'Winnowing out' the vexing nature of vexatiousness

Louise Jones, Barrister at Guildhall Chambers, looks at some recent cases that discuss the 'vexatiousness' exemption in FOIA, and considers whether they help public authorities to traverse the tricky issues that can arise in this area

Most public authorities will know what it is to face a request for information that might look and feel vexatious. However, given the constitutional importance of the right to information, the exemption in section 14(1) of the Freedom of Information Act ('FOIA') must be applied with some caution. The same caution should be applied when relying on Regulation 12(4)(b) of the Environmental Information Regulations ('EIRs'), which permits authorities to refuse to disclose information to the extent that the request for information is 'manifestly unreasonable'.

Three years ago, the Court of Appeal gave important guidance on how to approach section 14 FOIA (and the sister provision in Regulation 12 of the EIRs) in *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454. The Court of Appeal largely approved the guidance given by the Upper Tribunal in *Dransfield* [2012] UKUT 440 (AAC). The Court of Appeal declined then to provide any comprehensive or exhaustive definition of vexatiousness, with Arden LJ stating at paragraph 68 of the Court of Appeal decision that it was better to allow the meaning of the phrase to be 'winnowed out' in cases that arise.

Since *Dransfield*, two other Upper Tribunal decisions have been of considerable importance in clarifying the law on the section 14 exemption: *CP v Information Commissioner* [2016] UKUT 427 (AAC) and *Y v Information Commissioner* [2016] UKUT 475 (AAC). These cases have provided a clear legal framework for the operation of the section 14 FOIA and Regulation 12 of the EIRs exemptions. This article looks at the guidance that has emerged from these decisions, as well as that originating elsewhere.

Previous guidance on vexatiousness

It is worth remembering that an excellent starting point when deciding to use the vexatiousness exemptions is the ICO's guidance on 'Dealing with Vexatious Requests' ('the Guidance', copy at www.pdpjournals.com/docs/887955). That guidance draws a distinction between, on the one hand, requests that are so patently unreasonable or objectionable that they are obviously vexatious, and on the other hand, cases where the issue is not so clear-cut. In the latter scenario, the key question to ask, the Guidance states, is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

Guidance that has emerged from cases

In June 2018, the Upper Tribunal handed down judgment in *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 208 (AAC), emphasising the importance of a holistic assessment of all relevant circumstances in determining whether a request is vexatious. This case concerned a request by an academic (a professor in international history) for a number of files held by the Prime Minister's Office about relations between Libya and the UK, for files covering a period of 12 years (1990 to 2002).

The Cabinet Office concluded that the request was vexatious, applying section 14(1) FOIA. The Information Commissioner, whilst accepting that the motive for the request was very much in the public interest, found that the burden placed on the public authority by it was so great that it outweighed the value in compliance.

The Upper Tribunal (Judge Wikeley) provided an extremely useful summary of the law on vexatiousness as it stands, at paragraph 27:

"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. [….] 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.

"The burden which compliance with the request will impose on the resources of a public authority is a relevant consideration in such an assessment.

"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."

Here, the key issue was whether a compelling public interest in the disclosure of information held by a public authority necessarily trumps any consideration of the resource burden involved in complying with that request, such that the request cannot under any circumstance be regarded as vexatious. The short answer to this was that, as a matter of principle, it does not. In fact, in this particular case, the First-Tier Tribunal ('FTT') had allowed the requester's appeal against the ICO's decision, and the Upper Tribunal was satisfied that the FTT had been properly engaged in making a holistic assessment of all relevant considerations.

In *Oxford Phoenix Innovation Ltd v The Information Commissioner and the Medicines and Healthcare Products Regulatory Agency* [2018] UKUT 192 (AAC), the Upper Tribunal dealt with an appeal relating to section 14 FOIA. The requester in this case was the inventor of a sterile midstream urine sample collecting device, the 'Whizz Midstream'. He had been in protracted and often acrimonious discussions with the Medicines and Healthcare Products Regulatory Agency ('MHRA'), an executive agency of the Department of Health, over some years, arising inter alia out of issues around regulatory compliance and a competitor's product. He had received some disclosure through FOIA requests, but three further requests were then refused on the grounds of section 14. The Commissioner upheld the refusals, and the FTT agreed that the requests were vexatious.

> ***"Conduct that is much less obviously vexatious can still give rise to proper reliance on the section 14 exemption. The delicate balance between preserving the important right to information and protecting authorities from having to deal with vexatious requests is one that will no doubt continue to exercise authorities, and prove a fruitful territory for disputes, as the process of 'winnowing out' continues."***

The Upper Tribunal found no error in the FTT's approach — in particular, the FTT had not made an error by focussing on the requester instead of the request. Given the long history between the requester and the authority in this case, the central question was whether those background matters rendered the particular requests vexatious.

There were a number of features of that long history that were in large part undisputed. The requester had:

- sent 36 emails over a 9 day period before making his requests;
- made 20 applications to the FTT;
- used abusive or aggressive language in communications;
- made references to the Wannsee Conference — suggesting that the officials in the MHRA were like Nazis — and to 'Baby P'; and
- made over 50 FOIA requests.

The Upper Tribunal found that the FTT was 'modest' in its characterisation of offensive language that compared MHRA workers to Nazis. The FTT had properly taken into account the significance of the requester's concerns about public health issues, but the actual requests in this case in fact related to the MHRA's handling of the files and to broader policies for records management. The MHRA had at one stage made an error in referring to a file as destroyed, when in fact it had not been, so that had given rise to a legitimate question. But, applying *Dransfield*, the Upper Tribunal noted that the fact that there had once been a genuine dispute did not stop a request from becoming 'vexatious by drift'.

Finally, the approach of the First-Tier Tribunal (Judge Stephen Cragg QC) in *Peter Scott v The Information Commissioner and Kirby Muxloe Parish Council* (EA/2018/0054, 10th October 2018) is interesting. Here, the requester sought copies of surveyors' reports in relation to leases of a recreation ground. The requests were refused by the Council on the basis of vexatiousness (FOIA) and that they were 'manifestly unreasonable' (EIRs). (In the context of this case, the FTT said there was no difference between these tests. Arden LJ at paragraph 78 of *Dransfield* described the difference between the two tests as 'vanishingly small'.)

The Commissioner examined the Council's evidence of vexatiousness, which included evidence that the requester was acting in concert with others and that, together with other residents, he was working to disrupt the workings of the Council. The Council's view was that the requester was acting as the solicitor for other requesters who have previously had their requests refused under section 14(1) FOIA and Regulation 12(4)(b) of the EIRs. Those refusals had been upheld by the Commissioner in a number of decision notices where it was accepted by the Commissioner that three residents were working in concert to disrupt the workings of the Council. As such, the Commissioner upheld the refusal.

The FTT also upheld the refusal, but the decision to do so appears to have been more finely balanced than perhaps is the case with some section 14

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FOIA cases. The FTT accepted that the requester had not attempted to conceal his links with parishioners who, like the requester himself, had very genuinely held concerns about the way in which the Council had been run and the way it had dealt with particular issues such as the recreation ground. The FTT further accepted that this case was not as clear cut as that of *Harvey v Information Commissoner & Walberswick Parish Council* EA/2013/0022, 21st January 2013), where section 14 FOIA was applied in a situation where there had been a large number of requests from a group of people to a parish council. Here, there had not been a flood of requests and the requester's correspondence with the council had been polite. But this did not prevent the application of section 14 FOIA, when a 'rounded approach' was applied: the requests were the continuation and exacerbation of requests made by the requester's clients and others with whom he had worked closely, and this had been previously recorded by the Commissioner.

In circumstances where there was obviously a genuine concern about the council's conduct, and where the requests had remained polite — a far cry from the intemperate language described by the Upper Tribunal in *Oxford Phoenix Ltd*, for instance — this is perhaps a more subtle application of section 14 than readers may be used to seeing.

Summary

In conclusion, the above cases illustrate that the 'winnowing out' process that Arden LJ anticipated in *Dransfield* is well underway. In terms of Upper Tribunal decisions, we have seen, at least in theory, that in the FOIA context, the public interest will not always win out where substantial resources will be involved in dealing with a request.

We have seen a working out in practice of the need for the focus to be on the request, not the requester, but nonetheless proper consideration being given to the history of relations between the requester and the authority in determining whether a request is vexatious.

Oxford Phoenix produced an unsurprising result, given the nature of the requests made and the particular nature of the conduct involved over time. Comparing workers at the MHRA to Nazis, or the circumstances with those of Baby P, showed that the requester's conduct had reached a particularly aggressive level.

However, the recent FTT decision of *Scott* shows us that conduct that is much less obviously vexatious can still give rise to proper reliance on the section 14 exemption. The delicate balance between preserving the important right to information and protecting authorities from having to deal with vexatious requests is one that will no doubt continue to exercise authorities, and prove a fruitful territory for disputes, as the process of 'winnowing out' continues.

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