth, as to the nature of the public interests in issue. In any event, less than perfect reasons are not necessarily inadequate reasons.

17. Mr Hogarth readily accepts that the IOPC may not lawfully adopt a blanket policy under which certain categories of request are automatically adjudged vexatious. The same applies to the Commissioner and the First-tier Tribunal. Each request must be considered on its own merits but that is what the Tribunal did. Mr Hogarth accepts that Mr Williams was entitled not to have complained to the Commissioner about previous IOPC refusals but that did not mean the absence of any such complaint was irrelevant in identifying the relevant context to the present refusal.

The Appellant, Mr Williams

18. Mr Williams argues:

(a) none of his previous requests for information from the IOPC have been adjudged vexatious by either the Commissioner or the First-tier Tribunal;

(b) the IOPC was not “burdened by a flood of requests from me”. The evidence shows that it has “large resources” at its disposal. At the hearing, Mr Williams argued that his requests for information could not possibly take up all of the IOPC’s available resources for dealing with FOIA requests;

(c) in substance, the Commissioner’s position was that, in the light of Mr Williams’ previous requests, any subsequent requests were bound to be vexatious. This is effectively a blanket refusal and amounts to the IOPC having an absolute exemption from disclosure which is contrary to the FOIA;

(d) no authority supports the key part of the Tribunal’s analysis, which Mr Williams says is to be found at paragraph 75 of its reasons, as follows:

“In that context, persisting with a request for the evidence underlying an IOPC report in the knowledge that the investigation is ongoing or a referral has just been made to the CPS is, in the light of all the previous responses received by Mr. Williams, a manifestly unjustified and inappropriate use of the FOIA.”

19. At the hearing, Mr Williams argued that the First-tier Tribunal had authorised an unlawful blanket rule adopted by the IOPC to reject all requests for information, made while an investigation was ongoing. The reference to his ‘intransigence’, in paragraph 72 of the Tribunal’s reasons, was unfair because it failed to take into account that his actions were taken in response to an unjustifiable blanket refusal to disclose. Mr Williams added that he was entitled to choose not to challenge the IOPC’s earlier refusals, and should not now be prejudiced for this. It was ‘totally bizarre’ for the Tribunal to have found that there was no public interest in disclosure of the information he sought.

20. Mr Williams argued at the hearing that, at no point, had anyone explained to him why disclosure of a medical report connected to Mr Moura’s death, which was the main object of his request, would prejudice an IOPC investigation. He also submitted that the First-tier Tribunal, in holding against him his previous requests for information,

overlooked that the IOPC had never told him, on those requests, whether the information sought even existed. Mr Williams further argued that the Tribunal's finding that his requests for information had placed a "significant burden" on the IOPC was unsupported by the evidence and was irrational. Is it really vexatious, he asked, simply to disagree with the IOPC's blanket policy to refuse a whole category of requests for information?

21. At the hearing, I asked Mr Williams whether he disputed the Commissioner's contention that, before the present case, he had not complained to the Commissioner about any earlier IOPC refusal to provide him with information. Mr Williams conceded that he had not.

22. Mr Williams also submitted at the hearing that the present request was consistent with the Commissioner's own statutory guidance, in particular chapter five about best practice for public authorities.

Conclusions

23. I remind myself that Mr Williams was granted permission to appeal on a single, relatively narrow ground, framed as follows:

"Arguably, the Tribunal erred in law by failing to explain why a request for information which it found, at least in isolation, to have a serious and genuine underlying purpose was vexatious in the absence of any earlier Tribunal determination balancing the public interests for and against disclosure of similar information held by the IOPC, that is information connected to an ongoing investigation. I grant permission to appeal on that ground."

24. A Tribunal's reasons will be inadequate where they fail to convey to the losing party why the relevant issue or issues were decided against him (*Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263). The issue for me, therefore, is whether the First-tier Tribunal's reasons contained an intelligible explanation as to why, despite the apparent serious purpose of Mr Williams' request for information and the absence of a Tribunal qualified exemption decision for any similar request, it was considered vexatious. In determining that issue, the Tribunal's entire statement of reasons must be considered.

25. I also remind myself that it is not my role to decide afresh whether Mr Williams' request was vexatious for the purposes of section 14 of FOIA. That was the job of the First-tier Tribunal and the Upper Tribunal's jurisdiction is restricted to determining whether the First-tier Tribunal's decision involved an error on a point of law.

26. In my judgment, the First-tier Tribunal was not required to explain why it found vexatious a request for information of a type which had not previously been subject to the judicial balancing of public interests that would have been undertaken had a request of that type been considered under a FOIA qualified exemption from disclosure. Had the present request been, say, Mr Williams' first request for information made to the IOPC relating to an ongoing investigation into police misconduct, it might have been different, but that was not the case. The IOPC gave what was to my mind a clear enough explanation for refusing those requests and Mr Williams does not argue that he failed to understand why the requests were refused. It was at this point that the First-tier Tribunal became involved, upon Mr Williams making his next request for information – the instant request – relating to an ongoing IOPC investigation.

27. The First-tier Tribunal clearly explained that two considerations, in combination, were the principal basis for its finding that the present request for information was vexatious. Firstly, Mr Williams had the benefit of multiple previous IOPC responses explaining why it had refused to disclose information while investigations or proceedings were ongoing. Secondly, there was no value in the public having access to the information sought while an investigation was ongoing because releasing the information would be likely to jeopardise the chances of any offenders being brought to justice. The question, therefore, is whether the Tribunal was required, in order to give adequate reasons for its decision, to go on to explain why a request with an apparently serious purpose was vexatious despite the absence of any judicial balancing of public interests in relation to a request of a similar type previously made by Mr Williams. In my judgment, the Tribunal was not so required. Such a judicial balancing of public interests was absent because Mr Williams had decided not to challenge any of the IOPC's earlier refusals to provide information relating to an ongoing investigation. That was his right, of course, but it was part of the context to this case before the First-tier Tribunal and, as such, influenced what was required by way of adequate reasons for its decision. Had the present appeal to the First-tier Tribunal been concerned with, say, Mr Williams first ever request for information from the IOPC, the duty to reasons might well have required the Tribunal to explain why it was satisfied that the request was vexatious despite no consideration having ever been given to the balancing of public interests for and against disclosure. But the Tribunal

was concerned with the latest in a series of requests of a similar type, made to the same public authority, many of which had been refused following the authority's application of FOIA's qualified exemption provisions. In those circumstances, the Tribunal gave perfectly adequate and intelligible reasons for dismissing Mr Williams' appeal.

28. For the above reasons, this appeal is dismissed.

Upper Tribunal Judge Mitchell

Authorised for issue, on 10 October 2023.

Section 11 of the Tribunals, Courts and Enforcement Act 2007.