IN THE UPPER TRIBUNAL **Application No: GIA/2035/2014**

ADMINISTRATIVE APPEALS CHAMBER

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL AFTER ORAL HEARING

Applicant:	**Mr Alan Melville Dransfield**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Devon County Council**
Tribunal:	**First-tier Tribunal (Information Rights)**
Tribunal Case Nos:	**EA/2010/0152**
Decision date:	**2 April 2014**

DETERMINATION

I refuse permission to appeal.

REASONS

1. Permission to appeal is refused because I do not consider that it is arguable with a realistic prospect of success that the First-tier Tribunal erred materially **in law** in its decision of 2 April 2014. The grounds of appeal put forward by Mr Dransfield do not identify any arguable **error of law** that was material to the tribunal's decision, nor is any such error otherwise evident.

2. This determination of permission to appeal has been much delayed. This in the main was because of other proceedings involving Mr Dransfield and section 14 of the Freedom of Information Act 2000 (FOIA). Those proceedings were decided ultimately against Mr Dransfield by the Court of Appeal on 14 May 2015 and then by the Supreme Court refusing Mr Dransfield permission to appeal against the Court of Appeal's decision on 14 December 2015. Regrettably it took a little while after 14 December 2015 for the Supreme Court's determination to become known to the Upper Tribunal and that has added to the delay. Those proceedings were relevant to this application for permission to appeal because it also concerns section 14 FOIA and whether the request for information made by Mr Dransfield to Devon County Council on 10 February 2009 for the Operations Maintenance Manual for ISCA College was vexatious.

3. Upper Tribunal Judge Wikeley refused Mr Dransfield permission to appeal on the papers in a detailed ruling dated 20 May 2014. Mr Dransfield then renewed his application to an oral hearing. This was stayed until the Court of Appeal had decided Mr Dransfield's other case – *Dransfield –v- Information Commissioner and Devon County Council* [2015] EWCA Civ 454, decided on 14 May 2015 ("*Dransfield*"). I then sought further submissions from the parties on how they considered the Court of Appeal's decision affected Mr Dransfield's prospects of success on this application for permission to appeal.

4. The Information Commissioner and Devon County Council both in essence took the view that the application had no merit in error of law terms given that the Court of Appeal had not disputed the Upper Tribunal's general guidance as to section 14 of FOIA and vexatious requests.

5. Mr Dransfield made six submissions on the Court of Appeal's decision.

(i) His first was that the decision had compromised Lady Justice Goddard's Chid Sex Scandal (by which I think he must have meant *The Independent Inquiry into Child Sexual Abuse* chaired by Hon. Dame Lowell Goddard DNZM).

(ii) Second, the Court of Appeal's decision had been allowed to navigate the UK legal system unlawfully because Devon County Council had become legal custodians of the Exeter Chiefs rugby bridge in January 2014 which meant jurisdictional default since April 2009, and that would have a knock on effect on this case.

(iii) Third, if he obtained permission to appeal from the Supreme Court this application should be further stayed.

(iv) Fourth, there need to be a full hearing on this case and the Stockport case. It should be in Exeter. The need for a hearing was because the Court of Appeal's decision was a rogue decision made by political motivation.

(v) Fifth, the original FOIA request was for six PFI schools in Exeter which was wrongfully downgraded by the Information Commissioner and he wished his original request to be reinstated.

(vi) Sixth, breaking news in the Stockport case concerning a pond adjacent to the school the subject of his FOIA request in the Stockport case showed Stockport Borough Council was being sued for school drainage failure which supported his claims about health and safety failures at the school.

Mr Dransfield also referred in this response to the last Upper Tribunal hearing having been adjourned due to Devon County Council's evidence credibility and witness credibility and a costs warning having been placed against the council.

6. The oral hearing took place before me on 30 November 2015 in London. Mr Dransfield attended by way of video link from Exeter. Neither the Information Commissioner nor Devon County Council attended the hearing. Prior to the hearing Mr Dransfield had submitted two further requests which he had made to Devon County Council and to which they had made disclosure in July 2015. The hearing took a little while to set up because Mr Dransfield initially disputed why the hearing was to be in London and not in Exeter.

7. Mr Dransfield prior to the hearing had sought to have it postponed to await the ruling (then not made) of the Supreme Court on his application for permission to appeal. I refused that request because, as I explained, the Court of Appeal's decision in *Dransfield* was binding on me and had to be followed by me and at that stage had not even been called into any doubt by any grant of permission to appeal by the Supreme Court. I therefore asked Mr Dransfield to address me on the basis that the Court of Appeal's decision in *Dransfield* was the last word on section 14 of FOIA, but I indicated that I would hold off determining the permission to appeal application until the Supreme Court had decided whether to give permission to appeal (having been told by Mr Dransfield that the Supreme Court's decision was imminent). I indicated that I would then revisit whether to further stay this application for permission to appeal if the Supreme Court gave permission to appeal. In the result that stage did not arise.

8. Given the breadth of some of the complaints made by Mr Dransfield on this application it is important to bear in mind the jurisdiction of the Upper Tribunal on such an application. This is limited to whether there is an arguable case with a realistic prospect of success that the First-tier Tribunal **erred in law** in the decision to which it came on 2 April 2014. It is not for the Upper Tribunal in determining whether there was an arguable error of law to decide for itself whether the relevant request was vexatious.

9. I will deal with Mr Dransfield's grounds of appeal as he developed them at the hearing and then return insofar as it is necessary and relevant to his earlier written grounds.

10. Before doing so, however, it is worth stressing three points.

11. First, the Court of Appeal's decision in *Dransfield* is binding authority on me as to the correct scope of section 14 of FOIA and cannot now be called into any doubt given the Supreme Court's refusal of permission to appeal. Moreover, and more importantly given one of Mr Dransfield's grounds of appeal, the effect to the Court of Appeal's decision is to declare the law as it always has been: see Lord Nicholls *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680 at paragraphs 4-7 and 34.

12. Second, it is the actions of Devon County Council when it dealt with the request for information Mr Dransfield made in February 2009 and its then reliance on section 14 of FOIA so as to refuse the request which were in issue before the Information Commissioner and the First-tier Tribunal and not any later actions or events. As it was put in paragraph 52 of *All Parliamentary Group on Extraordinary Rendition –v- Information Commissioner and the Foreign and Commonwealth Office* [2015] UKUT 377 (AAC) "taken as a whole, the language of the statutory scheme indicates that the Commissioner (and the FTT) is charged with assessing past compliance with FOIA, not with monitoring ongoing compliance". Further, as I have already indicated, it is not the function of the Upper Tribunal to determine on the evidence that was in place at the time of Devon County Council's refusal to provide the information sought in the February 2009 request, let alone on evidence which has only come into existence subsequently, whether the request was vexatious within section 14.

13. Third, the function of the First-tier Tribunal was to decide the appeal on the basis of the issues and relevant evidence argued before it. The function of the Upper Tribunal is to decide, at this stage, whether there is any arguable case that the First-tier Tribunal erred in law in coming to the decision it did on the issues and evidence argued before it. The Upper Tribunal has no function above or beyond this. In particular the Upper Tribunal has no power to reopen to review other requests a party may have made to a public authority.

14. Mr Dransfield's first argument before me concerned Devon County Council not attending at the hearing before me. As I understand this argument its gist was that by so doing Devon was not allowing itself to be questioned on its FOIA procedures and guidance. This is simply a non-point. What the hearing was concerned with, and all it was concerned with, was whether the First-tier Tribunal had arguably erred in law. The Upper Tribunal has no wider role to play in respect of Devon County Council.

15. His first main argument was that the decision of the Upper Tribunal upheld by the Court of Appeal in *Dransfield* was neither effective nor material to his case as it post-dated his request of February 2009. His request of February 2009 as a matter of law had to be decided on the basis of how section 14 had been interpreted before the Upper Tribunal's decision in Dransfield. There is nothing in this point for the reasons given in paragraph 11 above. The Upper Tribunal's decision and the decision of the Court of Appeal in *Dransfield* have the legal effect of laying down how section 14 of FOIA was always to be construed. There is, moreover, no disputing that the First-tier Tribunal in this case followed *Dransfield*, and it did not err in law in so doing. In particular, *Dransfield* holds good as a matter of law that the past history of requests can be taken into account in determining whether the particular request was vexatious.

16. This leads into and answers the second ground of appeal argued before me by Mr Dransfield. This relied on a witness statement of Amber Steer-Frost dated 7 December 2010. She was then an employee of Devon County Council. It had filed this witness statement as part of its response to Mr Dransfield's appeal to the First-tier Tribunal against the section 14 FOIA decision made on his request of 10 February 2009. The purpose of Mr Dransfield referring to this witness statement was because he said it correctly encapsulated the five considerations to be taken into account in determining vexatiousness under section 14. This has to fail for the same reasons as given immediately above. The five criteria relied on by way of guidance issued by the Information Commissioner's Office current in 2010 are no longer the correct test following *Dransfield*, which expressly modified them. Even if he was right as to the jurisprudence, however, the five criteria were never intended to be cumulative and so the fact that Ms Steer-Frost did not consider the 10 February 2009 request was designed to cause disruption or annoyance did not mean it was not vexatious (indeed she was arguing that it was vexatious, contrary to Mr Dransfield's view of her evidence). Further and in any event, Ms Steer-Frost's view of the request did not bind the First-tier Tribunal and it is its view and decision on whether the request was vexatious that has to be considered. I therefore reject the argument that the First-tier Tribunal even arguably erred in law in not referring to this evidence.

17. The witness statement had another aspect in terms of argument. This was the argument, foreshadowed at the end of paragraph 5 above, that the last hearing had been adjourned on the issue of the credibility of a witness. I need not detain myself long on this as Mr Dransfield was unable to even take me to any adjournment notice of the First-tier Tribunal (or Upper Tribunal). As Judge Wikeley pointed out when refusing permission to appeal on the papers on this application, this was the third decision of the First-tier Tribunal on Mr Dransfield's appeal against the Information Commissioner's decision notice of 25 August 2010 upholding that his 10 February 2009 request was vexatious. Two previous decision of the First-tier Tribunal had been set aside: the first was dated 30 March 2011 and was set aside by Judge

Wikeley on 16 November 2011; the second was dated 23 May 2013 and was set aside by Upper Tribunal Judge Jacobs on 8 November 2013. The effect of these Upper Tribunal decisions was that the First-tier Tribunal appeal proceedings began entirely afresh after 8 November 2013. I can find no adjournment direction of the First-tier Tribunal on this appeal between 8 November 2013 and the First-tier Tribunal's decision of 2 April 2014 (nor was, as I have said, Mr Dransfield able to take me to any such decision); and the decision of 2 April 2014 was a final decision and not an adjournment. This ground therefore is not made out.

18. The next argument was that it was a contempt of court for the Upper Tribunal to hear and determine this application whilst Mr Dransfield was seeking to challenge the Court of Appeal's decision in the Supreme Court. This is nonsense and simply wrong. In fact the opposite is the case: the Court of Appeal's decision as a decision of the superior court is binding on the Upper Tribunal and it would be wrong for the Upper Tribunal to ignore it. At most the fact that Mr Dransfield was seeking permission to appeal from the Supreme Court might have led to a case management direction by the Upper Tribunal not to decide the application for permission to appeal until the Supreme Court had determined the permission to appeal application, but that was achieved by my delaying deciding this application until after the Supreme Court had decided the permission to appeal application. In any event, this argument has even less merit given the Supreme Court has refused permission to appeal, leaving the Court of Appeal's decision as the binding authority on section 14 of FOIA. (And the argument that the Court of Appeal's decision is a rogue decision made by political motivation is tendentious nonsense, wholly unevidenced, which in any event can take Mr Dransfield nowhere as the decision is binding on the Upper Tribunal.)

19. The last point, made in brackets, holds equally true for the next two argument made by Mr Dransfield – that Judge Wikeley "acted above his station" and was wrong in *Dransfield* (no he didn't and no he wasn't, as the Court of Appeal upheld his decision) and that the Court of Appeal's decision is part of a wider conspiracy to close down FOIA - and I say no more about these arguments other than that they give rise to no arguable error of law on the part of the First-tier Tribunal. Whatever Mr Dransfield may believe, having been refused permission to appeal by the highest court in the land, *Dransfield* is the binding authority on section 14.

20. Mr Dransfield next sought to argue that evidence he claimed he now had about Exeter Chiefs Rugby bridge showed the original decision in *Dransfield* was wrong as he now had information proving his request was properly motivated and correct. However this cannot alter what the correct test for a "vexatious request" is as matter of law under section 14 of FOIA. Moreover, the request in issue on this application has nothing to do with the said bridge. In the end this was no more than a merits challenge on the facts to the effect that as a matter of fact the 10

February 2009 request was not vexatious, but as I have sought to stress it is not the Upper Tribunal's role on this application to decide for itself whether the 10 February 2009 request was vexatious.

21. The next clutch of arguments was about Judge Warren, the presiding judge on the First-tier Tribunal which made the decision of 2 April 2014, being biased. It was said that this was shown by Judge Warren having a history of striking out appeals. However he did not strike out this appeal and it was the subject of a full hearing which Mr Dransfield attended on 24 March 2014. Moreover, beyond mere assertion Mr Dransfield did not evidence this alleged history nor did he explain how it affected the First-tier Tribunal in unfairly coming to its decision (beyond the point I have already rejected about not referring to or accepting Ms Steer-Frost's evidence), and I can find no arguable merit in this bare allegation. I also adopt and endorse all that Judge Wikeley said when rejecting the bias argument when he refused permission to appeal on the papers on 20 May 2014.

22. No other error of law arguments were advanced by Mr Dransfield at the hearing before me. Insofar as he continued to hold to his arguments made in writing on the application for permission to appeal of 4 April 2014 and insofar as they raise separate arguments to those addressed above, I simply adopt and endorse all that Judge Wikeley said when refusing permission to appeal on the papers on 20 May 2014.

23. As for the arguments set out in paragraph 5 above, if they are legally distinct argument to those already addressed then I can identify no arguable merit in any of them and need say little more about them. Quite how the Court of Appeal's decision compromised the *Goddard Inquiry* was left unexplained and, as I have said, it is a decision which is still binding on me. I do not understand the "jurisdictional default" argument nor did Mr Dransfield seek to further explain it.

24. The separate point about there having been six requests simply does not stand up to scrutiny as (i) it was no part of Mr Dransfields' grounds of appeal to the First-tier Tribunal that the Information Commissioner had wrongly characterised the scope of the relevant request made by Mr Dransfield to Devon County Council as being limited to the 10 February 2009 request, and (ii) in any event the Information Commissioner's Decision Notice of 25 August 2010 accurately records Mr Dransfield on 10 February 2009 (the date of the relevant request) saying he now wished to downgrade his FOI request for the Operations Maintenance Manual for the ICSA College only.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

6th April 2016