THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/1384/2013

PARTIES

The Information Commissioner
Gordon Bell
and
the Ministry of Defence

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

This front sheet is not part of the decision and is issued only to the First-tier Tribunal and the parties.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 26 February 2013 under reference EA2012/0134) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the decision notice served by the Information Commissioner under reference FS50436416 is in accordance with the law. Mr Bell's request of 19 January 2012 is vexatious under section 14(1) of the Freedom of Information Act 2000.

REASONS FOR DECISION

A. Introduction

1. I gave the Information Commissioner permission to appeal to the Upper Tribunal in this case and suspended the effect of the First-tier Tribunal's decision. Subsequently, I joined the Ministry of Defence as a party to the appeal. I held an oral hearing on 4 March 2014. Robin Hopkins of counsel appeared for the Commissioner and George Peretz of counsel appeared for the Ministry of Defence. I am grateful to them both him for their written and oral arguments. Mr Bell did not attend the hearing. He had written to me repeatedly and at length about the issues that concern him, so he had ample opportunity to say anything he wanted me to take into account.

B. The error that was made

2. Mr Bell applied to the Ministry of Defence for information. The Ministry relied on section 14 of the Freedom of Information Act 2000 claiming that Mr Bell's request was vexatious. The Information Commissioner decided that the Ministry had been right to do so. Mr Bell exercised his right of appeal to the First-tier Tribunal. It held a hearing on the papers on 14 January 2013. Its decision, which is dated 26 February 2013, allowed the appeal. The reasons refer to, and are in parted structured around the analysis of section 14 provided in, Upper Tribunal Judge Wikeley's decision in *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC). That decision was dated 28 January 2013, which was after the hearing of Mr Bell's appeal.

3. Given that that decision contained a fundamentally important analysis of section 14, the tribunal was required to take it into account but it was also required to allow the parties a chance to comment on its application before doing so. That the tribunal failed to do. As a result, the tribunal's reasons contain some remarks about the evidence that are inaccurate and could have been avoided had the parties had the chance to make submissions on the factors set out in Judge Wikeley's decision.

4. The tribunal's failure to allow the parties to comment was a breach of natural justice.

C. The error that may have been made

5. As if that is not bad enough, it is possible that there is a much more serious error in this case.

6. The judge wrote in paragraph 1 of the decision:

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

However, the judge wrote in paragraph 33 that 'This Tribunal reminds itself of the purpose of FOIA.' There follows a quotation from Judge Wikeley's decision followed in paragraph 34 by the remark:

> '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.'

There follows an analysis of how those criteria applied to Mr Bell's request.

7. There is clearly some contradiction between the tribunal deliberating on the issues before Judge Wikeley's decision was issued but reminding itself of and then applying its content during their deliberations. I like to think that this is just an example of poor decision writing and that the tribunal in fact reconvened or in some other way reconsidered its initial analysis in the light of Judge Wikeley's decision. A less charitable interpretation is that paragraph 1 is correct and the judge simply took account of Judge Wikeley's decision in explaining the decision already reached. If that is what happened, the reasons were not those of the tribunal as required by rule 38 of Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976).

D. Why I have re-made the decision

8. Both the Commissioner and the Ministry asked me to re-make the decision rather than remit the case for rehearing. I have done so. In my grant of permission, I said:

> Even if the tribunal did commit some of the mistakes set out in the application, there is still the question whether they made any difference to the outcome. It is clear from the remarks made by the tribunal that it was limited in what it could find by the lack of information in the case presented to the tribunal by the Commissioner. On the limited information available about the history of Mr Bell's dealing with the Ministry, could the tribunal properly have come to any other decision?

9. Having had the benefit of argument at the oral hearing, I resile from those remarks. I am satisfied that the tribunal relied on the way that the case had been presented to it by the Commissioner – the Ministry was not a party before

the First-tier Tribunal. If the tribunal had allowed the Commissioner to present an argument structured around the criteria in Judge Wikeley's decision, it could have been referred to other evidence in the papers that the Commissioner had not specifically referred to. I will take just one example. The judge wrote:

> 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.

Given the chance to do so, the Commissioner could have referred the tribunal to what Mr Bell wrote to an official in an email of 7 February 2011:

> Clearly you need a lot of help with comprehension skills, or perhaps a lesson in order to teach you the difference between what is right and what is wrong. For anyone to hide the deaths, or to hide the records of missing servicemen poisoned at Porton Down – as you seem intent on doing – there needs to be a psychiatric assessment conducted for they are not of the human psyche.

This is but one example. There are others in the papers, to which the Commissioner could have referred the tribunal. Indeed, the tribunal could have found these for itself if it had troubled to read the papers. That is why the papers were provided: to be read. A tribunal is not entitled to rely on the parties to point to the passages that it should read and to look at nothing else.

10. I have dealt with this example in detail because it illustrates that the tribunal's reasoning was fundamentally flawed by its failure to take account of the whole of the evidence. In those circumstances, the only proper course is for me to reconsider the decision afresh.

E. Why the request was vexatious

11. I have directed myself in accordance with Judge Wikeley's analysis. I have to decide whether this request was vexatious, but in making that decision I have to take account of the background and context in which it was made.

12. No one could doubt Mr Bell's genuine concern to discover what happened at Porton Down. His requests to the Ministry under the Freedom of Information Act began in July 2005, although he was interested long before then. By the time of the request with which I am concerned in January 2012, he had made 53 requests, many involving a series of questions. There have since been others.

13. The particular request that I am concerned with asked about payments made under a compensation scheme to a particular firm of solicitors: on what dates were the payments made, who authorised them, how was the money transferred and had there subsequently been payments of the same kind to any others law firms?

14. In deciding that the request was vexatious, I have taken account of the following.

15. First, I begin, as counsel did at the hearing, by accepting that what happened at Porton Down is a matter of public concern, as well as of genuine and personal concern to Mr Bell.

16. Second, looked at in isolation this appears to be a polite request for a limited amount of information that should be readily accessible and easily provided. However, that ignores the context.

17. Third, there has been a large number of requests that have been made, spread over the years. They have involved a great deal of research in order to provide the information requested. I do not take this against Mr Bell. The Ministry has engaged with his requests, objecting only to repeat questions and intemperate correspondence.

18. Fourth, there has been drift. This is often a feature of requests becoming vexatious, although it is not an essential characteristic. Just looking at the barest structure of the requests:

- They begin with questions about Mr Bell;
- They move on to questions about other veterans.
- Then they become more detailed in asking about chemicals used.
- In 2006, he asked a series of questions about the individual responding to his requests.
- There follow questions about compensation, settlements and the law firms involved.

I am sure that Mr Bell sees each of the responses that he has received as raising more questions and opening new issues to explore. That can happen quite properly, but it can also be a sign that the requests are drifting away from their original aim, perhaps without the person appreciating what is happening. To an objective observer, however, detailed questions about individual firms of solicitors or a particular partner are a long way from concern about what happened at Porton Down.

19. Fifth, there is persistence even when told that the Ministry does not hold any more information on a particular point. I accept that public authorities can be wrong and that persistence by requesters, sometimes supported by enquiries from the Commissioner, result in further searches and more information being discovered. But persistence is a factor that is part of the overall background. And the possibility of further information remaining uncovered is not a justification for repeating questions that have been answered, as Mr Bell did in July 2010.

20. Sixth, there are the allegations of bad faith and cover up. These things do occur, but they are rare. They are not allegations that should be made lightly or addressed to individuals without any reasonable basis for belief.

21. Seventh, there is the tone of some, although not all, of the correspondence. I have already quoted from one email and will not multiply examples unnecessarily. It is sufficient to say that Mr Bell's tone has at times been personal and abusive, and his comments have been thoughtless, hurtful and unfair. This has gone on since at least May 2010, when he wrote to one officer saying 'you are either engaged in a conspiracy to hide the facts or you are extremely dim witted' and referred to 'your diatribe of deceit.' He was asked to

desist and told that his tone was 'harassing in its effect and causing distress'. He did not comply with that request. This has gone well beyond the expressions of frustration or occasional outbursts that all public officials are expected to bear with fortitude. The tone and content of his comments speak for themselves as to the likely impact on all but the most thick-skinned officials.

22. Taking all those factors into account, and making due allowance for Mr Bell's genuine concern and obvious frustration with the officials in the Ministry, in my judgment his request was vexatious. As Knight Bruce V-C recognised in *Pearse v Pearse* (1846) 63 ER 950 at 957: 'Truth, like all good things, may be loved unwisely – may be pursued too keenly – may cost too much.' Mr Bell may well ask, as I asked at the hearing: why now? Why after so long did the Ministry decide to treat a request as vexatious? I accept Mr Peretz's answer that this was a matter of judgment and timing. The issue for me is not whether the Ministry could or should have relied on section 14(1) for other requests. The issue for me is whether it was entitled to do so for this request. My answer is that it was.

23. I have taken account of what Mr Bell has written during these proceedings. It shows his continued determination to discover whatever he can about the matters that he has raised, but he has said nothing that changes my overall analysis.

24. I was asked by Mr Peretz to take account of events and correspondence from Mr Bell after the date of his request and, in part, relating to solicitors engaged in these proceedings on behalf of the Ministry. As I have found that the request was vexatious, it has not been necessary to consider those matters. Had I done so, I would have had to deal with issues of relevance that no longer arise.

Signed on original
on 5 March 2014

Edward Jacobs
Upper Tribunal Judge