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

Appeal No: EA/2013/0054

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50449944
Dated: 26 February 2013**

Appellant: Dr Yeong-Ah Soh

Respondent: The Information Commissioner

2nd Respondent: Imperial College

Heard at: Field House, London

Date of Hearing: 15 July, Deliberations 30 August

Before

Chris Hughes

Judge

and

Anne Chafer and Richard Fox *(deceased)

Tribunal Members

Date of Decision: 10 October 2013

*The late Mr Richard Fox participated in the hearing and deliberation and approved the first draft of the conclusions of this hearing. He died suddenly and with the consent of the parties the two other members of the Tribunal have concluded the work of the Tribunal. We would wish to pay tribute to Richard for his contributions to this and many other decisions over the years.

Attendances:

For the Appellant: in person assisted by Professor Gabriel Aeppli FRS

For the Respondent: no attendance

For the 2nd Respondent: Amy Rogers (Counsel) Helen Mulligan (Solicitor)

Subject matter:

Freedom of Information Act 2000

Cases:

IC and Devon CC v Dransfield [2012] UKUT 440 (AAC), [2013] 1Info LR 360.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 February 2013 and dismisses the appeal.

Dated this 10th day of October 2013

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Dr Soh was appointed to the academic staff of Imperial College in 2007 and took up her responsibilities in 2009. She was subject to a period of probation which was extended due to concern about the quality of her teaching. She had a mentor appointed to guide her, Professor Alford and in 2010 he became Head of Department. Another senior academic took over this role, in discharging this role he provided some support and was concerned as to her teaching skills.
2. In early 2011 she issued grievance proceedings against both her first and second mentors. Neither was upheld. In May 2011 she raised a concern about her second mentor which may be summarised as saying that he spoon fed his students as to what is going to be in exams. She also made other statements about him.
3. Imperial College conducted an investigation, the matter was considered under its procedures with the consideration of the issue by academic staff. This concluded that the matters raised against her mentor were not substantiated.
4. In the light of this Imperial College then conducted a similar investigation concerning Dr Soh and the allegations she had made against her mentor.
5. As a result of this investigation disciplinary proceedings against Dr Soh were instituted. Following the disciplinary hearing the College concluded that Dr Soh should be dismissed with immediate effect. She was notified of dismissal on 12 January 2012.

Requests for information

6. From 20 January onwards Dr Soh made a series of requests for information. These requests were for information to enable her to contest the decision to dismiss her. She made a subject access request under the Data Protection Act on 20 January and she made the first FOIA request on 23 January. In subsequent days there were significant and intense communication between her and the College; a further request for information was made under FOIA on 31 January 2012 which

specifically identified her second mentor's teaching as being the primary focus of her requests.

7. The request of 23 January was:-

"I would like a copy of all the 1st year Progress Tests, and exams and materials for specified courses offered at [a specified Department], during the period 2002-2012, with individual instructors responsible for the different parts of the exams and tutorials mentioned on the documents"

8. The 31 January communication:-

"I would like in addition the lecture notes and revision lectures by [the second mentor] for [specified] courses offered during the period 2009-2012

In addition, I would like a table of the SOLE [student online evaluation scores] of all the instructors at the [specific] department from 2002-2012. If the identity of the individuals need to be protected, then you can refer a particular individual with a symbol, but keep the same symbol for the same individual for the SOLE score information over all the years requested "

9. There was further correspondence and some material was supplied to Doctor Soh and on 28 February 2012 the College confirmed that it would not comply with the requests made on 31 January relying on section 43(2) and section 40(2) of FOIA.
10. Dr Soh's internal appeal against dismissal was unsuccessful and she applied to the Employment Tribunal. Proceedings before the tribunal are scheduled to be resolved by a 15 day hearing in autumn.

The Complaint to the Commissioner and his Decision Notice

11. She complained to the Information Commissioner concerning the decision of the College not to provide information. She indicated that the scope of her request was now limited to requests 1 and 2 and the form of request 1 was agreed to be (DN paragraph 8):-

"Copies of all first year progress tests during the period 2002-2012, with the individual instructors responsible for the different parts of the progress tests mentioned on the documents.

Copies of the tutorials (rather than all material) for the specified courses offered by[her second mentor] (not all instructors) during the period 2009-2012 (not 2002-2012).”

12. The Commissioner considered the case in the light of the recent decision in *Dransfield* which noted that the term "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure". He considered the request in the light of the four issues or themes identified in the *Dransfield* decision recognising that it was important to view a request broadly and citing paragraph 45 of the Upper Tribunal decision:-

“... importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests”

And paragraph 29:-

“the present or future burden on the public authority may be inextricably linked with the previous course of dealings. Thus the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly characterised as vexatious. In particular, the number, breadth, pattern and duration of the previous requests may be a telling factor”

13. In his assessment of the case he disregarded some of the College’s examples of correspondence which it indicated demonstrated vexatiousness as falling outside the statutory time limit for compliance with requests however he noted that:- *“the complainant had been in contact with the Imperial College on a number of different occasions over a reasonably short period of time”*. He considered that the requests had a serious purpose and appeared to be relevant to her appeal; he also considered that *“whilst the allegations at the centre of the dispute have been investigated by Imperial, he is not aware that they have been considered by an independent body to date.”* On balance the Commissioner concluded that the requests were likely to impose a significant burden because of the volume, quick

succession and fairly wide-ranging nature of the various enquiries and requests made.

14. The Commissioner considered whether the request would have the effect of harassing and causing significant distress to the second mentor. He expressed his settled view that FOIA “*should never be used as a mechanism by which to escalate openly a feud, or otherwise abuse, an official at a public authority. In such a scenario, it is only right that section 14 should be applied as a means of protecting the public authority and its staff. Similarly, section 14 can be found to apply where a request is likely to be upsetting to staff, regardless of whether this was the intended effect.*” He noted the concerns expressed by the second mentor at the prospect of the allegations made against him being repeated; this prospect causing him further stress and upset.
15. The Commissioner weighed the serious purpose of the complainant and the wider public benefit of having the course materials disclosed. He weighed these against the factors presented in favour of excluding disclosure and concluded that the material should not be disclosed (DN para 32,33):-

“The Commissioner understands that disputes will often have the unfortunate by-product of causing distress to the parties involved. This, in itself, though should not automatically restrict the rights of a party to seek more information about a dispute. However a key point in this case is the severity of the harassment felt by an employee and the acute nature of the distress that this has caused. Importantly, the Commissioner considers that it was not unreasonable for the members of staff to be affected in this way, bearing in mind the climate in which the requests were made.

This impact, when considered together with the wider burden that the requests would place on Imperial, has led the Commissioner to conclude that section 14(1) of FOIA is engaged.”

16. He concluded that the College was entitled to refuse disclosure relying on section 14 FOIA - that the requests were vexatious and did not further explore S43(2).

The Appeal to the Tribunal

17. In her appeal to this tribunal Dr Soh has contested this finding. She confirmed that the request for lecture notes was core to her Employment Tribunal proceedings for

unfair dismissal, race/sex discrimination and detriment for making a disclosure in the public interest. At the core of her case was the claim of misconduct against her second mentor in connection with the conduct of teaching and examinations ; this had arisen from what two students had told her:-

“The information I am requesting is necessary as part of the evidence which I plan to submit to the Employment Tribunal that I did not make a comment with no basis.”

18. She denied that the request imposed significant burdens on the College or was obsessive; she had made 2 subject access requests and 5 FOIA requests:-

“For a request to be obsessive, the requester should already possess the information that he is requesting, which is not the case here, or there should have already been findings of independent and external investigations, which does not apply here either, therefore my request is not obsessive.”

19. She asserted that the Imperial College investigation was procedurally flawed and that she had substantial evidence of the flaws. She denied that the request was a vendetta; rather it was in the interests of justice and the public interest. She asserted that disclosure of embarrassing or distressing information did not make a request vexatious.

20. The Commissioner in his response maintained the position in his decision notice at paragraphs 14-34. He confirmed that he had not found Dr Soh “obsessive”, he had felt that there was a serious purpose in her seeking material for her appeal and it was “not unreasonable” for her to do so, he had taken her ongoing Employment Tribunal into account. He clarified that he had not considered “embarrassment” as a valid ground for finding a request vexatious. He confirmed the importance of context and history in considering a request and therefore it was proper to consider the various requests made and the burden that was created:- *“This is as a result of the volume, quick succession and fairly wide ranging nature of the various enquiries and requests made by the complainant.”* He relied on the burden imposed by the request and the impact on the member of Imperial College staff most affected by the requests.

21. The College in its response to the appeal supported the Information Commissioner’s analysis and set out its arguments based on s43 (protection of

commercial interests). In the hearing however it did not maintain the position with respect to s43 and accordingly the sole issue which the Tribunal had to decide was whether the Commissioner had been correct to find that the requests fell within S14 (1) FOIA and therefore the College was not obliged to comply with them.

Evidence and submissions to the Tribunal

22. In her evidence before the Tribunal Dr Soh emphasised that her requests were not obsessive, had not contained abusive language, and had a serious purpose – proving her dismissal was wrong. She disputed the extent of the burden placed upon the College – she did not consider that the subject access requests should be included in the consideration since they were a separate statutory regime. She had need of the information to defend herself; she needed the revision lectures since they were “like a summary”. She had not made false accusations against her second mentor; she had:- *“made a comment, stated my concerns, as an educator I had that right”*. She provided reasons for her requests in terms of her dismissal. She felt that her requests had received disingenuous replies. With respect to the issue with her second mentor she stated *“what gets high student evaluation is easy marking”*. She further commented *“They did not tell me I could face disciplinary action”*. She emphasised that she was not harassing her second mentor and the issue was only embarrassment. She accused the College of fabricating evidence and calling her a bad person. She stated that her second mentor had fabricated events, that he lacked integrity.
23. In evidence the College’s witnesses indicated that complying with the requests had placed a considerable burden on College staff and notably on the second mentor who had needed to review much of the material. In addition to this work the requests had caused considerable stress which had required him to seek medical advice. The continuing prospect of the revival of allegations against him which had been properly addressed was an ongoing cause of concern to him.
24. In her detailed written submissions she confirmed that there is a 15 day ET hearing in November and that she has sought to obtain an order for the disclosure of these documents but the ET judge has indicated that this disclosure was a matter to be pursued through FOIA and DPA. She affirmed that the motive was to

restore her reputation and address the adverse health impacts upon her, the value and serious purpose was to provide evidence for arguments she wished to advance in the ET, she re-stated her position with respect to the number and frequency of interactions and she pointed out that providing the material would not have imposed a significant additional burden on the College. She repeated that any distress caused would be by the “possible disclosure of actual wrongdoing”.

Consideration

25. In considering this matter the Tribunal has treated the question of whether a request is vexatious in the light of the guidance provided by the Upper Tribunal in the case of Dransfield.
26. The matters under consideration go back to January 2012. At that stage she had made one previous FOI request and a subject access request under the Data Protection Act. There was correspondence extending the subject access request, seeking anonymity in her FOI request, seeking further material under FOIA and other matters. The decision was made by the College on 28 February not to grant the requests relying on S40 (personal information) and S43 (commercial interests). In the event, as a result of Doctor Soh’s subject access requests in excess of 8000 pages of material were finally provided to her, as a result of FOIA requests in excess of 700 pages. The amounts of work which the College would need to do in order to comply with these requests would have been well appreciated at the end of February and clearly represented a significant burden on the College. The focus of her requests on a particular individual, together with the allegations which she had made against him, caused considerable distress to him.
27. Dr Soh’s purpose and motive in seeking this information was to dispute the dismissal by the College. That dispute is currently before in the Employment Tribunal, but was at the time the requests were made in the internal appeal process of the College. This is clearly a serious purpose and she has in the dispute raised a number of issues some of which have a public interest element within them; although she has very largely couched her arguments in terms of the benefit to her in the Employment Tribunal. It is clear that the benefit which she hopes to flow from these requests is almost entirely a private and not a public benefit.

28. The College has disputed the disclosure on the grounds that, taking a broad view of the requests in their context, they were vexatious. There is force in that contention; given the undoubted burden and the impact on her second mentor. Looking at the possible use of the material before the Employment Tribunal; which is the clear focus of Dr Soh's approach, it is for the Employment Tribunal to regulate the proceedings before it. It has extensive case management powers and could direct the disclosure by Imperial College of information which the Tribunal considers necessary for it to come to a proportionate and fair resolution of those questions before it. Furthermore Dr Soh in her evidence made very clear that she wishes to use this material in furtherance of her attack on the professional integrity of her second mentor. It may be noted that the investigation set up by the College with expertise in academic matters has looked at this and concluded that there is no substance in the allegations (while the Commissioner has stated that the investigation is not independent of the College, it should be borne in mind that the decision was made by academics charged with independently looking into issues which had arisen between academics; it cannot therefore be simply stigmatised as the College management against one individual academic). Should the Employment Tribunal conclude that it needs this material to resolve the issues which are before it in the employment dispute raised by Dr Soh then it has the power to make an appropriate direction. It would be inappropriate for this Tribunal to justify disclosure in the public interest of material for the purposes of litigation before another Tribunal when that Tribunal (which is far better placed to understand the issues it needs to resolve) is in a position to make such an order.
29. The final substantive area for consideration is the impact that the request may have on members of staff of the College. As the Upper Tribunal noted in *Dransfield* :- *"vexatiousness may be evidenced by excessive conduct that harasses or distress its staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive"*. From an early stage in the various internal college proceedings the second mentor was experiencing considerable distress as a result of what he viewed as the unfounded allegations against him. The evidence before the Tribunal was consistent with that and that he had sought medical advice as a result of this. The Tribunal has no doubt whatsoever that the request is part of a

continued attempt by Dr Soh to discredit him and she continues to pursue it as part of a strategy in her employment dispute.

Conclusion

30. The Tribunal is therefore satisfied that the Commissioner has properly characterised this request as vexatious. It has created significant burden on the College, it has caused, is causing and no doubt will continue to cause significant distress to her second mentor as part of Dr Soh's employment dispute with the College. While Dr Soh argues that her request is serious and has value, such value was and is in the context of her employment dispute with the College. This Tribunal is in no position to comment on the merits or otherwise of her claims which are now before the Employment Tribunal. Should the Employment Tribunal conclude that this material or some of it is needed in order to fairly resolve those claims then it is open to that Tribunal to make an appropriate direction.
31. This Tribunal is satisfied that at the time the requests were made they were vexatious in their context by reason of the burden on the College and the distress to the second mentor, she has repeated these extremely distressing and allegations in this Tribunal; the benefit which was sought from the disclosure was Dr Soh's private interest in her employment dispute; not the public interest. It was an inappropriate use of FOIA and therefore vexatious.
32. Our decision is unanimous.

Judge Chris Hughes

[Signed on original]

Date: 10th October 2013