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

**Appeal Reference: EA/2020/0277P/**
**EA/2020/0256**

**Determined, by consent, on written evidence and submissions.**
**Considered on the papers on 16 March 2021**

**Before**
Judge Stephen Cragg Q.C.

**Tribunal Members**
Ms Susan Wolf
Dr Malcolm Clarke

**Between**

**D Moore**

Appellant

And

**The Information Commissioner**

Respondent

## DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 131 in case number 0256, and 1 to 141 in case number 0277.

BACKGROUND AND CONTEXT

4. There are directions dated 21 October 2020 that these two appeals be considered at the same time. The first case is EA/2020/0256 which relates to a decision notice dated 21 August 2020 (which we will refer to as '0256'), and EA/2020/0277 which relates to a decision notice dated 28 September 2020 (which we will refer to as '0277'). In both cases the Parliamentary and Health Service Ombudsman (PHSO) has relied on s14 FOIA to argue that the Appellant's requests are vexatious and, in each decision, notice the Commissioner has upheld that reliance.

5. We will describe the request and the decision notice in each case.

**0256**

6. On 16 March 2019 the Appellant made the following request for information to the PHSO: -

> Information requests 1 to 8 relate to information on the following page of the PHSO website: https://www.ombudsman.org.uk/making-comp...
>
> 1. Please provide for the year 2017/18 the number of telephone calls you received to your dedicated MP helpline 0300 061 4953.
>
> 2. Please provide for the year 2017/18 the number of cases to which the calls you received to your dedicated MP helpline related.
>
> 3. Please provide for the year 2017/18 the number of emails you received at the address [email address] (MP [at]ombudsman.org.uk). ]

4. Please provide for the year 2017/18 the number of cases to which the emails you received at [email address] (MP [at]ombudsman.org.uk) related.

5. Please provide for the year 2017/18 the number of requests received at [email address] (public affairs[at]ombudsman.org.uk) for a meeting with "the team". How many of these meeting were cancelled, if any?

6. Please provide (pseudonymized) the number of meetings with the team that were held by each of the five MPs and/or individuals acting on their behalf who had the most meetings.

7. Please provide the total expenses claimed in relation to meetings with MPs and/or individuals acting on their behalf, if applicable.

8. Please provide (pseudonymized) the expenses claimed in relation to each of the five MPs and/or individuals acting on their behalf referred to in (5).

9. Please provide a blank copy of the health form referred to in paragraph 12 of the employment tribunal judgment between H Rashid and PHSO dated 14 January 2019, in which PHSO was found to have directly discriminated against the claimant: https://www.hsj.co.uk/download?ac=3040650

10. For each of the years 2016/17 and 2017/18, please provide the number of PHSO staff who declared a disability. Specify the number for dyslexia.

11. For each of the years 2016/17 and 2017/18, please provide the number of disabled PHSO staff who benefited from workplace adjustments.

12. For each of the years 2016/17 and 2017/18 please provide the amounts spent by PHSO on workplace adjustments for all disabled staff.

13. Paragraph 64 of the Rashid judgment refers to "training for managers and colleagues on issues related to dyslexia".

(i) For each of the years 2016/17 and 2017/18, please provide the amounts spent specifically on training for managers and colleagues related to disabilities of all kinds.
(ii) Where training was provided by anyone other than PHSO, please specify the total costs paid to external providers.
(iii) Please also provide details of the total expenses claimed by PHSO staff in relation to disability training. Include information on travel and accommodation costs, if applicable."

7. The PHSO responded on 4 April 2019 and refused to provide the requested information citing section 14(1) of the FOIA as its basis for doing so. After an internal review the Appellant contacted the Commissioner on 19 November 2019.

8. In her decision notice dated 21 August 2020, the Commissioner explained something

about the background to the PHSO's position: -

> 21. The PHSO states that the complainant submitted 12 FOI requests in 2018-19 with seven (including the subject of this decision notice) being received within the last 3 months of that year. The PHSO provided a table to the Commissioner which breaks down these requests. On four occasions there was full disclosure, six occasions –partial disclosure, and on two occasions the information was not held. Many of these requests have multiple parts including one request in 11 parts, one request in 7 parts, one request in five parts and three requests in four parts. This request is in 13 parts.
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> 22. The public authority argues that the volume and nature of the requests submitted by the complainant place a significant burden on a small team that consists of only 3 FOI/DP Officers and that this request is considered disruptive and burdensome.
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> 23. The PHSO characterises the requests as broadly similar in nature and overlapping. On more than one occasion a new request will be received before the previous request has been responded to. The number and subject matter of the requests and the complainant's dealings with the PHSO, it argues, support the contention that this is a vexatious request. The frequency, length of requests and complexity add significantly to the administrative burden.
>
> 24. In analysing this request, the PHSO states that there is very little purpose or value to the request and that it jumps from subject to subject in a disjointed way and has no clear correlation.
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> 25. The PHSO suggests that it is very difficult to understand how the disclosure of the information could possibly be in the public interest which it considers is indicative of this being a vexatious request. Any attempt to locate and gather this information would only serve the complainant's interests and not that of the wider public. This would be an unjustified use of staff time and a significant burden. The PHSO considers the matter to be relatively trivial and getting numerous departments involved in order to comply would mean expending a disproportionate amount of effort.

9. The Commissioner then sets out in more detail the PHSO's analysis as to what would be required to reply to this thirteen-part request, noting that the requests encompass (i) the MPO helpline; (ii) details relating to the Public Affairs mailbox and specific meetings; (iii) a blank health form; (iv) staff declaring a disability and linked matters; (v) an employment tribunal case and amounts spent on training.

10. The Commissioner records that the Appellant does not accept that the request is "burdensome" or would cause "unjustified disruption", before concluding that: -

34. …the Commissioner's decision is that this request is vexatious. It is fair to characterise the complainant's requests as neutral in tone and lacking in unfounded accusation. However, it is also clear that any response from the public authority is likely to lead to a further request, on occasion before the previous one has been responded to. Within context the request follows a pattern. Many of the requests concern the workings of the PHSO – its staff, recruitment, pay, redundancy, training, levels of contentment with the service the PHSO offers. Although, the Commissioner does not agree that this request amounts to harassment or that it would necessarily cause distress to staff, the Commissioner's view is that the request appears to be less motivated by the desire to obtain information than to subject the PHSO to ongoing and, in this case, random scrutiny in the form of FOIA requests. As the complainant points out, applying section 14(1) solely on the grounds that it is burdensome is a high threshold. Had this been solely the case, she might have expected the PHSO to consider citing the cost limit at section 12. Within the context provided, the Commissioner agrees that the request is vexatious and that the PHSO was entitled to refuse it.

**0277**

11. On 4 August 2019, the Appellant wrote to the PHSO and requested information of the following description.

"This information request relates to DN FS50823461:[1]
…
The following extract is from paragraph 40:

'This means that the advice and identity of the clinical advisors may be shared with the person who makes the complaint and the organisation that the complaint is about. The complainant may receive the names and advice of clinical advisors in the draft report, which would later be anonymised in the final report.'

1. Please provide the number of times the identity of the clinical advisor was shared with (a) the person making the complaint and (b) the organisation about which the complaint was made in respect of the 50 most recently completed final reports. Please also provide the dates the final reports were completed.

The following extract is from paragraph 39:

"Its current policy is that the clinical advisors will remain anonymous to safeguard their objectivity and privacy so that they are not exposed to public pressure and harassment."

[1] This is a reference to a previous decision notice from the Commissioner and the Appellant provided a weblink to it on the Commissioner's website.

> 2. In respect of the 50 final reports referred to part 1 of my request, please provide the number of times your records reveal that clinical advisors were exposed to either (a) public pressure or (b) harassment. Additionally, please provide brief details of the unwelcome intrusion identified in each case."

12. On the same day, the Appellant clarified part 2 of his request, as follows: -

> "Where I wrote: 'in respect of the 50 most recently completed final reports' I meant final reports involving the advice of a clinician."

13. PHSO responded to the request on 22 August 2019. It refused to comply with the request which it categorised as vexatious under section 14(1) FOIA. The Appellant requested an internal review on 3 September 2019. PHSO did not carry out an internal review of its response but subsequently confirmed to the Commissioner that it would not reverse its decision that the request is vexatious under section 14(1) FOIA. The Appellant contacted the Commissioner on 19 November 2019.

14. In her decision notice dated 28 September 2020, the Commissioner again explained something about the background to the PHSO's position: -

> 15. …PHSO says that at the time of the complainant's current request, he had previously submitted 15 FOI requests between 7 April 2018 and 4 August 2019. Nine of these requests (including the current request) were received between 10 January 2019 and 4 August 2019. PHSO has provided the Commissioner with a summary of these 15 requests and their outcomes. It has advised that the complainant's requests span a number of years but that it has focussed on April 2018 to August 2019 for relevancy and context. However, PHSO has nonetheless noted that the complainant submitted 15 FOI requests in 2017/18 and nine in 2016/17.
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> 16. PHSO advised that, notwithstanding the volume of requests received between April and December 2018, the Commissioner should consider the number received in the eight months preceding the current request and the number of parts to each request (41 parts over eight requests).
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> 17. PHSO went on to say that the volume and nature of the requests that the complainant has submitted placed a significant burden on a small team that consisted of only three FOI/data protection officers at the time of the request. It considers that the volume of correspondence received from the complainant is disruptive and burdensome. PHSO notes that the requests the complainant makes are broadly similar in nature and overlapping. Often, insufficient time is given to respond to a request before another is submitted.

18. PHSO considers that there is very little purpose or value to the current request. It notes that the request is a direct response to the Commissioner's decision in FS508234611 which the complainant escalated to the First-tier Tribunal (Information Rights) ('FTT'). In its view this request is clearly aimed at undermining PHSO's response as published in the Commissioner's decision. PHSO considers the request is asking for an unnecessary level of detail when it has already provided relevant information.

19. PHSO has told the Commissioner that the information being requested is not routinely recorded in a central record as it is unique to each case. To try and collate the information would involve first identifying the last 50 final reports issued which required clinical advice. Again, the use of clinical advisors is unique to each case. Once identified, each of the 50 cases would need to be reviewed in depth - many of these reports run to hundreds of pages - to understand if the complainant requested the clinical advisor's name, if it was shared and whether the named organisation submitted the same request. Dates would need to be recorded for each to understand when the investigation (final report) was completed.

20. PHSO says it would then have to trawl through each record to see if there is any evidence of the clinical advisor informing it of exposure to public pressure and/or harassment. This information may not even have been saved to a specific case if, for example, it receives a complaint directly from the clinician to the clinical advice team, which would be recorded elsewhere.

15. The Commissioner recorded PHSO's arguments that (a) that this was a repeat request; (b) the request is trivial and is only being made to undermine the PHSO's position in a previous decision; (c) a disproportionate about of time would be required to meet the request; (d) the request is an inappropriate use of FOIA; (e) the request would place a significant burden on the PHSO and cause disruption, irritation and distress.

16. The Commissioner concluded that (a) she was not persuaded by the request's value; (b) the Appellant had made a large number of multi-part questions over a number of years which appeared to have little value; (c) if there is a theme to the requests it appears to relate to PHSO staff members following an initial grievance in 2016 or before.

17. The Commissioner concluded that request was part of a longstanding campaign of requests, generated by the complainant's dissatisfaction with a decision PHSO originally made about a matter he brought to its attention, in 2016 or before. The Commissioner agreed with PHSO that dealing with a large number of requests that

have very limited, if any, wider public interest and no clear purpose other than to burden staff would be demoralising and distressing for those staff.

18. The Commissioner said that the evidence suggests that the Appellant's intention, at this point, is to disrupt PHSO and generally cause a nuisance. The Commissioner therefore decided that PHSO was correct to categorise the Appellant's current request as a vexatious pursuant to section 14(1) FOIA.

LEGAL FRAMEWORK

19. Section 14(1) FOIA states that "Section 1(1) [FOIA] does not oblige a public authority to comply with a request for information if the request is vexatious". Vexatiousness is not defined in section 14 FOIA, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.

20. The approach to vexatiousness is set out in the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC). There is an emphasis on protecting public authorities' resources from unreasonable requests which is described by the Upper Tribunal in *Dransfield* when it defined the purpose of section 14 as follows at paragraph 10:

> 'Section 14…is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)…The purpose of Section 14…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…' (paragraph 10).

21. Also in *Dransfield, the* Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. As the Upper Tribunal observed:

> 'There is…no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.

22. One aspect of the consideration was whether the request had inherent value. As the UT said at paragraph 38: -

> 23. …Does the request have a value or serious purpose in terms of the objective public interest in the information sought? In some cases, the value or serious purpose will be obvious – say a relative has died in an institutional setting in unexplained circumstances, and a family member makes a request for a particular internal policy document or good practice guide. On the other hand, the weight to be attached to that value or serious purpose may diminish over time. For example, if it is truly the case that the underlying grievance has been exhaustively considered and addressed, then subsequent requests (especially where there is "vexatiousness by drift") may not have a continuing justification. …Of course, a lack of apparent objective value cannot alone provide a basis for refusal under section 14, unless there are other factors present which raise the question of vexatiousness. In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident.

24. *Dransfield* was also considered in the Court of Appeal *(Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454) where Arden LJ observed at paragraph 68 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.

25. Specific reference should also be made to paragraph 72 of *Dransfield* in the Court of Appeal where Arden LJ addressed paragraph 10 of the UT decision and said: -

> 72. Before I leave this appeal I note that the UT held [2012] UKUT 440 AAC at [10] that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA". 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, as Lord Sumption JSC indicated in *Kennedy v Charity Commission (Secretary of State for Justice and others intervening [2015] AC 455* para 2 above), been carefully calibrated.

26. The Upper Tribunal case of *Cabinet Office v Information Commissioner v Ashton* [2018] UKUT 208 (AAC) made clear that s14(1) FOIA can apply on the basis of the burden placed on the public authority, even where there was a public interest in the request being addressed and where there was a 'reasonable foundation' for the request:-

> 27. The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument. As Mr Armitage put it in the Commissioner's written response to the appeal (at §18):
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> a. In deciding whether a request is vexatious within the meaning of section 14(1), the public authority must consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.
>
> b. The burden which compliance with the request will impose on the resources of a public authority is a relevant consideration in such an assessment.
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> c. In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

27. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include: • Abusive or aggressive language • Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden • Personal grudges • Unreasonable persistence • Unfounded accusations • Intransigence • Frequent or overlapping requests • Deliberate intention to cause annoyance.

28. As the Commissioner says, the fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

THE APPEALS

**0256**

29. The Appellant filed an appeal dated 27 August 2020 in case number 0256. He denied that his request was vexatious. He accepted that a 'genuine interest in understanding how the PHSO works prompts me to make information requests to the PHSO, I contend that when I receive a response it does not automatically form the basis of future requests covering related ground'. He set out a list of his requests but argued there was no pattern in the requests, and that 'the Commissioner has failed to appreciate the objective importance of the information sought' and that 'I can assure the tribunal that my aim was to obtain meaningful information. I must admit, however, to being puzzled by the phrase 'random scrutiny'. He states that: -

> The Commissioner has mischaracterised my information request. I legitimately requested information from the PHSO. The Commissioner instead of considering each of my requests separately simply guillotined me. The information I asked for was information I thought the PHSO would likely hold and which would be reasonably accessible to it: (1) performance data and financial information re the MP helpline, and (2) information on disability and training. Most, if not all, parts of my request were narrow and specific. If any exemption was applicable it should have been section 12. That the Commissioner has read motive into my request consistent with vexatiousness is deeply puzzling and far from the truth.

30. He asked the Tribunal to consider a case where Scottish Water failed to persuade the Scottish Information Commissioner that as the complainant in that case had already submitted at least 317 requests for information vexatiousness was evident. He pointed out that there was a high hurdle to establish vexatiousness.

**0277**

31. In the second case the Appellant's notice of appeal is dated 29 September 2020. He argues that it was not excessive to submit an average of one request a month over the course of a number of years. He argues that simply stating that many of the requests are multi-limbed says nothing about the burden placed on PHSO, and that the Commissioner seems to have been 'hornswoggled' by the PHSO.

32. The Appellant argues that the Commissioner 'is wrong to attempt to deny me my constitutional right to obtain this important information under FOIA. My request was narrow and specific; it neither required the PHSO to consider a great number of exemptions nor to carry out a grossly burdensome amount of work' and that as his request related to only 50 final reports a 'fulsome response' would not cause any of the harm referenced by the Commissioner. He states that responses to his requests would 'have considerable value and purpose in justifying whether the identities of clinical advisors should or should not be made public', and states that his other requests have value too. The Appellant argues that he has a genuine interest in the PHSO because of his background in managing complaints, and that regularly sending requests to the same public authority for years is not unusual. He says that he is not pursuing a grievance and that there is public interest in the high staff turnover rate at the PHSO and the redundancy costs incurred.

33. He also accepts that '…the PHSO awarded me £200 in compensation for its poor handling of my complaint, so its right to say I had a grievance – a big one. However, I did not let the subject of my grievance become the motivating force for my subsequent information requests to the PHSO'.

34. The Commissioner has filed a combined response to both appeals. It is noted that the Appellant first made a request to the PHSO in 2014. The Commissioner then sets out in full the large number of requests the Appellant has made between 2015 and 2019.

35. In relation to case 0266, the Commissioner submits that: -

> …compliance with the material requests would be burdensome in its own right not least because it is a 15-part request. Further, the burden of compliance in this specific instance also needs to set in the context and history of the Appellant submitting requests dating back to 2015 and which are also often multi-limbed.

36. In relation to case number 0277 the Commissioner maintains that an average of one request per month over a number of years is a significant use of FOIA, questions the

value of the requests and notes that the Appellant's requests do in fact seem to have been triggered by an initial grievance against the PHSO.

DISCUSSION AND DECISION

37. Taking an holistic view of these requests, they come in the context of the Appellant raising large number of requests about the minutiae of the PHSO's processes and staffing. It is palpable from the documents in this case that the Appellant has developed a close and repeated interest in the day to day working of the PHSO, which has then manifested itself in a long series of requests for information about a wide range of matters, in the form of multi-limbed requests.

38. It is hard to avoid the conclusion that the Appellant's interest was initially piqued by the grievance that he had against the PHSO, but we accept that this has developed into a genuine concern about many aspects of the way the PHSO is run. Over the years the PHSO has provided information when it can.

39. But we do agree that the continued making of requests over a long period of time, about increasingly specialised areas of the PHSO operation, calls into question the value of the requests.

40. In our view this is the kind of case referred to by the UT at paragraph 38 of *Dransfield* where "…the weight to be attached to the value or serious purpose may diminish over time'. There is of course a public interest in the way the PHSO works, but the nature of the Appellant's requests makes it difficult for us to perceive any continuing value in the requests that he makes.

41. In terms of the Commissioner's factors to be taken into account in considering vexatiousness we would refer specifically to (a) the burden on the authority caused by this long series of request, (b) unreasonable persistence in the sense that the response to one request appears inevitably to lead to further requests, and (c) frequent or overlapping requests, which is obvious from the description of the requests in the Commissioner's decision notices.

42. In our view these are features both of the request in case 0256 and the request in 0277.

43. Thus, it seems clear to us that a continuing series of multi-part requests about the detail of the PHSO operation imposes a disproportionate burden on the PHSO and is a relevant consideration in our holistic assessment of the request.

44. Sending a request a month, often in multi-part form, for several years to a public authority can amount to unreasonable persistence. In the circumstances of case 0256 we have already noted that this thirteen-part request encompasses (i) the MPO helpline; (ii) details relating to the Public Affairs mailbox and specific meetings; (iii) an blank health form; (iv) staff declaring a disability and linked matters; (v) an employment tribunal case and amounts spent on training.

45. In relation to case 0277 the Appellant was seeking more further information about 50 clinical adviser cases following the dismissal of a complaint about non-disclosure of information concerning clinical advisers by the Commissioners.

46. The history which reveals the frequency of the requests is a factor to be taken into account in relation to both requests.

47. Taking all these factors into account and bearing in mind the considerations set out in the *Dransfield* case, and in agreement with the reasons given by the Commissioner in each decision notice, it is our decision for the reasons set out above that each of the requests (when considered separately) is a vexatious request for the purposes of s14 FOIA.

48. For all these reasons, these appeals are both dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 7 May 2021.