



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2009/0103

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50234985, dated 4 November 2009**

Appellant: Robert Rigby

Respondent: Information Commissioner

Additional Party: Blackpool, Flyde and Wyre Hospitals NHS Trust

Determined on the papers on: 18 May 2010

Date of decision: 10 June 2010

Before

**Anisa Dhanji
Judge**

and

**Michael Hake and Dave Sivers
Panel Members**

Subject matter

FOIA, section 14(1) – whether requests were vexatious

Cases

Ward (EA/2009/0093)

Adair (EA/2009/0043)

Carpenter (EA/2008/0046)

Betts (EA/2007/0109)

Gowers (EA/2007/0114)

Coggins (EA/2007/0130)

Welsh (EA/2007/0088)

Billings (EA/2007/0076)

Hossak (EA/2007/0024)

Brodie MacClue (EA/2007/0029)

Brown (EA/2006/0088)

Ahilathirunayagam (EA/2006/0070)

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2009/0103

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Information Commissioner's Decision Notice dated 4 November 2009 and dismisses the appeal.

Signed

Date: 10 June 2010

**Anisa Dhanji
Judge**

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2009/00103

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr. Robert Rigby (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 4 November 2009.

The Request for Information

2. In 2005, the Appellant’s mother underwent surgery at a hospital run by the Blackpool, Flyde and Wyre Hospitals NHS Trust (“the Trust”). A few days later, she passed away.
3. On 19 September 2005, the Appellant made a complaint to the Trust about shortcomings in the care his mother had received. We will refer to this complaint as the “underlying complaint”. Dissatisfied with the Trust’s responses, the Appellant referred the matter to the Health Commission (“HC”). They upheld the Appellant’s complaint and made a number of recommendations for action by the Trust.
4. Starting in 2006, the Appellant made a number of requests for information to the Trust in relation to the underlying complaint, and about the Trust’s implementation of the HC’s recommendations.
5. On 8 October 2008, the Trust informed the Appellant that it was invoking its “Vexatious Complaints Policy” (the “Policy”) and would no longer correspond with the Appellant in relation to the underlying complaint.
6. On 21 October 2008, the Appellant made a number of requests for information in relation to the Policy, including the number of people who had been classified as vexatious in the previous 5 years, and the number of appeals made by those who had been classified by the Trust as vexatious.
7. This was followed on 28 October 2008 with a detailed 8 page letter from the Appellant to the Chief Executive of the Trust setting out particulars of the underlying complaint.
8. On 11 November 2008, he was informed by the Trust that it could not offer him any more information in relation to the underlying complaint, but that he could pursue the complaint with the Parliamentary and Health Services Ombudsman and he was provided with the relevant address.
9. On 1 December 2008, the Appellant made a request for information to the Trust. It is that request that forms the subject of this appeal. The request was in the following terms:

“In accordance with the terms of the Freedom of Information Act 2000 please provide a copy of the trust’s files (including all documentation and correspondence detailing the requirement and purpose of such a policy) relating to the introduction and amendment of the trust’s Vexatious Complaints policy – Unique Identifier CORP/POL/153.”

10. On 23 December 2008, the Trust refused the Appellant’s request on the basis that it was vexatious. It relied on the exemption in section 14(1) of the Freedom of Information Act 2000 (“FOIA”).
11. The Appellant sought an internal review of the Trust’s decision. On 26 January 2009 (the letter appears to have been incorrectly dated 26 January 2008), the Trust informed the Appellant that it was upholding the refusal.

The Complaint to the Commissioner

12. On 9 February 2009, the Appellant complained to the Commissioner that the Trust had refused his request. He alleged that the Policy had been introduced by the Trust specifically because of the requests he had made for an explanation about the circumstances of his mother’s death, and that the Policy had only ever been applied against him.
13. The Commissioner asked the Trust to explain why it considered his request to be vexatious. He reviewed the history of the Appellant’s dealings with the Trust in connection with the underlying complaint, his requests for information, and the Trust’s responses to those requests. For the reasons set out in his Decision Notice, the Commissioner concluded that that the request was vexatious, and that the Trust had correctly applied section 14(1).

The Appeal to the Tribunal

14. By a Notice of Appeal dated 26 November 2009, the Appellant appealed to the Tribunal against the Decision Notice. The Trust was joined as a party to pursuant to Rule 7(2) of the 2005 Rules.
15. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5), we are now constituted as a First-Tier Tribunal.
16. The procedural aspects of this appeal have been governed by the Information Tribunal (Enforcement Appeals) Rules 2005, and the appeal has been determined without a hearing, pursuant to Rule 16 of those Rules. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeal could properly be determined without an oral hearing.
17. The parties have lodged an agreed bundle of documents comprising some 178 pages. It includes Witness Statements from Patricia Butcher, the Trust’s Information Governance Manager, who has held that post since 2003. It also contains a Witness Statement from the Appellant himself. All parties have also made detailed written submissions.

The Tribunal's Jurisdiction

18. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
19. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.
20. The Appellant's Grounds of Appeal raise a number of matters relating to the underlying complaint which, as the Tribunal had explained during the course of case management directions, are outside our jurisdiction. While we recognise the Appellant's concerns in relation to the underlying complaint, the Tribunal can only consider matters relating to his right of access to information held by the Trust, and in particular, whether the Trust was entitled to refuse his request under section 14(1) of FOIA. Accordingly, the Grounds of Appeal have been read as being confined to such matters.

Legislative Framework

General

21. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
22. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA, or if certain other provisions apply. In the present case, the Trust relies on section 14. This does not provide an exemption as such. Its effect is simply to render inapplicable the general right of access to information contained in section 1(1).

Section 14

23. Section 14 sets out two grounds on which a public authority may refuse a request. The first is where the request is vexatious. The second is where the request is identical or substantially similar to a previous request that the public authority has already complied with. The Trust relies only on section 14(1) which provides as follows:

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

24. Where section 14 applies, the public authority does not have to provide the information requested.

Findings

Background to the Request

25. As with many other cases which give rise to the question of whether a request is vexatious, the evidence in the present case shows a long history of difficult encounters between the parties. The request in issue is clearly rooted in the underlying complaint about the treatment the Appellant's mother received while she was a patient of the Trust.
26. From 2006 up to the request of 1 December 2008 which is in issue here, the Appellant made a large number of requests for information. These were inextricably linked to the underlying complaint. The Trust responded to most of these requests, although it refused some on the basis that the cost of compliance would exceed the limits provided for in section 12.

Section 14(1) – Principles

27. As already noted, the only issue for the Tribunal in this appeal is whether the Appellant's request of 1 December 2008 was vexatious. The first question is what is meant by vexatious in section 14(1). FOIA does not define "vexatious". However, the Tribunal has had a number of opportunities now, in other cases, to consider what the term means.
28. Although previous decisions of the Tribunal are not binding on us, we have found the following cases, in particular, to be helpful: **Ward** (EA/2009/0093), **Adair** (EA/2009/0043), **Carpenter** (EA/2008/0046), **Betts** (EA/2007/0109), **Gowers** (EA/2007/0114), **Coggins** (EA/2007/0130), **Welsh** (EA/2007/0088), **Billings** (EA/2007/0076), **Hossak** (EA/2007/0024), **Brodie MacClue** (EA/2007/0029), **Brown** (EA/2006/0088), and **Ahilathirunayagam** (EA/2006/0070).
29. We have summarised below some of the key principles that emerge from these cases:
- Section 14(1) is concerned with whether the request is vexatious in terms of the effect of the request on the public authority, and not whether the applicant is vexatious;
 - In the absence of a definition of "vexatious" in FOIA, it must be assumed that Parliament intended the term to be given its ordinary meaning. By its ordinary meaning, the term refers to activity that "is likely to cause distress or irritation, literally to vex a person to whom it is directed";
 - The focus of the question is on the likely effect of the activity or behaviour. Is the request likely to vex?
 - For the request to be vexatious, there must be no proper or justified cause for it;
 - It is not only the request itself that must be examined, but also its context and history. A request which when taken in isolation, is quite benign, may

show its vexatious quality only when viewed in context. That context may include other requests made by the applicant to that public authority (whether complied with or refused), the number and subject matter of the requests, as well as the history of other dealings between the applicant and the public authority. The effect a request will have may be determined as much, or indeed more, by that context as by the request itself. This is in marked contrast to other types of FOIA appeals where the Tribunal is said to be strictly applicant and motive blind; and

- The standard for establishing that a request is vexatious should not be set too high. Equally, however, it should not be set too low. The judgement that section 14(1) calls for is balancing the need to protect public authorities from genuinely vexatious requests on the one hand, without unfairly constraining the legitimate rights of individuals to access information.

30. Although every case turns on its own facts, in the cases referred to above, a wide range of factors have been considered to be relevant to finding that a request is vexatious:

- where the request forms part of an extended campaign to expose alleged improper or illegal behaviour in the context of evidence tending to indicate that the campaign is not well founded or has no reasonable prospect of success;
- where the request involves information which has already been provided to the applicant;
- where the nature and extent of the applicant's correspondence with the authority suggests an obsessive approach to disclosure;
- where the tone adopted in correspondence by the applicant is tendentious and/or haranguing and demonstrates that the applicant's purpose is to argue and not really to obtain information;
- where the correspondence could reasonably be expected to have a negative effect on the health and well-being of the employees of the public authority;
- where the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before, and is, in effect, the pursuit of a complaint by alternative means;
- where responding to the request would likely entail substantial and disproportionate financial and administrative burdens for the public authority;
- where the same requests have been made repeatedly, or where on repetition, the particulars of the requests have been varied making it difficult to know exactly what the requester is seeking and making it less likely that the request can be satisfied; and
- where providing the information requested previously has tended to trigger further requests and correspondence, making it unlikely that a response ending the exchange of correspondence could realistically be provided.

31. The Commissioner's Awareness Guidance 22 ("AG 22") on "Vexatious and Repeated Requests" which the Commissioner appears to have applied in reaching his decision (although he has not referred to it specifically in the Decision Notice), suggests a general approach to determining whether a request is vexatious. It focuses on five questions:
- Could the request fairly be seen as obsessive?
 - Is the request harassing the authority or causing distress to staff?
 - Would complying with the request impose a significant burden?
 - Is the request designed to cause disruption or annoyance?
 - Does the request lack any serious purpose or value?
32. Although AG22 is not binding on public authorities, nor of course on the Tribunal, the considerations it identifies are a useful guide to public authorities when navigating the concept of a "vexatious" request. However, it must not lead to an overly-structured approach; it is important that every case be viewed on its own facts.

The Parties' Positions

33. The Commissioner says that the request is vexatious. He recognises that it is the request, and not the requester, that must be vexatious for the exemption in section 14(1) to be engaged. He also notes that on the face of it, the request in issue seems to demonstrate a shift away from the underlying complaint, towards a specific policy. Nevertheless, he considers that the request forms part of the Appellant's general grievance against the Trust.
34. In particular the Commissioner says that:
- The request was obsessive. The death of a close family member will always be traumatic and will often lead to questions about the quality of health care offered to the individual. It is not unreasonable that a member of the family should want to know more about the surrounding circumstances, and where applicable, to hold an authority to account. However, there must be a limit to such enquiries. Since July 2006, the Trust had fielded 56 separate requests from the Appellant;
 - The underlying complaint had been considered by the Trust and by the HC. The Appellant had, in effect, used FOIA to force the Trust to revisit an issue which had already been considered. Since the Appellant had been informed that he had the opportunity to pursue the underlying complaint further through the Parliamentary Health Service Ombudsman (the "Ombudsman"), his reason for pursuing the request was, at least in part, to continue his campaign against the Trust;
 - From the provocative nature of some of the Appellant's comments aimed at staff within the Trust, it was reasonable to conclude that the effect of the request would have been to harass the Trust and its staff;

- The Trust had conceded that complying with the request would not be resource-intensive. However, it was reasonable for the Trust to consider that compliance would simply trigger further correspondence and further requests, therefore imposing a significant burden; and
 - The effect of much of the Appellant's contact with the Trust, particularly the revisiting of issues examined by the HC, was to cause disruption and annoyance, even though this may not have been intended. In relation to this particular request, the Appellant had sought to foster the perception that the Trust had purposefully obstructed or impeded his enquiries.
35. The Trust asks the Tribunal to uphold the Commissioner's Decision Notice and it adopts the Commissioner's reasons. It says that there is ample evidence to justify the Commissioner's findings that the request formed part of the Appellant's general grievance against the Trust, that it was obsessive, that its effect was to harass the Trust or its staff, and that compliance with the request was likely to impose a significant burden on the Trust.
36. In addition, the Trust says that:
- The Appellant's Grounds of Appeal which repeatedly refer back to the underlying complaint provide clear evidence of the Appellant's determination to re-open issues that have already been debated and considered;
 - In determining whether the request in question is vexatious, it is the nature and frequency of the requests previously made to Trust that is relevant;
 - The Appellant's prime motivation behind his various requests for information is to further the underlying complaint. That complaint has been scrutinised by the HC, which in turn has obtained independent clinical advice. In addition, the Trust has responded to the complaint and the HC's observations in detail on a number of occasions. The Appellant does not appear to accept that the steps taken by the Trust are adequate and it appears that it is this belief that lies behind his FOIA requests;
 - The Appellant has demonstrated a prolonged history of tendentious requests, and his actions in seeking to pursue the underlying complaint beyond the independent investigation carried by the HC, can properly be described as obsessive;
 - If viewed in isolation, compliance with the request in issue would not be resource-intensive. However, when viewed in the context of his previous requests, it is highly likely that any response would result in further detailed requests and correspondence;
 - The Trust has experienced a significant burden on its resources in responding to the Appellant's requests;
 - It appears unlikely that the Appellant will ever be satisfied that his concerns about the underlying complaint have been addressed adequately and unlikely, therefore, that the Appellant will cease his requests to the Trust. Continued correspondence on an issue that objectively can be regarded as having been completed, will have the effect of harassing the authority; and

- The confrontational approach adopted by the Appellant in correspondence is likely to cause, and has caused, significant distress to members of the Trust's staff who, by the nature of their employment, have no choice but to deal with the Appellant's correspondence.
37. The Appellant gives a number of reasons for why his request is not vexatious within the meaning of FOIA. Much of what the Appellant says in his evidence and submissions, however, relates to the underlying complaint, in particular, his concerns over the care received by his mother, and how the Trust has failed to take on board the HC's recommendations. The thrust of his position is that his requests for information are justified in view of the Trust's conduct.
38. In particular, the Appellant says that:
- The Trust has, from the outset, obfuscated, obstructed and sought to deceive him about the circumstances of his mother's death and the actions it had taken. His requests for information have been intended to obtain a better understanding of the treatment provided to his mother and the actions the Trust claims to have taken. He is entitled to request and receive a proper explanation based upon the facts;
 - It is not obsessive to require the Trust to implement the HC's recommendations;
 - In invoking the Policy and in treating his request as vexatious, the Trust has further sought to obstruct his requests;
 - He suspects that the Trust introduced the Policy in June 2006 as a means of dealing with his complaint;
 - The request for the Policy is a specific, stand alone and straight forward request and would not impose a significant burden on the Trust;
 - The request was not designed to caused disruption or annoyance; it was a request for information;
 - Compliance with the request would not have resulted in further requests. Had the Policy been provided, it is difficult to understand what further information in relation to the Policy there would have been to request;
 - He has not "often made requests arising out of the Trust's response to a previous request" as stated in Ms. Butcher's Witness Statement. Ms Butcher has exaggerated the time spent in dealing with the Appellant's requests; where information was not readily available, the Trust has simply refused his requests;
 - Many of the requests identified on the Trust's spreadsheet were not in fact separate requests;
 - His requests were not harassing of the Trust's staff. Also, correspondence relating to the complaint was sent to the Trust's CEO and should not have involved the Trust's staff; and
 - His requests did not contain personal attacks on the Trust's staff. He may have used strong language borne out of frustration with the

constant obstruction and provocation by the Trust, but the language was not offensive.

Was the Request Vexatious?

39. We come now to our findings. Having given careful consideration to the history of prior dealings between the Appellant and the Trust, the submissions made by the parties, and to the considerations set out in paragraphs 24 to 29 above, in our view, the request in issue was vexatious.
40. It is important of course that all requests from an applicant should not be refused as being vexatious just because some may have been. On the face of it, the request in issue seems to be a specific, stand alone and straight forward request. However, it is entirely appropriate and indeed necessary, when considering whether a request is vexatious, to view that request in context. From the Appellant's previous communications with the Trust, it is clear that the request in issue formed part of the Appellant's wider grievance against the Trust, and was inextricably linked to the Appellant's quest to hold the Trust to account for the shortcomings in the care it had provided to his mother.
41. We accept that this request and the Appellant's previous requests, arose from serious concerns he had about how his mother was treated by the Trust, and that rightly or wrongly, he was dissatisfied with the answers and explanations given to him by the Trust. However, the Trust's shortcomings had already been investigated by the HC, and the requests for information appear to have become a vehicle for the Appellant to try to reopen those issues. Although we recognise that the Appellant was not satisfied with the responses he had received from the Trust, FOIA is not a panacea for problems that have not been resolved through other channels. In our view, the on-going requests (which included the request in issue in this Appeal), after the underlying complaint had been investigated, went beyond the reasonable pursuit of information, and indeed beyond persistence. They indicate an obsessive approach to the Appellant's grievances about the underlying complaint.
42. We agree with the Commissioner and the Trust that responding to the request would likely have triggered further requests. Even a cursory consideration of the correspondence between the parties shows that this has been one of the characteristics of the Appellant's requests. We recognise that the Appellant considers that further requests were necessary because the Trust did not properly respond to his requests. That may have been the case on some occasions, but the more typical pattern has been for the Appellant to seek to engage in substantive debate with the Trust about his mother's treatment and other related matters, by combining his challenge of the Trust's explanations, with further requests for information. The correspondence beginning at pages 231 of the bundle are particularly illustrative of this.
43. The Appellant says that he does not see what further requests there could be if he is provided with the Policy. However, the request in issue was not for the Policy alone. The request was for "*a copy of the trust's files (including all documentation and correspondence detailing the requirement and purpose of*" and "*relating to the introduction and amendment of*" the Policy. It is also

clear from what the Appellant has said that he wanted to know how and why the Policy came into existence because he suspects that it was introduced to thwart his requests and that it has only ever been used in relation to him. It seems more than likely, therefore, that responding to the request would have prompted further requests and would not have brought the correspondence to an end.

44. The Commissioner says that since July 2006, the Trust had fielded 56 separate requests from the Appellant on 16 different dates. The Trust's evidence, as set out in the Witness Statement of Patricia Butcher, is that dealing with these requests has consumed a considerable amount of her time and that of her colleagues. The Trust has provided a spreadsheet to which Ms. Butcher refers, setting out the number and frequency of the Appellant's requests. The Appellant disputes that these were all separate requests. However, the question of whether the request was vexatious does not turn on the precise number of requests made. Although it is clear that the Appellant made a considerable number of requests, if that alone was in issue, the Trust may have been able to rely on section 12, though not necessarily on section 14. It is the number of requests, combined with the nature of the requests, that brings section 14(1) into play.
45. We also find that whatever the Appellant's intentions may have been, the effect of his requests has been to vex, that is to say, to cause distress or irritation. The Appellant has repeatedly ascribed a lack of integrity and ill-intent to the Trusts' staff. He has accused them of lying to him and he has used language which it is reasonable to expect would have caused offence and distress to the recipients. In his letter of 10 July 2006, for example, he alleges: *"You have lied and deceived throughout"*. In an email on 20 August 2007, he claims that the Trust *"has lied and tried to deceive me throughout and you have a considerable amount of information that substantiates this"*.

The Appellant's letter of 5 January 2009 (although post-dating the request in issue), is another example of the tone and language of much of his correspondence. In it, the Appellant sets out what he says were the Trust's failures. He then says that the Trust *"did nothing but seek [to] cover its tracks"*. It *"deceived me as my mother was dying and then deceived the Coroner's Office as it issued a false and deceitful death certificate"*. He adds *"even worse was to follow. The trust lied about carrying out "robust" and "in-depth" investigations"*. It *"has wilfully and deliberately lied and sought to mislead throughout in order to cover its tracks"*. Later in the same letter he says: *"You appear to have an exaggerated view of your own self-importance. For me you are not. Your department is a means of providing information – nothing more and nothing less. Unfortunately you are also an instrument for obstruction"*.

We accept that the way in which the Appellant expressed himself was borne out of frustration and anger as to what he sees as the Trust's culpability for his mother's death. We also accept that his intentions may not have been to vex, but we have no reason to doubt Ms. Butcher's evidence when she says that that was the effect. In particular, we accept her evidence at paragraph 8 of her Witness Statement, that:

“Viewed in isolation the tone of Mr. Rigby’s correspondence might appear impolite or rude but not especially significant. However, for both me and my staff within the department, the negative tone of his letters, frequently questioning our competence and sometime accusing us of deliberate wrong doing has caused considerable distress and has reduced staff within the department to tears.”

46. No single one of the above factors would lead to a finding, by itself, that the request was vexatious. However, based on the strength of the various factors, taken together with the history and context of the request, we are satisfied that it was. We therefore uphold the Commissioner’s Decision Notice. We would also say that we are entirely satisfied that both the Trust and Commissioner took into account relevant and proper factors in reaching their findings, and that they have both given careful and thorough reasons for those findings.
47. We make no findings on the underlying complaint. We accept from the Appellant’s Witness Statement that the matter has been very distressing for him, but as already noted, such matters are entirely outside this Tribunal’s jurisdiction. We also make no finding as to the Trust’s reasons for introducing the Policy. That, too, is not a matter for us. The only issue before us is whether the Trust was entitled to refuse the Appellant’s request under section 14(1) of FOIA, and for the reasons set out above, we find that it was.

Decision

48. For all the reasons set out above, we uphold the Commissioner’s Decision Notice and dismiss this appeal. This decision is unanimous.
49. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First-tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal’s website.

Signed

Date: 10 June 2010

**Anisa Dhanji
Judge**