



IN THE FIRST-TIER TRIBUNAL Case No.s EA/2011/0085 - 0158
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

**The Information Commissioner's Decision Notices Nos: FS50321319,
FS50351585**

Dated: 10 March 2011, 28 June 2011

Appellant: Mr Paul Burns

1st Respondent: Information Commissioner

2nd Respondent: Lancashire County Council

3rd Respondent: Lancashire Fire and Rescue Service

Heard at: The Crown Court, Manchester

Date of consideration: 21 November 2011

Date of decision: 15 December 2011

Before

Christopher Hughes

Judge

and

Darryl Stephenson and Paul Taylor

Tribunal Members

Appearance: No parties attended the oral hearing.

Subject matter: Freedom of Information Act 2000

Section 14 vexatious requests

Rigby v Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust
EA/2009/0103

Gowers v Information Commissioner and LB Camden EA/2007/0114

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeals for the reasons stated.

Signed:

Christopher Hughes

Information Rights Judge

Dated this 15th December 2011

REASONS FOR DECISION

Preliminary issues

1. The Appellant in these cases originally indicated that he wished to have these matters considered on paper. On his account it was at a late stage that he realised that the Tribunal did sit outside London and he then applied for an oral hearing. The Tribunal granted such a hearing and the hearing was fixed for a date the Appellant had indicated was appropriate at a geographically appropriate court venue. The Respondents indicated that they would not attend the hearing. On 10 November the Appellant applied to the Principal Judge in the Information Rights jurisdiction for a transfer of the Appeal to the Upper Tribunal. He expressed a lack of confidence in the allocated judge and in the First-tier Tribunal in the light of the decisions of the

judge not to grant a number of orders he had sought. He indicated that the date and venue were inconvenient for his witnesses.

2. The Principal Judge did not order such transfer. The Appellant was invited to take part in a telephone directions hearing, however he did not acknowledge the e-mail invitation or telephone messages nor did he take part in the directions hearing. The directions hearing confirmed that the hearing would proceed and that the evidence of his witnesses would be accepted without the need for them to attend. The Appellant did not acknowledge receipt of the directions and was not available when telephoned by tribunal staff prior to or on the morning of the hearing.
3. The Tribunal considered, in the light of the over-riding objective, whether it should proceed with the hearing at the appointed date and time in the absence of the party who had requested the oral hearing. The Tribunal noted that its duty was to deal with the case fairly and justly in a way which was proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. The Tribunal noted that there was no oral evidence, the documents available fully disclosed the cases of the parties, that three parties had indicated that they would not attend and the date of hearing had been acceptable to the Appellant and the location was objectively suitable for him, that he had been repeatedly notified that the hearing was proceeding, that the Appellant's objection to the location and date were based on convenience for witnesses whose evidence (he had been informed) would be accepted in their absence.
4. The Tribunal was satisfied that the Appellant was aware of the hearing and had chosen not to attend or to co-operate with the Tribunal and acknowledge the communications from the Tribunal staff. The Tribunal considered that to adjourn would further delay the resolution of this case, and would involve a significant further expenditure of resources which could not be justified. The Tribunal accordingly decided that it would be fair and just to decide the case on the day appointed for the hearing.

The Applications

5. On 16 March 2010 Mr Burns (the Appellant) made a request for information from the Lancashire County Council (the Second Respondent – the Council) for copies of what may be summarised as records and communications held by the Council with

respect to the drafting of a “consent form” for the disclosure of information. The Council rejected the request as vexatious on 16 April 2010 and waived the internal review stage, directing Mr Burns to the Information Commissioner in the event that he was dissatisfied. Mr Burns appealed to the Information Commissioner (the First Respondent) who on 16 February 2011 upheld the position of the Council. Mr Burns received the decision notice on 20 February 2011 and appealed to this Tribunal on 25 March 2011.

6. On 19 January 2010 Mr Burns wrote to the Lancashire Fire and Rescue Service (the Third Respondent – the Fire Service) making requests for information concerning how it had dealt with documents he had wished to be circulated to the elected members responsible for the service and for “copies of all public expenditure/reimbursement records claimed by {name redacted} during the last 9 years of his elected appointments, or whatever the lesser maximum Treasury record retention requirements, for example, 7 years.” On 10 February 2010 the Fire Service declined to comply with the request on the grounds that it was vexatious. On 20 February 2010 Mr Burns requested an internal review, the outcome of which was the upholding of the refusal which was communicated to Mr Burns by letter dated 27 February 2010. On 28 September 2010 Mr Burns contacted the Information Commissioner who on 28 June 2011 issued a Decision Notice upholding the position of the public authority. Mr Burns received the decision on 2 July 2011 and appealed against it to this Tribunal on 21 July 2011.
7. In the light of the single underlying dispute and the reliance of both public authorities on S14 FOIA the Tribunal directed that these cases be consolidated.

The factual background

8. The Appellant is one of a group of retired firefighters formerly employed in Lancashire and receiving pensions from the Fire Service. The Council provides a range of administrative services for the Fire Service. A review within that organisation prompted by the Audit Commission led it to conclude that there had been errors in the administration of pensions, notably concerning payments in respect of disabilities arising out of service and the interaction of such payments with benefits received from the DWP. The Service believed that in a number of cases

there had been overpayment since in its view the scheme rules did not permit the receipt of both the disability element of the pension and the relevant DWP benefit. It sought to confirm the DWP benefits received by various individuals in receipt of pensions from the Fire Service by seeking the information from various sources, including inviting pensioners to complete the "consent form" the drafting of which is the subject of one of the requests for information. A dispute arose between certain of the pensioners, among them Mr Burns, and the Service about whether there had been overpayment, the steps which the Service took to acquire information and the steps which the Service took to (in some cases) stop payments. There have been numerous contacts between the Service and Mr Burns about this dispute and the Service has issued proceedings against Mr Burns for the recovery of money which it considers has been overpaid to him. Mr Burns has summarised his view of the dispute (see paragraphs 25 and 30).

The challenged decisions and the position of the Respondents

9. The Council in refusing the request for information relied on S14 of FOIA and alleged that the application was vexatious. The ICO, in upholding that decision, conducted an investigation and analysed the case in accordance the methodology he has developed over a number of years in connection with cases where section 14(1) is applied by public bodies. This methodology draws on previous decisions of this Tribunal. In conducting his analysis the Commissioner considers each case in its context in the light of five questions and then takes a view of the matter as a whole. The five questions are:-

- Whether compliance would create a significant burden in terms of expense and distraction?
- Whether the request is designed to cause annoyance and disruption?
- Whether the request has the effect of harassing the public authority or its staff?
- Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable?
- Does the request lack any serious purpose or value?"

10. The Council provided a schedule of 54 communications from Mr Burns to the Council with respect to the pensions issue between the start of 2008 and the request. Many of these were long and detailed (one was 54 pages long), and copied to multiple recipients inside and outside the Council. Mr Burns argued that he received answers to only 11 of these letters and the multiple copies were circulated to people in the Council who ought to be aware of the contents. The Commissioner noted that while only some of these related to FOIA and the Council could have been more active in responding to the correspondence, the request could not be seen in isolation from this correspondence and some weight should be given to the expense and distraction of dealing with the request.
11. The Commissioner in the light of the provocative tone of much of the correspondence, and of Mr Burns' own statement that he is "engaged in uninhibited public criticism of the LCC and the Lancashire Combined Fire Authority" concluded that much of the correspondence was designed in part to cause annoyance.
12. Terms used by Mr Burns in correspondence accused individual recipients (usually Council officers although the correspondence was often copied to councillors and to persons outside the Council) of enjoying "humiliating and hurting", of "abusing power", "criminal and unlawful conduct", "blatant falsehoods...calculated acts in which he blatantly lied". Although the request itself did not contain such language the Council and Commissioner felt that in the wider context the request should be seen as harassing staff and a reasonable person would be likely to feel harassed or distressed by it.
13. The Commissioner concluded that Mr Burns was pursuing a campaign against the Council. He noted that he had made findings adverse to the Council in its handling of Mr Burns previously. He noted that in his dealings with the Commissioner, Mr Burns had misrepresented the position of the Commissioner to others and this was consistent with the statement of the Council that Mr Burns:-

"has a history of "confirming" in writing the content of telephone conversations in a way that is twisted to suit his case"

He considered that such action was:-

“not only manifestly unreasonable, but also casts doubt on whether the complainant’s accounts can be considered to be as objective as they may at first appear.”

However in the light of his previous finding that the Council had not handled a request appropriately and his concerns as to the handling of Mr Burns’ personal data he did not find that Mr Burns was obsessive or manifestly unreasonable and gave no weight to this factor.

14. The Commissioner noted that the request related to the consent form for disclosure of data and Mr Burns’ argument that:-

“this request goes to the legal heart of the matter. The key question being the illegality of the so called “consent forms”. ... The primary objective of my exercise was to obtain independent documentary evidence that the LCC PS (Lancashire County Council Pension Service) in complicity with the LFRS (Lancashire Fire and Rescue Service) had acted unlawfully in stopping FSVs (fire service veterans) injury pension awards.

My secondary objective was to support my charges against your LCC staff (and others) that they had acted in a

- (a) Knowingly criminal and reckless manner
- (b) in an unlawful manner;
- (c) and with defamatory words and imputations...

you must now accept, on trust, that I have the independent documentary evidence I require to support my intended charges under (a), (b) and (c).”

The Commissioner concluded that even if he accepted that the legality of the consent forms was central to the case concerning withdrawal of pensions, Mr Burns had stated that he had sufficient evidence to achieve that objective. The material was at best helpful; however in the light of the serious purpose behind Mr Burns request (the pensions dispute) on this point he gave modest weight in Mr Burns’ favour.

15. The Commissioner found that three of his five factors were engaged to some extent. He reviewed the context and noted the significance of the wider issue – the withdrawal of injury pension payments. He concluded:-

“(86)... while the complainant’s wider campaign has a serious and proper purpose, and the request should not be considered entirely in isolation from that undertaking, the request has not been shown to be sufficiently important to that wider campaign. He is therefore unable to give sufficient weight to the complainant’s statement that the request has a serious and proper purpose, in order to permit him to decide that that serious purpose outweighs the combined weight of the arguments put forward by the public authority. Accordingly, he finds that the public authority correctly applied section 14(1) of the Act in this case.”

16. The Commissioner followed a similar analysis with respect to the request for information from the Fire Service.
17. With respect to the burden, expense and distraction criterion the Commissioner noted a similar pattern of voluminous correspondence which was lengthy, poorly structured, copied to a number of recipients and with an expectation of a response where there was no formal request for information. The Commissioner considered that it would be inappropriate to distinguish between the requests and the wider correspondence because they formed part of the wider pattern; significantly he noted that any responses by the Fire Service “invariably provoke further correspondence in return.” He concluded that compliance would create a significant burden in terms of expense and distraction.
18. He similarly concluded that given the context and pattern of behaviour, some weight should be given to the criterion of the request being designed to cause disruption and annoyance.
19. The Fire Service argued that the volume, frequency, multiple copying and derogatory nature of the correspondence amounted to harassment of the authority and distressed its staff. The Commissioner noted:-

“(33) In this case the Commissioner considers that the tone of the complainant’s correspondence containing the requests is characterised by attempts to discredit and make accusations against specific LFRS employees and members of the Combined Fire Authority.

(35) While it is not normally relevant to take into account an applicant’s motivation when making a request for information under the Act, the Commissioner considers that the complainant’s willingness to single out individual members of staff as the

focus of his requests and complaints means this factor is engaged. The nature of the complainant's requests and other correspondence suggest that he has become more interested in pursuing campaigns against individual members of the Combined Fire Authority and LFRS employees than concentrating on the substantive points of his campaign about injury pension payment which he purports to be principally interested in. For these reasons, the Commissioner accepts that a reasonable person would be likely to feel harassed or distressed by the nature of the complainant's dealings with LFRS and finds this factor is engaged."

20. The Commissioner noted that Mr Burns was pursuing a campaign against the Fire Service. He accepted that there was a thin line between obsession and persistence and concluded:-

"(39) While the significant levels of correspondence exchanged between the parties since late 2007 began as part of the complainant's determined and persistent pursuit of his campaign on the pensions dispute, more recently the focus of the campaign and the related correspondence has shifted to the complainant's dissatisfaction with individuals within the authority. The Commissioner considers that the use of frequent and voluminous correspondence to pursue these secondary elements of the complainant's campaign against LFRS mean the complainant's behaviour and the request in this case have crossed the line from behaviour which is persistent to that which can be seen as obsessive. The Commissioner therefore considers that a strong degree of weight should be attributed to this factor."

21. The Commissioner accepted that Mr Burns felt that his request had a serious purpose and in the absence of argument from the Fire Service did not attach weight to the criterion of an absence of serious purpose. The Fire Service submitted evidence to the effect that Mr Burns was attempting to shift the focus from the real issue, the pensions dispute, and that therefore the request lacked a serious purpose of value.

22. The Commissioner concluded that, having found four of the five factors engaged to some degree:-

"He is satisfied that the requests in this case would impose a significant burden upon the resources of LFRS and would have the effect of disrupting the authority's business and harassing or distressing the authority's staff. The Commissioner also

considers there is a strong indication that the persistence of the complainant's campaign on the underlying matter of the pensions dispute has more recently developed into an obsessive and manifestly unreasonable campaign against the authority and individuals within the authority. For these reasons the Commissioner finds that LFRS correctly applied section 14(1) of the Act in this case."

Mr Burns' Grounds of Appeal and Evidence

23. Mr Burns appealed against the Commissioner's decision with respect to the Council on the basis of what he claimed was the Commissioner's inconsistency in applying FOIA law and that the request was refused on the "grounds of the application of personality not law." As supporting documents he referred to a large number of PDF files he had already supplied to the Commissioner.

24. The appeal document with respect to the Commissioner's decision on the request to the Fire Service contained 13 grounds of appeal. Of these four were claims that the Information Commissioner had failed to apply FOIA correctly by not ascertaining whether the information sought was held; not applying a public interest test (twice) and failing in his duty with regard to S14(2) by not determining whether or not his request was actually repeated. These grounds were based on a failure to understand the law. Where a request is properly seen as vexatious then there is no duty to establish whether the information is held, no public interest test and in this case the argument did not rely on section 14(2). The other nine grounds were a failure to prove the request was vexatious, a "failure of duty of common humanity"; bias/failure to investigate properly; failure to consider the request in isolation; failure of impartiality; failure to approach this complaint with a clear mind; repeated failure to discharge his statutory duty; acting ultra vires in deciding that Mr Burns was "obsessive"; engaging in unbridled public character assassination.

25. Mr Burns stated that the core of the dispute was:-

"The DN section described as "background" is incorrect in spite of my response to a request from the IC for information during which I supplied him with 165+ documents for him and his staff to consult.

"Background paragraph 4 in particular is simply factually wrong, slanted and biased.

If the IC must record a “background” then it behoves him to report it accurately, without bias or partiality, and in a balanced and objective manner and not as he has done working on behalf of the LFRS.

An administrative issue, the core issue of this dispute, which he has failed to report on was repeatedly brought to the attention of the IC, a matter which ought to have interested him but did not.

The question was why the LFRS had failed to recognise the impact of the implementation of the DPA on the statutory administration of the Fire Service pensions in respect of the DWP records. A matter which the IC is bound to investigate but in which he exhibited no interest whatsoever.

The failure by both the IC and the LFRS led to the gross maladministration of the FSV’s DWP pension records which led in turn to the LFRS’s complete failure to maintain statutory pension records. This is why the LFRS refuses to release personal record files (PRF) to individual subject data Requests from disabled FSVs because it proves their case for maladministration.

It is the IC’s duty to enquire into such a matter when brought to his attention yet he has failed to do so.”

26. In a footnote he stated:-

“At the commencement of this dispute I developed a strategy to obtain information useful to the disabled FSV’s case. I repeatedly outlined a “step back procedure” which I would follow to the IC and those organisations involved in my attempts to gain information and personal data from four public agencies. Namely, the audit Commission, the DWP, the LCC and the LFRS”

27. In the course of his appeal statement he made criticisms of the relevant officer of the Commissioner in strikingly similar terms to those used about the officers of the Council and the Fire Service.

28. Mr Burns lodged a number of witness statements from retired fire fighters and the widow of a former fire fighter. These clearly show the strength of feeling these individuals have about the way that the Fire Service has handled the pensions issue and the significance of the underlying dispute relating to payments. One of the statements indicates that the witness had been advised by solicitors instructed by the Fire Brigades Union to sign a form authorising the Council to have access to his DWP records and had declined to do so.

29. Each of these statements begins with a common form of words

“I [name and address redacted] am a party to these proceedings, by reason that I am represented by Mr Paul P Burns the Appellant in this matter.”.

This statement is inaccurate in that they were witnesses and not parties.

30. One of the earliest documents supplied by Mr Burns is a letter he wrote to the Commissioner in February 2008. It began:-

“The issue is that the Lancashire County Council Pensions Services acting as contracted agents for the Combined Fire Authority/Lancashire Fire and Rescue Service threatens to suspend my Fire Service Injury Pension if I do not, under duress, sign away my legal right of data protection under the Data Protection Act 1998. I regard this proposal as unlawful and ultra vires.”

The legal framework for the appeals

31. The role of the Tribunal laid down by s.58 FOIA is to determine whether or not the Information Commissioner’s Decision Notice is in accordance with the law or whether the Commissioner ought to have exercised his discretion differently. To do so it can review any finding of fact upon which the Decision Notice was based.

32. In these cases the Council and the Fire Service have relied on section 14(1) FOIA arguing that the requests were vexatious and the Commissioner has agreed with them. A distinction should be drawn between this use of vexatious and a decision by the court that a litigant is vexatious. Following a complex process the decision that an individual is a vexatious litigant results in the individual being significantly restricted in her/his access to the courts. A decision that a request for information is vexatious has the considerably less significant result that the relevant public authority is not obliged to disclose the information.

33. Vexatious is not defined in the statute. The Commissioner has over the years, drawing on the decisions of this Tribunal, developed his guidelines as to how the

question of vexatiousness may be approached. The guidelines have been endorsed by the Tribunal as a useful guide in *Rigby v Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103*.

34. Mr Burns argued that each request should be looked at in isolation; however to do so would be divorced from reality. The Tribunal stated in *Gowers v Information Commissioner and LB Camden EA/2007/0114* that “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 the 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.” The Tribunal is satisfied that in order to come to a just decision it is required to understand the significance of the request in its context and its impact both for the requester and the public body receiving the request.
35. The Tribunal considers that it is important to bear in mind that vexatious is an ordinary term in common use. Guidelines, however useful, should not become a straightjacket or lead to an over-formulaic approach to issues. The Oxford English Dictionary definitions of “vexatious” extend over several columns. A working summary of the definition however is “tending to cause trouble or harassment by unjustified interference.” Within this definition the issues raised by the Commissioner’s five criteria – the amount of work and expense caused to the public body, the impact of staff feeling harassed, whether done to annoy, whether obsessive or manifestly unreasonable, whether lacking in serious purpose - all fit easily. It is important to take all these issues into account as they arise, however any one of these may be of great importance and others may not figure at all. They need to be used flexibly and in the light of the context of the request. The Tribunal also notes that the term “obsessive” is unlikely to add significantly to the term “manifestly unreasonable” which can fairly be seen as encompassing the former meaning; which indeed is an expression very similar in meaning, in this context, to vexatious.

Consideration of the Appeals

36. It is appropriate to take stock and review the case in the round. It is clear from the letter quoted at paragraph 30 above that Mr Burns' concerns about data protection and FOIA arose from the threat to his income. He has pursued correspondence with the Council and the Fire Service on data protection and FOIA matters but the underlying issue driving this contact is an argument as to whether he and other retired firefighters have been overpaid. The Fire Service has issued proceedings against Mr Burns and the courts will decide whether or not there has been an overpayment; this, as the Commissioner clearly saw, will resolve the underlying issue.
37. Mr Burns has indicated that his strategy has been to "step-back" and seek information from relevant public agencies to acquire information for the purposes of the dispute. However it is difficult to see how the information he seeks is of significant assistance with respect to the financial issue, or even with respect to the broader emergent issue of data management by the public bodies which has been raised with the Information Commissioner in his data protection role on a number of occasions in respect of this issue. If indeed the Council and the Fire Service discussed the drafting of the consent form that would be unsurprising - the two public bodies had responsibilities to each other with respect to the administration of data concerning the retired firefighters. Furthermore Mr Burns has indicated that he already has the information and merely seeks to obtain this as confirmation. It is difficult to see how the request for disclosure of the expenses of the Chair of the Fire Service can contribute either to the underlying financial issue or to the emergent data management issue. The witness statements he has filed, while movingly demonstrating the distress which those individuals have experienced and their concerns about the actions of the public bodies do not materially advance Mr Burns cause, as the Commissioner repeatedly indicated, that is a significant and serious underlying issue; however the requests do not help resolve it.
38. In his appeal in relation to the Council Mr Burns asserted that the Commissioner had been inconsistent in the application of FOIA law and had applied personality not law. The Tribunal has not found any inconsistency or error in the application of the law nor any indication that the Commissioner has made a decision other than on the basis of a fair and impartial consideration of the relevant facts.

39. In his appeal in relation to the Fire Service Mr Burns advanced four incorrect assertions with respect to the law which the Tribunal has dealt with above. The other nine grounds are similarly flawed. The Commissioner demonstrably carried out a proper investigation and his statutory duties in accordance with his powers, there was nothing inhumane in his actions or decision, there is no evidence of bias or lack of clear-sightedness, The Commissioner was correct to view the request in context, not in isolation, there was evidence upon which to find the request as vexatious and he considered the request obsessive not the requester.
40. In reviewing the appeals as a whole the Tribunal notes the enormous energy and persistence with which Mr Burns has pursued his struggle against the Council and the Fire Service.
41. There is no doubt that the underlying issue is one of great emotiveness and concern. The distress of those affected by the pensions review is clear to see from the witness statements placed before us and the accounts which we have read (if accurate), describing the treatment of those affected, quite understandably may give rise to feelings of injustice. However, perhaps the most significant difficulty for Mr Burns is this. While through all his excessively numerous, long and convoluted letters and arguments he may feel that he is advancing his cause, the detached and objective view, that of the reasonable and impartial observer with knowledge of the facts, is very different. It is clear these specific requests were but a stage in a long campaign. If they had been met they would simply have triggered further correspondence and requests (correspondence which, the Appellant insisted, should be sent to him by registered post). The whole process was imposing a significant burden on the Council and the Fire Service. While campaigns eliciting information from public bodies are of value and can make a contribution to accountability in a democratic society, and indeed the facilitation of such inquiries and campaigns is a key role of the Act, the way in which they are conducted is of significance to the Commissioner and the Tribunal. The tone of the correspondence and the multiple copying of personally abusive and offensive letters was on any objective assessment going to cause annoyance and disruption to these bodies and to harass and distress the staff. While public servants can be expected to show resilience in the face of abusive letters that does not mean that there is any entitlement on the part of the public to write such offensive letters to them nor to circulate them to others inside or outside the organisation. Under such circumstances the public authority should try to

minimise the impact of such correspondence on individuals; perhaps by designating a single point of contact. The Commissioner was unsuccessful in eliciting a satisfactory account from Mr Burns of how these requests would advance his case. That is unsurprising. Neither of these requests is likely to be of value in the financial dispute or in demonstrating anything significant concerning inappropriateness in the public bodies' handling of data and data protection issues (where indeed Mr Burns has indicated he already has the evidence). The seriousness of an underlying purpose is clearly relevant to the question of vexation – or being manifestly unreasonable or an unjustified interference; however it is an objective not a subjective issue. While Mr Burns may be entirely satisfied, the Tribunal is not. The issue is whether a reasonable observer would conclude that the purpose was serious and also whether the request was objectively likely to advance that purpose. The Tribunal unhesitatingly concludes that no reasonable observer would themselves conclude that these were proper steps to the resolution of the problem. They are manifestly unreasonable. The requests were vexatious; they caused trouble and harassment by unjustified interference.

42. The Tribunal considered that while the Commissioner's criteria had some value and undoubtedly had guided the Commissioner to the correct decision in these cases there were weaknesses in the criteria in that they over-valued the subjective views of the requester of information as to three of the five criteria – causing annoyance, harassment and serious purpose. It seemed to the Tribunal that the correct assessment of such criteria was on an objective standard – whether an impartial observer would conclude that the request was likely to cause annoyance, or harass staff or lacked a serious purpose. Clearly a finding that the intention of the requester was to cause annoyance or to harass would increase the weight to be attached to such a criterion; as would a finding that the request subjectively lacked a proper, serious purpose. Such an approach might simplify the investigation and assessment of such cases; it would have made no difference to the outcome of this case. The Tribunal noted that the Commissioner has amended his guidance away from a conditional test (i.e. whether the request would impose a significant burden and engage any of the four other criteria) to a test against any one of the five criteria. This is a helpful step. However, the Tribunal considered that the objective evaluation of the circumstances (as exacerbated by any subjective element) would seem desirable and the Commissioner may wish to consider revising his guidance further to reflect this.

43. The Tribunal is therefore satisfied that both Decision Notices were correct in law and the Tribunal finds for the Respondents in respect of both appeals.

Signed

C Hughes
Information Rights Judge

15th December 2011