



**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER  
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2012/0134

**B E T W E E N:**

**MR GORDON BELL**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Tribunal**

**Judge Kennedy QC**

**Henry Fitzhugh**

**Roger Creedon**

**Hearing: 14<sup>th</sup> January 2013.**

**Location: Field House, London.**

**Decision: Appeal allowed.**

**Subject matter:** Possible Exemption under S 14 (1) of the Freedom of Information Act 2000 and the issue as to whether the request is vexatious.

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## DECISION OF THE TRIBUNAL

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1. The Tribunal at a paper hearing on the 14<sup>th</sup> January 2013 deliberated on the issues herein and allow the Appeal.

### **Reasons:**

2. We set out below the Respondents helpful analysis of the introduction and background as presented to the Tribunal.

### **Introduction:**

3. The Appellant appeals against a Decision Notice dated 28 May 2012 (ref FS50436416) in which the Commissioner found that the Ministry of Defence (“MOD”) had complied with the Freedom of Information Act 2000 (“FOIA”) by correctly refusing the Appellant’s information requests as vexatious under s 14 of FOIA.
4. The Commissioner applies for the appeal to be struck out under rule 8(3) (c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
5. In the alternative, the Commissioner resists the appeal for the reasons set out in the Decision Notice and further below.

### **Relevant Statutory Framework:**

6. Section 14(1) FOIA states that -

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

7. The duty to comply with section 1(1) FOIA does not therefore arise where the request for information is vexatious.
8. Section 17(5) and (6) state:

*“(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.”*

**Background:**

9. In the 1950's and early 1960, there was a MOD Service Volunteer Programme at Porton Down ('Porton Down Volunteer'). The programme was involved with work to develop the means of prophylaxis, therapy, rapid detection and identification, decontamination and more effective protection of the body against nerve agents, capable of exerting effects through the skin, the eyes and respiratory tract. It also was involved in the development of CS gas, for riot control. This appeal is only concerned with Porton Down during this time period.
10. There has been litigation by way of a Group Action by a number of ex Porton Down Volunteers, who have sought compensation for ill-health which has been linked to their time at Porton Down. There was mediation between the MOD and the solicitors acting on behalf of the Porton Down Volunteers, which resulted in a global settlement of £3million (the Global Settlement) to a group of 360 veterans. An apology was also made by way of a written statement in the House on 31 January 2008.

11. The Appellant was a Porton Down Volunteer during his National Service with the RAF in the early 1960's. The Appellant now suffers ill-health and believes the cause of his ill-health is linked to his time at Porton Down. The Appellant was not part of the Global Settlement. The MOD has offered him the same amount of compensation that the other veterans would individually receive under the Global Settlement. The Appellant rejected that offer.
12. The MOD has indicated that it was prepared to consider any meritorious claims that were made on or before 30 June 2008. After that date the MOD has indicated it will plead a defence based on the Limitation Act 1980. The Appellant has not initiated any legal proceedings with regard to his claim for compensation. He has contacted 25 law firms in the UK, each of which has rejected taking on his claim for compensation.
13. The Appellant has been involved in obtaining information about Porton Down Volunteers for a number of years. This has involved requests for information under the Freedom of Information Act 2000, correspondence via his MP and Ministers, and was a prime mover in the a 6-year investigation into the Porton Down Volunteers commenced by the Wiltshire Police in 1999 (Operation Antlers). The allegations were that MOD and one doctor in particular had conducted "Josef Mengele type of human experiments". Having treated the claims seriously, no evidence was found to substantiate the claims.
14. Following the introduction of FOIA, the Appellant has made 53 requests for information, all relating to Porton Down in addition to Subject Access Requests and other communications on the subject. The MOD have responded to these requests for information under the provisions of FOIA. Most requests have received response, some have not been answered due to the cost limit of section 12 FOIA, and the request of 28 March 2011 was held to be vexatious under section 14 FOIA. The MOD further informed the Appellant that any further requests on the same subject would not be responded to by virtue of section 17(6) FOIA.

15. The position at the time of the Appellant's request is that the Appellant considers that he needs further information from the MOD relating to the amount of legal costs paid by the MOD to the lawyers acting in the Group Action and other payments of legal costs since the Global Settlement.

**The Appellants' Request:**

16. The request that is the subject of this appeal was made by the Appellant by email of 19 January 2012:

*"1. On what date was the payment/s made to Leigh Day?*

*2. Who sanctioned the payment, and by what method was the money transferred to Leigh Day?*

*3. Has there ever been any payment/s of this kind to any other law firm since this time?*

17. The MOD did not respond to the request for information.

18. The Appellant contacted the Commissioner on 2 February 2012 about the MOD failure to respond to the request.

19. The Commissioner contacted the MOD on 9 March 2012 and notified it of the received complaint about the failure to respond and provided a copy of the request. The MOD was invited to send a response to the Appellant.

20. The Appellant contacted the Commissioner again on 19 March 2012 indicating he had still not received a response from the MOD.

21. Following a further letter to the MOD on 2 April 2012, the MOD responded to the Commissioner indicating the Appellant's request for information had been refused on the basis of section 14 – vexatious request, in relation to Porton Down litigation. The MOD had written to him on 29 March 2011, following an earlier

requested of 28 March 2011 on the same subject. In the 29 March 2001 letter the MOD stated:

*“Your most recent request is the latest in a series of overlapping requests and other correspondence you have sent to MOD over many years about Porton Down Volunteers. Our records demonstrate that the Department has expended substantial resources to be as helpful as possible during this time to provide you with the information it holds in accordance with its obligations under the Act. Given this history, we believe that it is reasonable to assume that MOD now holds very little, if any, additional information about Porton Down Volunteers to which you would be entitled under the Act which is not already in your possession and that any future requests from you on this subject are likely to serve no useful purpose.*

*Moreover, it has been determined that the position has now been reached where the continuing high frequency of your requests on this subject are placing an increasing burden on the Department. Not only do your requests disrupt the activities of staff engaged on key tasks, but MOD believes that they are also designed to cause significant annoyance because of your tendency routinely to interweave your requests with disparaging remarks about staff. For example, your email of 28 March [2011] accuses Mr Eastwell of being involved in corrupt practices....Having taken account of the above factors, MOD has decided to treat your current request for information about the costs of searching for information about Thompson Snell and Passmore clients and any future requests received from you for information on the related subject of Porton Down Volunteers, as vexatious under section 14(1) of the Act. This means that any future requests for information from you on this subject addressed to any part of the Department, including DSTL, will not receive any acknowledgment and will go unanswered.”*  
(our emphasis!)

The letter provided details of requesting an internal review and the right to make a complaint to the Commissioner.

**The Commissioners' Decision:**

22. The Commissioner decided that the MOD had correctly treated the Appellant's request as vexatious under s 14 of FOIA and that it did not require a response by virtue of section 17(6) FOIA.

23. The Commissioner referred to his published guidance on s 14 of FOIA which sets out five criteria to consider when deciding whether a request is vexatious:

- (i) Whether compliance would create a significant burden in terms of expense and distraction;
- (ii) Whether the request is designed to cause disruption or annoyance;
- (iii) Whether the request has the effect of harassing the public authority or its staff;
- (iv) Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable;
- (v) Whether the request has any serious purpose or value.

24. The Commissioner considered that criteria (iii) (iv) and (v) were met in this case, criteria (i) had some weight but accepted that criteria (ii) was not met. In summary:

- The Appellant requested information on a very narrow issue, the Porton Down Volunteers, which placed an unreasonable burden on a small number of officials and diverted them from dealing with other areas of access to information or other core MOD functions. The overall effect of the requests put a strain on resources and therefore this factor carried some weight. (DN, §§13-14);
- The Appellant's requests and communications had gradually become more abusive and defamatory, and in one instance racially offensive. Staff felt harassed as they were personally abused by the Appellant in correspondence and over the telephone. The Appellant also attempted to

contact members of staff via their personal Facebook pages. The behaviour is accepted to have caused MOD staff to feel harassed. (DN, §§10-12);

- The request is the latest in a series of 53 information requests, most of which contained a number of requests for information. In addition, the Appellant had other voluminous correspondence with the MOD over the Porton Down Volunteers. The attempt to contact known MOD staff via Facebook also demonstrated the Appellant had crossed the line of reasonable behaviour and it is a clear example of the obsessive nature of the correspondence. (DN, §§8-9).
- The Appellant had been provided with all the information relating to his time as a Porton Down Volunteer and, has likely been in possession of this information prior to the introduction of FOIA in 2005. The time limit for accepting claims relating to Porton Down Volunteers has passed, the MOD has settled all the claims received in this respect. The Appellant has refused the offer made on similar amounts as the Global Settlement and, has not initiated any legal proceedings against the MOD. Due to these factors, the continued correspondence on this subject increasingly lacked any kind of serious value. (DN §§18-19)

25. Overall, the Commissioner therefore considered that the MOD had properly treated the 19 January 2012 request as being vexatious under s 14 of FOIA and that the MOD was not required to respond to the request.

**The Appellants' Grounds of Appeal:**

26. The Appellant's Grounds of Appeal are made up of five typed pages, along with other correspondence to the Tribunal office.

27. The Grounds contain a large amount of background information relating to the Appellant's concerns about Porton Down Volunteers, criticisms of the Group



Action, Global Settlement and the lawyers acting on their behalf. Further, the Grounds reference several previous requests for information to the MOD, with which the Appellant is not content with the responses, but which do not fall to be considered in this DN.

28. To the extent that the Grounds simply make textual criticisms of the content of the Decision Notice or general comments concerning the MOD or the Commissioner, and do not identify any alleged legal error, these are not proper grounds of appeal under s 58 of FOIA: see *Billings v IC* (EA/2007/0076) at §§5-11.

29. As to the points that the Appellant makes about the substance of the Commissioner's decision in relation to the application of s 14 of FOIA:

- The Appellant purports to challenge the DN as the Information Commissioner (Christopher Graham) did not have any input or personal approval, or indeed signed the DN. There is no requirement in law for such input, personal approval or signature (see section 6(7), Schedule 5, Part I, paragraphs 4(1) and 5(2) Data Protection Act 1998). If this is considered to be a ground of appeal, it is submitted that it should fail.
- The Appellant maintains that no request for information was made on 28 March 2011 and that he did not receive any notice that further requests on the same subject would not be responded to due to the vexatious nature of the requests. The Commissioner has been provided with a copy of both the request and the response which are contained in a bundle of documents for this appeal.
- The Grounds of Appeal contain no specific reasons that the factors referred to in the DN are not founded or are incorrect in law. The language used by the Appellant in his Grounds of Appeal support the submissions made by the MOD concerning the use of abusive language that has developed over the years and as was found by the Commissioner. (DN§10-13) For example, on page1, paragraph 2 (Scope

of the Case) ...”appears to have been concocted by the MoD themselves who are known to be an unscrupulous if not criminal group...”. Page 1, third paragraph, “Such nonsense of course can only come from criminally prone morons”. Page 1, fourth paragraph, “The very same morons in the “decision notice” instead of providing simple answers to simple question have decided to vilify me with offensive remarks.....Such drivel of course amounts to character assassination coming from thieves and low life criminals.”

30. For the above reasons, the Commissioner submits that he reached the correct conclusions in his Decision Notice and that the Appellant's appeal should be struck out, or in the alternative, dismissed.
31. This Tribunal looked first at the Request for the disputed information as set out above at Paragraph 16 and note they are three short and quite precise questions that should be easily answered without inordinate or even much effort on the part of the public authority, in this case the MOD. Neither the Public Authority nor the Respondent have made the case that it would cause much difficulty, time, resources, hardship or expense to provide the requested information in this instance.
32. This Tribunal also note the letter from the Public Authority to the Appellant dated the 29<sup>th</sup> March 2011, in relation to all future requests for information by him, where the MOD write inter-alia; in the 2<sup>nd</sup> Paragraph at Page 18 - “ –will not receive any acknowledgment and will go unanswered.”. This stance has been justified by the Public Authority on the grounds that they have been harassed by the Appellant and that his requests are vexatious. This Tribunal are of the view that each request should be considered on its merits and such a blanket ban should be used only once a vexatious request has been established par adventure.
33. As can be seen above the Respondent has adopted and approved the refusal to provide the requested information by the Public Authority and upheld the refusal of the request on the grounds that it is vexatious. This Tribunal reminds itself of

the purpose of FOIA. To quote Judge Wikeley in a recent decision of the Upper Tribunal (Case NO: GIA/3037/2011) at Paragraph 25 therein: *“It is to be remembered that one of the main purposes of FOIA is to provide citizens with a (qualified) right to access to official information and thus a means of holding public authorities to account. It may be annoying and irritating (as well as dissatisfying and disappointing) for politicians and public officials to have to fact FOIA requests designed to expose actual wrongdoing. However, that cannot mean that such requests, properly considered in the light of all the circumstances and the legislative intention, are necessarily to be regarded as vexatious.”*

34. In that regard this Tribunal look at the useful criteria set out by Judge Wikeley at paragraph 28 of that Judgment and consider each of the three helpful considerations suggested by him (paragraphs 67 to 74) to assist in our deliberations of the merits of this individual case when applied to the Decision herein under appeal.
35. There will always be a burden on a public authority in responding to FOIA requests. The Burden on the Public Authority in this case is outlined at paragraphs 14 above, with a little more detail in paragraph 21 above. However there is no helpful evidential analysis of time or cost involved that allows us to assess the true extent of the suggested extreme burden in this case. It is noted at Paragraph 14 that requests from this appellant that were costly were refused under Section 12 FOIA. This confirms that this is not one of those cases which would be too costly to provide. An assertion of routine disparaging remarks about staff is supported by one example in a reference to “corrupt practices”. There is a suggestion of more abuse by the Appellant in his reference to staff at paragraph 21 above but unfortunately these are not supported by the degree of detail that allows this Tribunal to give much weight to them.
36. The Motive, value and purpose of the request under FOIA is generally speaking motive blind. However Section 14 is not an exemption. It is concerned with the nature of the request. Its purpose is to protect the public authority from squandering its resources on a disproportionate use of FOIA. This Tribunal is of the Opinion that the Motive of the Appellant is genuine and of a serious and

significant nature. He may have made many requests for information and indeed for assistance relating to his time as a Porton Down Volunteer but he has not had satisfaction and on any view this is unsatisfactory in the extreme. This Tribunal find that the motive, value and purpose of this request to this Public Authority have significant value and purpose in his quest for an understanding of a matter pertinent to him as a Porton Down volunteer. That is not to say that there is not a limit to the requests that can be made and it may well be that the Appellant is verging on the vexatious in making ongoing requests. However we are satisfied that the request in this instance has significant value and purpose to an extent that warrants the release of the disputed information

37. In relation to the request causing harassment or distress, this Tribunal accept that there may have been an element of harassment or distress but there is insufficient evidence in the papers before this Tribunal to persuade us that much weight can be given to this ground or of the factors taken into consideration by the respondent in the making of the impugned decision. Critical and even unpleasant or derogatory as the Appellant may have been we are not convinced that his conduct amounts to harassment or caused distress to any individual to an extent that warrants a finding that the request is vexatious in all the circumstances of this case.

38. Having considered the papers in the case before us carefully we do not accept that the request, in the circumstances and for the reasons given above, is obsessive or manifestly unreasonable

39. The appellant has suggested that the Appeal should be allowed because the Decision Notice was not signed by the Respondent personally. We reject this ground of appeal on the basis that it is not necessary, either in Law or in fact, that the Commissioner sign the Decision Notice personally in order to adopt and maintain its validity.

40. The appellant is probably verging on making a vexatious request and would do well to seek advice on his quest for Justice. The Bar Council, the Law Society

may be in a position to direct the appellant to a more productive means of finding access to Justice.

41. For the reasons given above this Tribunal allows this appeal and direct the Public Authority to provide the appellant with the requested information.

[Signed on the original]

**Brian Kennedy QC**

26<sup>th</sup> February 2013.

*Corrections made to paragraphs 31 and 35 on 8 March 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009*



**IN THE MATTER OF A POSSIBLE APPEAL TO THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER) FROM A DECISION OF  
THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)**

First-Tier Tribunal decision  
no: EA/2012/0134

**B E T W E E N :-**

**THE INFORMATION COMMISSIONER**

**Appellant**

**-and-**

**MR GORDON BELL**

**Respondent**

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**APPLICATION FOR LEAVE TO APPEAL**

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**APPLICATION FOR PERMISSION TO APPEAL TO UPPER TRIBUNAL**

1. The Tribunal refers to this application for permission to appeal the decision of the Tribunal and the grounds as set out therewith.
2. In essence the appeal is that the Tribunal were wrong in their assessment of the weight given to the evidence and in the exercise of their discretion as set out in their unanimous Judgment.
3. The Tribunal refuses leave to appeal.

**REASONS:**

4. The application seeks to reargue issues of fact and Judgment. These were for the Tribunal to decide and their conclusions have been explained to the standard required by law. An appeal to the Upper Tribunal can be made only on a point of Law. Permission is therefore refused.
  
5. The Tribunal will consider any request to issue such other notice required by the parties, such as to “respond to the request” or specify the time frame for compliance with the steps directed to be taken.

[Signed on original]

**Brian Kennedy QC**

Judge

27 March 2013