



Neutral citation number: [2023] UKFTT 941 (GRC)

Case Reference: EA/2023/0174

**First-tier Tribunal
General Regulatory Chamber
[Information Rights]**

**Heard: by determination on the papers
Heard on: 30 October 2023
Decision given on: 09 November 2023**

Before

**TRIBUNAL JUDGE Alison McKenna
TRIBUNAL MEMBER Emma Yates
TRIBUNAL MEMBER Miriam Scott**

Between

IAN DALTON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CHIEF CONSTABLE of SURREY CONSTABULARY

Second Respondent

DECISION:

- 1. The Appeal is allowed. The Decision Notice contains an error of law.**
- 2. The Tribunal does not make a substituted Decision Notice.**

3. The Tribunal hereby joins the Chief Constable of Surrey Constabulary as the Second Respondent to this appeal pursuant to rule 9 of the GRC Rules¹.

4. The Second Respondent is directed to respond to the original information request within 28 days of the date it is sent this Decision, such response to be made on the basis that s. 14(1) FOIA is not engaged so it must confirm whether or not the requested information is held and claim any relevant exemptions to disclosure.

REASONS

Mode of Hearing

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of this Chamber's Procedure Rules. The Tribunal considered an agreed open bundle of evidence comprising 69 pages plus some additional submissions from the Appellant.

Background to Appeal

2. This appeal concerns the Appellant's request for information about the police interviews with Jimmy Saville. On 11 October 2022, he requested the audio tapes of the interviews. This is the request with which the Decision Notice dated 6 February 2023² and this appeal is concerned.
3. The Appellant had previously requested video tapes of the police interviews on 21 October 2021. Surrey Police explained that it did not hold videos of the interviews, but that it did hold audio tapes of the interviews. It offered the Appellant advice and assistance to this effect so that he made a fresh request for the audio tapes only. Surrey Police refused the original request on the basis that it did not hold the requested information but also (inappropriately) claimed exemptions in relation to the information that it said it did not hold. The Information Commissioner issued a Decision Notice³ upholding Surrey Police's refusal of the Appellant's first request on the basis that it did not hold information consisting of video tapes. That Decision Notice is not the subject of this appeal.
4. There have clearly been previous requests for the same information, although we do not understand this Appellant to have made any previous requests. In 2014, the Information Commissioner issued a Decision Notice⁴ which found that a request for the audio tapes was vexatious within the meaning of s. 14 (1) FOIA, as it had released a transcript of the interviews and the audio tapes themselves would not therefore add to the value of material already in the public domain, but would require significant additional work and burden on

¹ [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/102421/the-tribunal-procedure-first-tier-tribunal-general-regulatory-chamber-rules-2009.pdf)

² IC-206207-N0V0

³ IC-137214-X9T9

⁴ FS50526276, dated 11 August 2014.

Surrey Police in making redactions to the audio which outweighed the value of the request. In this case, the Information Commissioner's Office warned the Appellant that it was likely to take the same view, as indeed it did.

The Decision Notice

5. The Decision Notice concluded that the request for the audio tapes was vexatious because the burden on Surrey Police of preparing the tapes for disclosure would be onerous and that, as written transcripts were in the public domain, they would not add to the information already available. It is not clear from the Decision Notice whether the request for audio tapes was treated as a repeated request or one that was substantially similar to an earlier request in view of the previous request for video tapes.
6. The Decision Notice did not apply the indicia of vexatiousness, as determined by the Upper Tribunal and Court of Appeal, to this particular request, but relied on the conclusions of the 2014 Decision Notice. It did not therefore undertake the appropriate balancing exercise between this Appellant's request and the burden claimed by the public authority but apparently relied on a generic assessment of burden which would outweigh the value of all requests for the same information.
7. Surrey Police had also claimed an exemption under s. 38(1) FOIA because of the likely distress to Jimmy Saville's victims if the audio tapes were disclosed. The Decision Notice did not find it necessary to consider this exemption and so made no determination of its engagement or any application of the public interest test.

The Law

8. Section 14 (1) of FOIA provides that:

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

9. The Court of Appeal considered the question of identifying vexatious requests in *Dransfield v Information Commissioner* [2015] EWCA Civ 4543, and approved the approach of the Upper Tribunal, reported at [2012] UKUT 440 (AAC) 4. The Upper Tribunal's approach was to *“consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff)”* It also emphasised the importance of adopting a *“holistic and broad approach”* to the determination of whether a request is vexatious or not.”
10. The powers of this Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law,
or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

11. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

12. The Appellant’s Grounds of Appeal were broadly that the request was not vexatious. He submits that additional value may be gained from listening to the manner of Saville’s answers in interview which may not be obtained from a transcript. He suspects an institutional ‘cover up’.
13. The First Respondent relies on the reasoning in the Decision Notice in resisting the appeal. The Response correctly sets out the relevant law, although this is not referred to in the Decision Notice itself.
14. The Second Respondent has not made submissions and is not required to do so. It is only joined at this stage so that we can require it to issue a fresh response to the original request and so that it has a right of appeal. Its fresh response must be made on the basis that the request is not vexatious, but it is of course entitled to claim other exemptions at that stage.

Conclusion

15. As noted above, applying the test for whether a request engages s. 14 (1) FOIA involves a “holistic and broad” analysis of the facts. We conclude that the Decision Notice in this case failed to undertake that exercise but instead relied upon a conclusion reached 9 years earlier about a different request for the same information.
16. It seems to us that the elapse of 9 years may well have altered the factors to be considered in undertaking the requisite balancing exercise. So might the particular motive of any information requester, who might be connected to the Jimmy Saville case in any number of ways. So too might the availability of new technology which could ease the burden on the public authority of making audio redactions. It follows that there is a very good reason why each case must be considered carefully on its own merits, and we find that the Decision Notice in this case erred in law because it relied on a generic approach to all requests for the same information.
17. It is not clear whether the Appellant was treated as having made a repeated or substantially similar request in this case. That would be a relevant factor in considering the indicia of vexatiousness, but it seems to us that to take that view would be unfair to the Appellant as he made the second request only after the Information Commissioner issued a Decision Notice finding that Surrey Police did not hold the requested information and so making a

fresh request for the information in the form it was held was his only option. The information held had been clarified following appropriate advice and assistance from the public authority and it seems to us that his request could helpfully have been dealt with as a single clarified request rather than two separate requests.

18. Whilst not expressing any view about the response that we have directed Surrey Police now to make, it seems to us that a proper consideration of the claimed engagement of s. 38 (1) FOIA by this request and the conduct of the requisite public interest balancing exercise would have been the appropriate course for the Information Commissioner to have taken.
19. The Appellant clearly takes the view that if he succeeds in this appeal the requested information will be disclosed to him. However, that is not the way that FOIA works. Surrey Police must now respond to the request on the basis that it is not vexatious, but it can yet claim fresh exemptions. The Appellant retains all the usual rights to complain to the Information Commissioner and (if necessary) the Tribunal about the fresh response he receives to his original request.

Signed: Judge Alison McKenna

Date: 2 November 2023