FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 80
XA88/17

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal by

WILLIAM FREDERICK IAN BEGGS

Appellant

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

Appellant: Crabb; Drummond Miller LLP
Respondent: D Scullion (sol adv); Anderson Strathern LLP

19 December 2018

Introduction

[1] This is an appeal on point of law under section 56 of the Freedom of Information (Scotland) Act 2002 against a decision of the Scottish Information Commissioner. The appellant is William Frederick Ian Beggs. He is a prisoner in HM Prison Edinburgh serving a life sentence for murder. The appellant is a very experienced litigant before the Court of Session. That experience includes, but is by no means limited to, two previous appeals against different decisions of the Commissioner. As will appear from the history narrated in

the course of this opinion, the appellant is exacting when it comes to respect for what he maintains are his rights.

[2] The present appeal relates to the Commissioner's decision 152/2017, dated 13 September 2017, that a request for information made by the appellant to the Scottish Prison Service ("SPS") on 26 May 2016 was vexatious and that accordingly, by virtue of section 14 (1) of the 2002 Act, SPS was not obliged to comply. The request related to the provenance of certain statistical information (subsequently acknowledged to be inaccurate), which had been produced by SPS in the course of earlier proceedings for judicial review at the instance of the appellant. The proceedings for judicial review went to a hearing before Lady Wolffe. In the note of argument lodged on behalf of the Commissioner, who is the respondent to this appeal, the request is referred to as the "third FOISA request". We adopt that description. The third FOISA request was in these terms:

> "All and any information held by the SPS relative to the request for and compilation of the table or matrix referred to by Lady Wolffe at para [145] of her Opinion of 26 April 2016 ([2016] CSOH 61)."

[3] SPS had refused the third FOISA request, founding on section 14(1), in terms of a letter of 24 June 2016. On 22 August 2016 the appellant wrote to SPS requiring that it review its decision. SPS gave notice to the appellant that it would not do so, explaining that in terms of section 21(8) of the Act it was not obliged to conduct a review where the requirement was vexatious. The appellant applied to the Commissioner, in terms of section 47(1)(b) of the Act expressing his dissatisfaction and requesting a decision whether the third FOISA request had been dealt with in accordance with Part 1 of the Act. The Commissioner decided that SPS had complied with Part 1 of the Act. The appellant now appeals that decision.

Grounds of Appeal

[4] The appellant presents two grounds of appeal:

1. The Commissioner erred in failing to apply the correct legal test for determining whether a request is vexatious within the meaning of section 14(1) of the Freedom of Information (Scotland) Act 2002. She should have applied the test set out by Arden LJ in *Dransfield* v *Information Commissioner and another* [2015] 1 WLR 5316 in respect of the same section in the Freedom of Information Act 2000. At paragraph [68] of *Dransfield* her Ladyship found:

> "... the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public."

In the present case, the Commissioner recognised that the information requested was important to the appellant (paragraph [46] of her decision). Thus, if she had applied *Dransfield* that should have led her to find that there was a reasonable foundation for the request and, therefore, that it could not be rejected as vexatious.

2. The Commissioner's decision was irrational in that she failed to have regard to the following relevant considerations:

(i) The appellant's express disavowal, as set out in his submissions to the Commissioner of 1 June 2017, that the request was a "direct and personal attack" on those responsible for compiling the information sought.

(ii) The prior conduct of the requested authority, the SPS, and whether its prior actions had contributed to the need to make the freedom-of-information request. This is a consideration that paragraph [33] of Commissioner's Guidance on

"Vexatious or repeated requests" directs the requested authority, and, by extension, the Commissioner, to consider before rejecting a request. These prior actions included an apparent failure to respond to requests for clarification as to the accuracy of the statistical information the SPS had provided in the context of judicial review proceedings brought by the appellant (*Beggs Petitioner* [2016] CSOH 61 at paragraphs [145] and [146]).

(iii) The importance of the information requested, which sought to discover the process by which the apparently inaccurate statistical information came to be provided to the Court in judicial review proceedings. Had the Commissioner properly considered the importance of that information, she would not have been entitled to reject the application on the ground that she believed [the] appellant's motives in requesting the information to be improper. This is because as Arden LJ stated in *Dransfield* (at para [68] *in fine*) if the request is aimed at the disclosure of important information which ought to be publically available, then however vengeful the requester, the request will not be without any reasonable foundation. In turn, if the request is not without reasonable foundation then it cannot be rejected as vexatious.

History

Judicial review of prison disciplinary proceedings

[5] The judicial review referred to at ground 2 (ii) of the Appeal related to the conduct of disciplinary hearings held in August 2014 in terms of rule 113 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 and as to the *vires* of the Rules. The breaches of discipline with which the appellant had been charged and the subject of that disciplinary

hearing, were: (1) disrespectful conduct (at a meeting of a prison internal complaints committee ("ICC") on 7 August 2014) and (2) threatening conduct (by throwing paper at members of prison staff at an adjourned meeting of the ICC on 8 August 2014). The appellant was found guilty of charge (1) on 25 August 2014. His punishment was a caution. The appellant was found guilty of charge (2) on 18 August 2014. His punishment was a loss of earnings, recreations and access to personal cash privileges for a period of seven days.

[6] During the course of the disciplinary proceedings the appellant's solicitors wrote to SPS on 17 August 2014 requesting that the disciplinary proceedings be sisted. The letter included some 18 questions or requests for information. On 21 August 2014 the appellant lodged a petition for judicial review. The remedies sought included interdict of the disciplinary proceedings. A motion for interim interdict was withdrawn on 22 August 2014. On 28 August 2014 the appellant appealed the decisions made in the disciplinary proceedings to the ICC. Having considered written submissions the ICC refused the appeals.

[7] The appellant continued with his proceedings for judicial review which went to a substantive hearing before Lady Wolffe. Lady Wolffe issued her Opinion on 26 April 2016. In it, at paras [54] and [58], she records that while it had been a little difficult to discern relevant grounds amongst the many disparate challenges, they might be consolidated under six headings: (1) procedural unfairness, (2) procedural irregularity, (3) the *vires* of rule 113(9) of the 2011 Rules, (4) denial of legal representation, (5) substantive challenge to disciplinary charge (2), and (6) apparent bias by reason of the presence at the hearing of a particular administrative assistant.

[8] Prior to the hearing before Lady Wolffe, on 1 June 2015 the petitioner obtained commission and diligence from the court for the recovery of the documents listed in a specification with 14 separate calls. Call 1 was for:

> "All summaries, indices and overviews showing or tending to show the number of requests made for legal representation at prison disciplinary hearings or appeals and the number of requests that were granted from 31 May 2012."

In compliance with the order of the court SPS produced some 646 pages of documents. Included among these was a spreadsheet setting out in tabular form what had been extracted from the SPS prisoner database by way of response to call 1 of the specification. That spreadsheet or table recorded that whereas there had been 48 requests for legal representation over the 3-year period that had been refused, in 10 instances legal representation had been granted to a prisoner in HM Prison Edinburgh in respect of disciplinary proceedings even although no request had been made for such representation. The petitioner's legal representatives lodged the 646 pages in the petition process as production 6/10. The table was at page 12. On the basis of the information set out in pages 10 to 12 of production 6/10 the appellant's counsel revised his written note of argument by introducing the following statement:

> "The information from the SPS discloses that there were 48 requests for legal representation at HMP Edinburgh over a three year period (production 6/10, pages 10-11) and that, separately, there were 10 grants of legal representation (when not requested)."

[9] Having listed the various challenges to the lawfulness of the appellant's disciplinary proceedings at para [59] of her Opinion Lady Wolffe addresses and then dismisses each of them. At paras [143] to [146] she turns to consider what she describes as "some stray arguments". One of these stray arguments was the statement in the petition that "there is an

institutional reluctance to permit prisoners to have legal representation". At para [145] Lady Wolffe refers to page 12 of production 6/10 and goes on:

> "That information is suggestive (I put it no higher) that the SPS have not operated a policy of blanket refusals of requests for legal representation or fettered its discretion when considering such requests. Rather, that information is suggestive that individual adjudicators themselves determined that legal representation was necessary, even where the prisoner had not requested it. Whatever conclusion might tentatively be drawn from this information, it does not support the assertion of institutional reluctance. (In any event, the facts of this case would not support a conclusion that that was the basis for refusal here)."

And, at para [146]:

> "As presented, there is no proper or adequate basis in the material (such as it was) to support the assertion in the petition, even as augmented in the revised note of argument, of institutional reluctance on the part of the SPS. Had a specific order or plea been directed to these matters, I would have refused it."

The three Freedom of Information requests

[10] Following refusal of his petition for judicial review, the appellant has submitted three Freedom of Information requests to SPS in relation to what was set out in page 12 of production 6/10 in the petition process, the third of which is the subject of the Commissioner's decision of 13 September 2017 and the present appeal.

[11] On 11 December 2015 (the first FOISA request) and 4 February 2016 (the second FOISA request) the appellant requested information from SPS concerning the 10 grants of legal representation referred to at page 12 of production 6/10 in the petition for judicial review process. SPS responded to the first FIOSA request on 14 January 2016 explaining that it had not found any information falling within the scope of the appellant's request. On 1 February 2016 the appellant wrote to SPS requiring a review of the way in which SPS had dealt with the first FOISA request, as is provided in section 20 of the 2002 Act. SPS notified the appellant of the outcome of its review on 1 February 2016. It upheld its initial response

that it did not hold the requested information. On 10 February 2016 the appellant applied to the Commissioner in terms of section 47(1) of the Act stating that he was dissatisfied with the outcome of the SPS review of its response to the first FOISA request.

[12] On 24 February 2016 SPS responded to the appellant's second FOISA request informing the appellant that the information requested was not held by SPS. On 10 March 2016 the appellant required SPS to review its response to the second FOISA request. On 7 April 2016 SPS upheld its initial response that it did not hold the information requested. The appellant took no further action in relation to the second FOISA request.

[13] The Commissioner's decision on the appellant's first FOISA request is numbered 117/2016 and is dated 24 May 2016. In that decision the Commissioner accepted that SPS did not hold the information covered by the appellant's request. However, as is set out at paragraphs 13 to 20 of decision 117/2016, SPS's explanation of why it did not hold the requested information involved an acknowledgement that the information set out in page 12 had been inaccurate. Rather than there having been 48 requests for legal representation which were refused and 10 grants of legal representation where no request had been made, it was likely that there had been neither a request for legal representation nor a grant of legal representation in any of these 58 cases.

[14] SPS offered a likely explanation as to what had occurred. This explanation is set out in the Commissioner's decision 117/2016 of 24 May 2016 and therefore has been given to the appellant. In responding to the court order accompanying the appellant's specification of documents, SPS had interrogated its prisoner records database. That interrogation disclosed the results which were set out in the spreadsheet at page 12 of the documentation. However, in so far as the prisoner records database includes information about legal representation at disciplinary hearings, that information is taken from paper copy *pro forma*

reports of hearings. SPS had located 40 of the 58 paper copy reports relating to the cases referred to in the judicial review proceedings and found that they contained no information relating to legal representation. SPS attributed the erroneous transposition onto the database to a lack of understanding of the intended purpose of the relevant tick box on the *pro forma* on the part of the individuals responsible. While unable to locate the remaining 18 paper copy reports SPS considered it likely that, similarly, they would have contained no information relating to legal representation.

[15] As we have already indicated, having received the Commissioner's decision 117/2016 of 24 May 2016, on 26 May 2016 the appellant made the third FOISA request.

The Commissioner's decision now under appeal

[16] The Commissioner's decision 152/2017 includes the following findings:

> "45. Mr Beggs' request may not appear, on the face of it, to be vexatious. It is politely and rationally written concerning a matter of personal significance to him. The Commissioner is aware, however, that the vexatious nature of a request may only emerge after considering the request in context; for example, a history of previous or ongoing correspondence with the applicant. That context may reveal the request to be disproportionate in its nature and impact.
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> 46. The Commissioner appreciates that the matters raised by Mr Beggs are important to him. However, a request which has value and serious purpose can still be vexatious if it has the effect of harassing, or distressing, the public authority and/or its staff or individuals connected to the authority.
>
> 47. 'Harassing' is not defined in FOISA or the Commissioner's own guidance. The First Tier Tribunal (Information Rights) ruling EA/2011/0224 Roger Conway and the Information Commissioner was of the view that 'harassing' should be given its ordinary meaning, that is, to disturb persistently, bother continually, pester or persecute. In the Commissioner's view, the question is whether (viewed from the perspective of a reasonable person) the request has the effect of harassing the authority and/or its staff, and not whether the requester intended it to harass.
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> ....
>
> 52. The Commissioner would stress that it is not her role, in making a decision on Mr Beggs' application, to consider the merits of the decision reached in the judicial review raised by him. Similarly, she will not consider, or promulgate a view on,

whether the outcome of the judicial review might have been different had different information been provided to the court in relation to the matters that are of concern to Mr Beggs in this case.

53. That said, the judicial review is part of a course of conduct which forms the context in which Mr Beggs made the request under consideration here. That course of conduct goes back to disciplinary processes which it would appear reasonable to regard as minor, in both the nature of the charges and the impact of the disposals. In that context, Mr Beggs' subsequent actions would appear – on the face of it – to be disproportionate. That is not to excuse genuine incompetence or misconduct in the course of handling such matters, but the Commissioner does consider it relevant to bear in mind that most individuals experiencing disciplinary or similar consequences at this level would not resort to prolonged judicial and regulatory processes of the kind pursued by Mr Beggs.

54. The Commissioner also considers it appropriate in this case to take into account the effect of the request on the public authority, notwithstanding the intentions of the requester.

55. The Commissioner must consider whether the request has the effect of harassing an authority when considered from the perspective of a reasonable person, even if the requester did not intend to cause inconvenience or stress to the authority or to individuals. In the Commissioner's view, she is required to take into account the extent to which a request is likely to cause a disproportionate or unjustified level of disruption, irritation or stress.

56. In this case, the Commissioner notes some of the language used in Mr Beggs' correspondence with the SPS and in his application to the Commissioner. This makes clear his determination to pursue complaints against individuals whom he considers have acted inappropriately or incompetently.

57. In his application to the Commissioner, Mr Beggs alludes to individuals acting on behalf of the SPS in relation to the request under consideration who may have personal reasons to be concerned about the disclosure of relevant information. In all the circumstances of this case as presented to her, it is not immediately apparent why they should be so concerned, or why (for that matter) Mr Beggs should require disclosure [of] the information in question – to himself, never mind the public at large – to pursue the purposes he has identified.

58. On the other hand, it is apparent that the persistence with which Mr Beggs is pursuing the issue is likely, bearing in mind the underlying context of matters pursued to extreme lengths, to cause considerable disturbance and stress to those concerned. The Commissioner accepts that public employees should be held accountable, but this needs to be pursued within frameworks allowing for the fair treatment of anyone whose conduct is called into question.

59. In the Commissioner's view, Mr Beggs can pursue any complaints he considers to be justified with bodies such as the SLCC or Scottish Public Services Ombudsman, without recourse to the information sought in this request. It does not require the public exposure of anyone, certainly not before any accusations are duly investigated. Similarly, if Mr Beggs considers the outcome of his judicial review was

incorrect as a result of the information provided to his solicitors and the court, it is open to him and his advisers to explore further legal remedies.

60. As indicated above, the Commissioner notes fully the backdrop against which Mr Beggs made the present request. Taking into account all the circumstances of the case and Mr Beggs stated intentions, she is satisfied that the request can reasonably be considered disproportionate and, in its effects, harassment of the authority and individuals connected with it. Consequently, she considers the request was an improper use of FOISA and should be considered vexatious for the purposes of section 14(1)."

Submissions

Appellant

[17] Mr Crabb, who appeared on behalf of the appellant, adopted his written note of argument. He explained that what he wished to say by way of development of that fell under four heads: (1) the legal test for "vexatious" set out in *Dransfield* v *Information Commissioner*; (2) why that test should apply to section 14(1) of the 2002 Act; (3) why on an application of that test the appellant's third FOISA request was not vexatious; and (4) why, for the reasons set out in the second ground of appeal, the Commissioner's decision was irrational or, alternatively, was vitiated by reason of the Commissioner having failed to have regard to all relevant considerations.

[18] Arden LJ had not attempted a comprehensive definition of "vexatious" in *Dransfield* but, as appeared from consideration of paras 68, 69, 70 and 72 of her judgment, while the matter was to be looked at objectively, only if there was no reasonable foundation for thinking that the information sought would be of no value to the requester, or the public or a section of the public, could a request be regarded as vexatious. One needed to look at the reasons for making the request rather than the way in which the request had been made, taking a rounded approach to all the relevant circumstances with a view to reaching a balanced conclusion. Reflecting on the importance of the constitutional rights conferred by

the Act as a means of ensuring transparency and accountability, the standard for vexatiousness was a high one, albeit not an impossibly high one. Applying that standard required a careful calibration of the public interest on one hand and the right of the citizen on the other.

[19] The approach taken by the Court of Appeal in *Dransfield* in construing what was meant by "vexatious" in section 14 of the Freedom of Information Act 2000 should be adopted in construing the equivalent provision in the Scottish legislation. The importance of the right conferred applied equally to the 2002 Act and the meaning given to the term in question was consistent with that applied in the Scottish cases, for example, *Lord Advocate* v *McNamara* 2009 SC 598.

[20] When the objective approach advocated in *Dransfield* is applied in a rounded and balanced way the conclusion should be that the third FOISA request was not vexatious. It was instructive to look at the decision of the Upper Tribunal in *Information Commissioner* v *Devon CC and Dransfield* [2012] UKUT 440 (AAC) at paras 67 to 74 and the identification there of the factors which should go into the balancing process: the burden imposed on the public authority; the motive, value and purpose of the request; and the impact, in terms of harassment or distress caused to public officials by the nature and tenor of the request. Arden LJ's requirement that there be "no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public" before a request could be regarded as vexatious was a strong starting point. The information was important to the petitioner but it was also of interest to other prisoners. The Commissioner had not applied what she should have taken from *Dransfield*. There had been no development of what she had said at paragraph 46 about the importance to the appellant of the information requested. There was no recognition that the exercise of a

constitutional right was at issue. The Commissioner had referred to her published guidance. That was well and good but as had been said by the Upper Tribunal in *Devon CC and Dransfield*, while guidance might provide admirable signposts, such signposts should not be regarded as ends in themselves.

[21] In relation to the second ground of appeal, Mr Crabb contented himself with a reference to and adoption of what appears in the appellant's note of argument which essentially simply repeats the terms of the second ground of appeal.

Respondent

[22] Adopting his note of argument, on behalf of the Commissioner Mr Scullion moved the court to refuse the appeal. The issue was whether the Commissioner had erred in law in concluding that the SPS had followed the 2002 Act in finding the third FOISA request to have been vexatious. Mr Scullion reviewed the history (summarised above). The starting point was not the judicial review but the disciplinary proceedings in respect of two minor matters in 2014. Taking the whole background into account the Commissioner was entitled to conclude that: the appellant's third FOISA request was part of an extended campaign; that it was disproportionate and, in its effect, amounted to harassment of the SPS and persons connected with it; that it served no other purpose; and that the appellant was able to pursue whatever complaint he wished to make, without recourse to the information requested.

[23] "Vexatious" was not defined in the statute. This allowed the Commissioner to develop the concept of what can be regarded as a vexatious request. Mr Scullion commended paragraph 11 of the Commissioner's published Guidance with its non-exhaustive list of relevant factors: (i) that the request would impose a significant burden on

the public authority; (ii) that it does not have a serious purpose or value; (iii) that it is designed to cause disruption or annoyance to the public authority; (iv) that it has the effect of harassing the public authority; and (v) that it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate. What was said in *Dransfield* was relevant (although not binding). The appellant sought to argue that because the request was of importance to him, it should be granted. That was to adopt a subjective rather than the proper objective approach. The requested information was of no value to the appellant, certainly not in any objective sense. He already knew how it was that inaccurate information had come to be supplied in response to the order for recovery of documents in the judicial review proceedings. The court should find that the Commissioner had been right to conclude that the third FOISA request was vexatious and should accordingly reject the first ground of appeal.

[24] As for the second ground of appeal, it should also be rejected. The Commissioner had had regard to all relevant considerations; looking at matters objectively the effect of the third FOISA request, which was part of an extended campaign, was to harass SPS.

Decision

First ground of appeal

[25] The appellant contends that had the Commissioner followed what was said by Arden LJ when giving the leading judgment in the Court of Appeal in *Dransfield* v *Information Commissioner* she would not have found the third FOISA request to be vexatious. The first ground of appeal refers to "the test set out by Arden LJ in *Dransfield*" and in the course of submissions there was mention, again under reference to *Dransfield*, of "the test" for a finding of vexatiousness. This calls for some preliminary comment.

[26] *Dransfield* is an English case concerning English legislation but what is important for present purposes is that Arden LJ, in the passages in her judgment to which we were referred, expressly declines to offer a definition of or test for "vexatious" or "vexatiousness". It would be remarkable if the word "vexatious" when found in section 14(1) of the English Act of 2000 meant something different from the same word when found in section 14(1) of the Scottish Act of 2002; the terms of the two subsections are essentially identical. However, as yet, we do not see there as being any "test" for vexatiousness in the context of Freedom of Information requests, either in Scotland or in England, and we do not propose to provide one. We shall have something to say about what is meant by "vexatious" but, agreeing with Arden LJ, we are not inclined to attempt a comprehensive definition or to put forward a test. Rather, in the absence of a statutory definition, we propose to interpret "vexatious" by reference to the ordinary, natural meaning of the word, read in its legislative context.

[27] There is much with which we would agree in the judgment of Arden LJ in *Dransfield*. It is convenient to quote para 68 of that judgment in full:

> "68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of [the Freedom of Information Act 2000 ('FOIA')], I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which

> ought to be made publicly available. I understood Mr Cross to accept that proposition, which of course promotes the aims of FOIA."

[28] Thus, for Arden LJ the standard for a finding of vexatiousness should be a high one given "the constitutional nature of the right" (at para 2 of her judgment she describes the 2000 Act as an important statute because it enables ordinary citizens to obtain the information held by an authority and thus to know what the authority knows). It is because of that context that we would understand that Arden LJ takes as her starting point the proposition that for a request to be vexatious there must be "no reasonable foundation for thinking that the information sought would be of value". We agree that that is an appropriate way of looking at the legislation. Subject to sections 2, 9, 12 and 14, a person who requests information from a Scottish public authority which holds the information is entitled to be given it by the authority: 2002 Act section 1(1) and (6). Now section 14 of course provides that section 1(1) does not oblige a Scottish public authority to comply with a request which is vexatious, but that is of the nature of an exception to the generality of requests in respect of which there is an entitlement to the requested information. "Vexatious" is, as Arden LJ says, a strong word. Its primary meaning according to the Shorter Oxford Dictionary is "causing or tending to cause vexation, annoyance or distress; annoying; troublesome" but here it has a connotation of being *simply* troublesome or, as Chambers Twentieth Century Dictionary has it, "*wantonly* troublesome". In other words, not merely causing or tending to cause vexation, annoyance or distress but causing or tending to cause vexation, annoyance or distress for no purpose or benefit or, at least, very little purpose or benefit. Although she does not specifically mention the annoyance or distress consequent upon a vexatious request, it is this idea of gross disproportion as between much trouble inevitably caused and little benefit possibly gained that we see Arden

LJ attempting to capture with her reference to "no reasonable foundation for thinking that the information sought would be of value". We note her use of "reasonable" and we note her use of "value". As she says, and as Mr Crabb and Mr Scullion were agreed before us, the standard must be an objective one; what is under consideration is value in the information itself, as judged by a reasonable observer, not fanciful or purely idiosyncratic value, and not simply the malicious satisfaction of putting a public authority to trouble and perhaps causing it embarrassment. We also agree with what Arden LJ has to say about the need to take a balanced or rounded approach, having regard to all the circumstances of the case, it being understood that on an application of such an approach for a request to be vexatious the balance must point to a disproportion of trouble over benefit.

[29] The considerations for determining whether legal proceedings should be held to be vexatious are not exactly the same as the considerations which are relevant to the question as to whether a Freedom of Information request is vexatious but, as was submitted by Mr Scullion, the passage from the judgment of Lord Phillips of Worth Matravers MR in *Bhamjee* v *Forsdick* [2004] 1 WLR 88, which was cited by Lord Reed in *Lord Advocate* v *McNamara* 2009 SC 598 at para [31] is apposite:

> "… vexatious proceeding … whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

[30] With that by way of preliminary, we turn then to the first ground of appeal. As pled, it states that the Commissioner recognised that the "information requested was important to the appellant". Accordingly, so goes the argument, there was a reasonable foundation for the request and so, on an application of *Dransfield*, the request was not vexatious. It is an

argument that ignores the need for an objective assessment of what is the importance, or "value" to use Arden LJ's word, of the information requested, as it also ignores the need to consider whether any value that there may be in the applicant having information is disproportionately slight when balanced against what in *Bhamjee* was referred to as "the inconvenience, harassment and expense" of responding to the applicant's request. The Commissioner makes it clear in her findings that whatever the appellant might believe, on any objective assessment of the circumstances the requested information cannot be regarded as of importance. At paragraph 53 of her decision she draws attention to the collateral or peripheral nature of the request: the appellant had been subject to disciplinary proceedings of a very minor nature; he had challenged the lawfulness of the proceedings by way of judicial review; in the course of the judicial review, in response to a specification of documents, a summary had been provided of data which data were now accepted to have been inaccurate, that inaccuracy having been disclosed and explained in consequence of a subsequent section 47(1) application in respect of the first FOISA request; and yet the appellant, by way of his third FOISA request was now seeking information about how the data produced in the course of the judicial review had been compiled. The Commissioner goes on to state: "[the appellant's] subsequent actions would appear – on the face of it – to be disproportionate." At paragraph 57 the Commissioner has this:

> "57. In his application to the Commissioner, [Mr Beggs] alludes to individuals acting on behalf of the SPS in relation to the request under consideration who may have personal reasons to be concerned about the disclosure of relevant information. In all the circumstances of this case as presented to her, it is not immediately apparent why they should be so concerned, or why (for that matter) [Mr Beggs] should require disclosure [of] the information in question – to himself, never mind the public at large – to pursue the purposes he has identified."

And at paragraph 59:

> "59. In the Commissioner's view, [Mr Beggs] can pursue any complaints he considers to be justified with bodies such as the SLCC or Scottish Public Services Ombudsman, without recourse to the information sought in this request. It does not require the public exposure of anyone, certainly not before any accusations are duly investigated. Similarly, if [Mr Beggs] considers the outcome of his judicial review was incorrect as a result of the information provided to his solicitors and the court, it is open to him and his advisers to explore further legal remedies."

Thus, if the Commissioner is to be taken as having accepted that the information sought in the third FOISA request is of value in the eyes of the appellant, she cannot be taken to have accepted that there was any reasonable foundation for this view. As the Commissioner found, seen objectively, "any information held by the SPS relative to the request for and compilation of [page 12 of production 6/10 in the judicial review process]", is of no value to the appellant whatsoever, given the information that he already has and the absence of identified purpose for having more. Equally, it being entirely specific to what occurred procedurally in the course of a particular process for judicial review, this information is of no value to the public or to any section of the public. Given her findings the Commissioner made no error of law in concluding that the third FOISA request was vexatious. The Commissioner had no obligation to follow what was said in *Dransfield* but, had she done so, her findings would have led her (correctly) to the conclusion that there was no reasonable foundation for the third FOISA request.

Second ground of appeal

[31] The appellant presents his second challenge to the Commissioner's decision in terms of irrationality but the whole thrust of that challenge is failure to take into account what are said to be material considerations, namely: (i) the appellant's express disavowal that the third FOISA request was a direct and personal attack on those responsible for compiling the

information sought; (ii) the prior conduct of the requested authority (explained as the failure of the SPS to respond to requests for clarification of the accuracy of the information provided in response to the specification of documents in the judicial review proceedings); and (iii) the importance of the information requested which ought to have been in the public domain.

[32] We shall look at these three considerations in turn.

[33] As for express disavowal of any direct and personal attack (consideration (i)), Mr Scullion drew attention to the letter from the appellant to one of the Commissioner's officers, dated 1 June 2017 which would indicate that his intention was very much to pursue complaints against individuals. Mr Scullion emphasised the following passages:

> "In the foregoing circumstances it should be clear that the issues of professional competence concern not only the false and inaccurate information initially presented to my solicitors under [the] Specification, but the repeated failures on the part of individuals working within the SPS/SGLD to respond appropriately to the concerns expressed in good faith by my legal representatives – those concerns having ultimately been vindicated by the factual situation outlined by the Commissioner in Decision 117/2016.
>
> …I have no interest whatsoever in any such individual on a 'personal' level. Whatever personal insecurities any such individual may harbour, my request and application are intended solely to inform decisions as to the appropriate basis upon which to pursue a professional conduct complaint via the Scottish Legal Complaints Commission ('SLCC')."

This, Mr Scullion submitted, revealed the appellant's purpose. It was not to obtain information as such. It was to identify individuals with a view to pursuing complaints about their conduct. Mr Scullion accordingly questioned the sincerity of any "disavowal of any direct and personal attack" on the part of the appellant. We fully see the force of Mr Scullion's observations, but when one is considering the vexatious nature of a request; the absence of a malicious motive is not necessarily material or even relevant. While the presence of a malicious motive may point to a request being vexatious the absence of a

malicious motive does not point to a request not being vexatious. The standard for determining vexatiousness is an objective one. As the Commissioner correctly observed at paragraph 47 of her decision, the effect of a request may be harassing even if the intention has not been to harass. The Commissioner was called on to look at the whole circumstances on an objective basis and in doing so she was fully entitled to lay aside any self-serving assertion on the part of the appellant.

[34] Consideration (ii) is drawn from paragraph 28 of the Commissioner's decision 117/2016 in respect of the first FOISA request where she states:

> "Section 17(1) of FOISA requires an authority to give notice to an applicant that it does not hold the information that has been requested. It does not require an authority to explain why information is not held. In the circumstances, however, the Commissioner considers that it would have been good practice for the SPS to have explained to [the appellant] why there was a discrepancy between the information he expected to be held and the information that was in fact held."

The relevance of a failure on the part of SPS to give an explanation that it was not obliged to give (which is what we take the appellant to be founding on) is not clear, but more important, an explanation had been given to the appellant with the issue of the Commissioner's decision of 24 May 2016 prior to his making the third FOISA request on 26 May 2018. Any previous failure to give an explanation had therefore been superseded before the appellant made the third FOISA request. If the suggestion is that SPS should be sanctioned or punished for a departure from good practice or some other sort of failing (and this was not said by Mr Crabb), that is not a function of a Freedom of Information request; indeed as Arden LJ indicated, a vengeful motive may in itself point to vexatiousness.

[35] As for consideration (iii), as we have already sought to emphasise, the information requested was of no value to the public or any sector of the public. It was not of value to

other prisoners. Objectively, it was not of value to the appellant. The importance of the requested information was therefore not a material consideration.

[36] Both grounds of appeal must be rejected. The appeal is refused. We reserve all questions of expenses.