First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0209

Heard at Field House, London
On 18 July 2019

Before

JUDGE ANTHONY SNELSON
MS ROSALIND TATAM
MR PIETER DE WAAL

Between

DR DOREEN KING

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BARKING, HAVERING & REDBRIDGE UNIVERSITY HOSPITAL NHS TRUST

Second Respondent

DECISION

The unanimous decision of the Tribunal is that:

(1) The information sought by the request dated 9 April 2017 ('the first request'), para (q) was not held by the Second Respondent at the time of the request or at any material time thereafter.

(2) By virtue of the Freedom of Information Act 2000 ('FOIA'), s12(1) (cost of compliance), the Second Respondent was not obliged to comply with the first request, para (j) or the request dated 20 April 2017 ('the third request'), para (8).

(3) By virtue of FOIA, s14(1) (vexatious requests), the Second Respondent was not obliged to comply with the first request, para (o) or the third request, paras (7) and (8).

The majority decision of the Tribunal is that:

(4) Save as stated in para (3) above, the balance of the appeal (all of which challenges the First Respondent's adjudication on the FOIA, s14(1) issues) is well-founded.

Accordingly:

(5) (a) the appeal in respect of the requests referred to in paras (1), (2) and (3) above is dismissed;
(b) save as stated in (a) the appeal is allowed;
(c) the Second Respondent must, within 35 days of the date of this Decision, communicate to the Appellant the information requested by the first request, paras (k), (n) and (p) and the third request, paras (5) and (6).

REASONS

Introduction

1. The Appellant, Dr Doreen King, to whom we will refer by name, is a retired consultant psychiatrist. She is related to Miss X, who is a nurse by profession. Miss X was employed by the Second Respondent ('the Trust') for about two years ending in August 2014, when she was dismissed for gross misconduct, namely subjecting one colleague to harassment related to sexual orientation and passing a racist comment to another. In Employment Tribunal ('ET') proceedings heard over eight days in April 2015 in which she was represented by Dr King, she brought a series of complaints which included allegations of unlawful discrimination and victimisation under the 'whistle-blowing' provisions. All claims failed.

2. The 'whistle-blowing' claims alleged that Miss X had made disclosures to the Trust about an alleged lack of drug trolley keys and/or 'POD' keys[1] on the ward where she worked and about an alleged incident in 2013 to do with a blood transfusion. The ET found that the disclosures relied upon did not attract the protection of the applicable legislation.[2] Neither tended to show that health and safety were compromised or put at risk. Moreover, in neither instance did Miss X believe that any risk to health and safety was shown. Rather, the ET found a "strong possibility" that the 'whistle-blowing'

[1] Keys to lockers for 'patients' own drugs'
[2] The Employment Rights Act 1996, Part IVA

allegations were made in retaliation for a complaint about Miss X made by a colleague.

3. Not only did Miss X suffer a resounding defeat in the ET, she was also the subject of a successful costs application on behalf of the Trust and ordered to pay £20,000 towards its expenditure in resisting her claims. In its written reasons for making the costs order, the ET found that the claims were baseless and false and that Miss X had acted unreasonably and vexatiously in bringing them.

4. It seems that attempts were made to re-open the ET proceedings. At all events, no reconsideration application succeeded and no effective appeal was raised.

5. Between May and July 2014, in parallel with the disciplinary proceedings, the Trust carried out an investigation into the concerns relied upon by Miss X as 'whistle-blowing' matters and she was made aware of the resulting findings and recommendations. In August 2014 the Trust advised Dr King that the drugs management matters which she had raised would not be further investigated.

6. Fitness to practise proceedings followed in 2016 before the Conduct and Competence Committee of the Nursing & Midwifery Council ('NMC'), based on allegations that Miss X had made remarks in the workplace about the sexuality of a colleague. The charge was found not proved and the NMC placed on record its concerns about the reliability of witnesses produced by the Trust in support of it. Dr King again represented Miss X.

7. On 15 March 2017 Dr King complained to the Trust that the matter of uncontrolled access to drugs had still not been resolved. This led to the Trust, in a letter of 4 April 2017[3], classifying Dr King and Miss X as vexatious and unreasonably persistent complainants under the terms of their complaints policy and giving notice that further correspondence would not be acknowledged or replied to.

8. On 9, 19 and 20 April 2017, Dr King presented to the Trust three separate requests under the Freedom of Information Act 2000 ('FOIA'), for information relating to drugs security measures at Queen's Hospital, Romford. We will refer to them as the first, second and third requests. The first had eight parts, the second four and the third eight. The Trust aggregated the requests and dealt with them compendiously in a response dated 27 June 2017. It disclosed some of the requested information, stated that it did not hold some of the requested information, and refused to disclose some of the requested information, citing FOIA s12 (cost of compliance), s14 (vexatious requests), s21(1) (information available by other means), and s43 (commercial interests).

[3] Another version of the letter, dated 7 April 2017, appears in the bundle before us. Nothing turns on the date of the copy sent to Dr King.

9. Dr King was dissatisfied. Following a review, on 19 September 2017, the Trust maintained its position.

10. On 21 September 2017 Dr King complained to the Commissioner about the way in which the Trust had dealt with her request. An investigation followed.

11. The Trust subsequently abandoned its reliance on s21 and Dr King abandoned her challenge to the Trust's reliance on s43. By the time of her decision (20 September 2018) the Commissioner summarised the live issues, so far as now material, as follows:

> **34. The Commissioner considers the scope of this case is to determine whether the Trust is correct when it says that it does not hold further information in relation to points (p) and (q) of the request dated 9 April 2017.**
>
> **35. The Commissioner will also consider whether the Trust is entitled to rely on section 12(1) of the FOIA as a basis for refusing to provide the withheld information in relation to point (j) of the request dated 9 April 2017 and point (8) of the request dated 20 April 2017.**
>
> **36. The Commissioner will also look at whether the Trust is entitled to rely on section 14(1) of the FOIA as a basis for refusing to provide the withheld information in relation to points (k), (n), (o) and (p) of the request dated 9 April 2017, and points (5), (6) and (7) of the request dated 20 April 2017.**

12. By her Decision Notice the Commissioner determined that:

> **5. … the Trust:**
>
> - **Has, on the balance of probabilities, provided all the information that it holds within the scope of point (q) of the request dated 9 April 2017, and has complied with its obligations under section 1(1) of the FOIA with regards to this part of the request.**
> - **Has failed to state whether or not it holds any manual copies of the email communications falling within the scope of point (p) of the request dated 9 April 2017, and has not complied with its obligations under section 1(1) of the FOIA with regards to this part of the request.**
> - **Has breached section 10(1) of the FOIA with regards to all three requests, as it did not provide the complainant, within 20 working days, the information it held within the scope of these requests. In addition, the Trust did not communicate to the complainant, within 20 working days, whether or not it held any manual copies of the email communications falling within the scope of point (p) of the request dated 9 April 2017.**
> - **Has correctly applied section 12(1) of the FOIA in relation to point (j) of the request dated 9 April 2017 and point (8) of the request dated 20 April 2017. It has also complied with requirements of section 16(1) of the FOIA, in that no meaningful advice could have been provided as to how to refine the information requested in these parts of the requests for information. However, in failing to issue a refusal notice within the time for compliance, the Trust breached section 17(5) of the FOIA.**
> - **Has correctly applied section 14(1) of the FOIA in relation to points (k), (n), (o) and (p) of the request dated 9 April 2017, and points (5), (6) and (7) of the request dated 20 April 2017.**

The Commissioner further required the Trust to provide Dr King with an answer, within 35 days, to the query about manual copies mentioned in the second and third bullet points above.

13. By her[4] notice of appeal dated 26 September 2018, Dr King challenged the Commissioner's decision on a number of grounds.

14. By her response dated 31 October 2018 the Commissioner resisted the appeal contending that her decision of 20 September 2018 was correct.

15. The case came before the Tribunal[5] on 19 February 2019 and was adjourned with directions given for the joinder of the Trust as Second Respondent.

16. By its response to the appeal dated 19 March 2019 the Trust resisted the appeal on a variety of grounds.

17. The appeal came before us for hearing on 18 July this year, with one sitting day allowed. Dr King appeared in person. The Commissioner did not attend, relying principally upon her decision notice and response. Mr Darryn Hale, solicitor, represented the Trust.

18. We gave Dr King the opportunity to give evidence but after discussion she did not feel it necessary to do so. Mr Hale agreed that there was no need for live evidence. Accordingly, we proceeded on the basis of oral argument only, hearing first from Dr King, then from Mr Hale and then, briefly, from Dr King in reply. In accordance with our wishes, the submissions were completed during the morning session, leaving us sufficient time in the afternoon for our private deliberations.

Requests and Issues

19. The case before the Commissioner and before us was confined to elements of the first and third requests, the second having fallen away entirely. The parts of the first request on which we were asked to adjudicate were the following:

> **List of specific details required but entire reports and enquiries are requested relating to Queen's Hospital, Romford of security and availability of drugs and non-compliance with the safe locking away of drugs**
>
> **All details about Queen's Hospital, Romford of security and availability of drugs, including**
> **(j) Details relating to death on [redacted] Ward related to open PODs prior to August 2013. Details of any other deaths specifically related to drug access by patients/free access to drugs either before or after August 2013.**
> **(k) Reports and details of whether or not the CQC found any clinical concern/health and safety risk in relation to trolleys being left unlocked, key access/uncontrolled**

[4] The notice of appeal appears to name Miss King and Dr King as joint Appellants but that cannot be right as Dr King alone made the relevant requests.
[5] Judge Brian Kennedy QC, Dr Henry Fitzhugh and Dr Roger Creedon

drug key availability/POD access/administration of drugs by nurses (August 2013 to date), including all the papers on which the reports were based.

…

(n) Details of findings/improvements needed/made at Queen's Hospital while in special measures in relation to nursing trolleys being left unlocked, key access/uncontrolled drug key availability/POD access/administration of drugs by nurses (August 2013 to date).

(o) Details of all reasons found for unlocked trolleys/PODs (2013 to date).

(p) Details of [redacted], Deputy Chief Nurse/[redacted]/and or (sic) CQC concerns/reports/discussions/other in relation to key availability/drug access on [redacted] [same ward as (j)] and throughout the hospital (August 2013-August 2014).

(q) All background papers/consultations and report (sic) on the formulation of a Trust policy for drug key access for nurses (August 2013 to date).

20. The material parts of the third request were these:

(5) Details of clinical concern/health and safety risk in relation to nursing trolleys being left unlocked/key access/POD access, 2013 to date, and enquiries made by management.

(6) Details of findings/improvements needed/made at Queen's Hospital in relation to nursing trolleys being left unlocked, key access/POD access, 2013 to date if not included in (5).

(7) Details of all reasons found for unlocked trolleys/PODs (2013 to date) if not included in (5) -(6) above.

(8) Details of death on [redacted] Ward [same ward as in (j) above] related to open POD's prior to August 2013; and data of avoidable deaths related to nursing trolleys being left unlocked, key access/POD access before or after August 2013.

21. We will refer to the requests by the appropriate letter or number.

22. In relation to requests (p) and (q), the Trust stated to the Commissioner that it did not hold the information sought. As to (p), the Commissioner found that it had not searched the Employment Tribunal file and accordingly had issued a response which did not comply with FOIA, s1(1). As to (q), the Commissioner concluded on the balance of probabilities that the information requested was not held.

23. Dr King challenges the Commissioner's decision on (q); the Commissioner and the Trust seek to uphold it. We will call this 'the information not held point'.

24. In answer to requests (j) and (8), the Trust relied upon FOIA, s12(1) and the Commissioner agreed. Dr King challenges that adjudication; both Respondents defend it. We will call this 'the cost of compliance point'.

25. The Trust resisted all the other 'live' requests ((k), (n), (o), (p), (5), (6) and (7)) as vexatious (FOIA, s14(1)), and was supported in that contention by the Commissioner. Dr King challenges all findings of vexatiousness; the Commissioner and the Trust say that they are valid. We will call this 'the vexatious requests point'.

The Law

26. FOIA, section 1(1) enacts a general right of access to information held by public authorities.

27. Under the Act, 'information' means information recorded in any form (s84).

28. By s12(1) the right under s1(1) does not oblige a public authority to comply with a request if the authority estimates that the cost of complying with the request would exceed "the appropriate limit". That limit is set by subordinate legislation[6] at £450, based on 18 hours' work at an hourly rate of £25.

29. By the Act, s14(1), a public authority is excused from complying with a request for information if the request is "vexatious". In *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 (AAC), the Upper Tribunal ('UT') (Judge Nicholas Wikeley), at para 27, expressed agreement with an earlier first-instance decision that –

> **"… vexatious", connotes "manifestly unjustified, inappropriate or improper use of a formal procedure."**

The judge continued (para 28):

> **Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful 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). However, these four considerations … are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list.**

30. *Dransfield* and a conjoined case were further appealed to the Court of Appeal. Giving the only substantial judgment (reported at [2015] 1 WLR 5316), Arden LJ noted (para 60) that the UT's guidance just cited was not directly in issue on the appeal, but added these remarks (para 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 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 this is consistent with the constitutional nature of the right.[7] The decision-maker should consider all the**

[6] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

[7] This echoes remarks in paras 2 and 3 about the importance and constitutional significance of the right to freedom of information.

relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.

In another significant passage, Arden LJ remarked (para 72):

Before I leave this appeal, I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being *squandered* on disproportionate use of FOIA" … For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied.

31. In *Dransfield* the UT also passed certain comments on the Commissioner's Guidance relating to vexatious requests which, we understand, led to parts of it being modified. On appeal, Arden LJ commented (para 32):

The IC has a statutory obligation … to issue guidance … The guidance covers such matters as dealing with vexatious requests. Various government departments have also issued guidance … As this guidance does not have special status in matters of interpretation, it is not necessary for me to cite it in my conclusions. For my own part, while I welcome the issue of such advice, I do not find it provided assistance in resolving the issues on these appeals.

We likewise note the Guidance but our interpretation of the law is founded on the statutory language and relevant decisions of the higher courts.

32. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) If on an appeal under section 57 the Tribunal consider –

(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.

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

The Rival Cases

Dr King's case

33. Although she is plainly a most capable individual, Dr King would be the first to acknowledge that her skills do not lie in the field of information rights litigation. She has no legal training. Substantive law and practice in this area are far from straightforward. Plainly, as a litigant in person she has been at a considerable disadvantage throughout. In these circumstances, it is not surprising that her case has been expressed in a number of different ways.

Certain iterations (in correspondence or in other documents, some entitled 'applications ') have been difficult to follow. Some have been hard to reconcile with the applicable legal framework. Many have strayed well beyond matters relevant to the issues to be decided in the case. We make these points not by way of criticism of Dr King but to place on record our appreciation of the difficulty which she has faced in constructing her arguments.

34. On the information not held and cost of compliance points, Dr King's main argument was that the Trust deliberately misinterpreted the request.

35. On the vexatious requests point Dr King placed considerable reliance on a document called "Delivering Our Potential" dated August 2016, in which the Trust reported on progress over the preceding 18 months in achieving improvements called for by the CQC. Dealing with the subject of medicines management, it noted under the heading, "Where we were", that baseline data showed that 27% of wards had been failing to stow drugs trolleys appropriately after use with 14% not being locked and that, under the heading, "Where we are now", an audit showed that by the date of the report only 2% of wards were still failing to stow drugs trolleys appropriately, and very few were not locked. Dr King told us that this document contained information which was new to her and prompted her to make the disputed requests. She also complained that the Trust impermissibly relied upon Miss X's prior claims and complaints directed at it, for which she (Dr King) could not be held responsible.

The Trust's case

36. Mr Hale submitted shortly that the Commissioner had decided the information not held and cost of compliance points correctly and that there was no basis interfering with her adjudication.

37. On the s14 issue, the thrust of Mr Hale's argument was that the requests needed to be viewed in the light of the antecedent history, and that, so considered, they could be seen to be plainly vexatious. He pointed out that, prior to the disputed requests, Dr King and the Trust had been engaged (directly or indirectly) in an extended series of processes over a significant period. These included the internal investigations and hearings, the ET litigation, the NMC hearing, the CQC investigation and the (brief) complaints procedure. The combination of processes was an important factor which accentuated the burden on the Trust and should incline the Tribunal towards upholding the invocation of s14.

The Commissioner's case

38. The Commissioner stood by her analysis and conclusions on the information not held and costs of compliance points.

39. On the vexatious requests point, the Commissioner explicitly acknowledged a clear public interest in favour of the disclosure of the requested information but, essentially for the reasons advanced by the Trust, defended her conclusion that s14 was correctly applied.

Analysis and Conclusions

40. The Tribunal is agreed on much of the dispute but divided on one aspect.

The information not held point – unanimous view

41. Contrary to Dr King's submission, we are satisfied that the request, properly interpreted, was for recorded information generated by activity aimed at the formulation of a Trust-wide policy relating to drug key access for nurses. In argument she referred to a "small 'p' policy" (presumably informal, perhaps local, guidance), but her request cannot be read as asking for information of that sort. The Trust has stated than no Trust-wide policy was at any material time in contemplation, let alone formulated and that (a) at all relevant times it had a formal umbrella policy, the Medicines Care, Custody, Prescribing and Administration Policy (extracts from which were shared with Dr King by means of a letter of 19 September 2017) and (b) informal 'guidelines' were in place relating to drug key handling during the period to which the request relates (August 2013 onwards). We did not understand Dr King to raise any challenge to the facts put forward by the Trust. In any event, we agree with Mr Hales that the Trust's account is perfectly plausible and that we are shown no evidence which calls it into question. In these circumstances, we are clear that the Commissioner was entirely right to uphold the Trust's case on request (q).

The cost of compliance point – unanimous view

42. The Trust took the s12(1) point in its letter to Dr King of 17 November 2017, setting out its grounds in full. It explained that, given the time frame stipulated in requests (j) and (8) (before and after August 2013), it would be necessary to search two databases for material dating back from April 2017 to 2006. An initial search produced 900 reports. Of these cases 174 were identified as "catastrophic". To establish if these, or any of them, fell within the terms of the request, it would be necessary to conduct manual searches. Assuming a time allocation of 8 to 10 minutes per search, it is self-evident that the statutory maximum of £450 (the notional cost of 18 hours' work at £25 per hour) is exceeded.

43. Dr King did not quibble with the Trust's arithmetic. Rather, she based her challenge on the complaint that it had not focused on the "right time frame". We cannot agree. Her request was very clear and it was correctly interpreted.

The surprising assertion that the Trust not only misinterpreted the request but did so deliberately is, to our minds, simply unfounded.

The vexatious requests point – unanimous view

44. We can deal with two short points at the outset. First, requests (7) and (8) are, we think, simply duplicates of requests (o) and (j) respectively. They add nothing of substance and, on that simple ground, are plainly vexatious as that word is interpreted in *Dransfield*.[8] There is no possible reason for supposing that, given the corresponding requests made less than a fortnight earlier, the information sought could be of any benefit to the requester or to the public at large. At the start of the hearing we gave Dr King the opportunity to consider whether the apparent duplication was likely to assist her case in any way, but perhaps she was not ready for the question. At all events, she did not elect to abandon the superfluous requests.[9]

45. Secondly, we are satisfied that requests (7) and (o) are *both* vexatious on the separate ground that they focus on a question of very limited relevance and would put the Trust to trouble and expense out of all proportion to any benefit (to the requester or to the public at large) which the information sought could yield. Clearly, the concern to which the requests are directed is over drugs security measures and procedures. The aim, as all agree, must be to ensure a high level of security. But asking for the "reason for unlocked trolleys" is idle. The same answer could be given in every case: that someone omitted to lock the trolley. Such an answer would be worthless.[10] Another view would be that the Trust would have to conduct an investigation into every instance of a trolley being unlocked and search for recorded information (if any) which might reveal the reason (or a contributing reason) for the trolley being left unlocked. This would plainly impose an excessive burden on the Trust and it is exceedingly hard to envisage any benefit resulting from the exercise. The chances of recorded information being sufficient, and sufficiently consistent, to demonstrate reliably a single reason, or a manageable number of principal reasons, for trolleys or lockers being left unlocked seem thoroughly remote. In any event, the reason(s) is/are almost beside the point. Whatever the precise reason(s), the problem was to do with poor practice, which the Trust's management needed to put right. It was capable of being addressed and, according to the Delivering Our Potential report, the content of which Dr King did not attack, had been substantially remedied by August 2016. This factor reduces all the more the materiality of requests (o) and (7) presented some eight months later.

[8] The same result would have been more simply achieved had the Trust invoked s14(2) (repeat requests).
[9] We are mindful that requests (k) and (n) are also correspond quite closely with requests (5) and (6) respectively but here there are differences and we do not think that it would be right to take the peremptory step of excluding the later two as being inherently vexatious.
[10] And it is deeply unlikely that a search would uncover any document containing such a statement of the obvious.

46. That leaves five requests, (k), (n), (p), (5) and (6) ('the surviving requests') although, as already noted, the numbered requests seem to cover similar ground to requests (k) and (n).

The vexatious requests point – majority view

47. Not without hesitation, the majority, consisting of Judge Snelson and Mr De Waal, have concluded that the Trust did not validly invoke s14 in respect of the surviving requests. We have several reasons. In the first place, the main subject-matter of the requests – drugs management procedures in a hospital setting – is obviously important.

48. Second, the scope of the requests is narrow and specific. They are about drugs security arrangements and drugs administration at a particular hospital over a four-year period.

49. Third, we regard the Trust's case as to on the burden imposed by the requests is misplaced or overstated in four significant ways. The first is that it relies on the disclosure already given in the ET proceedings without detailing what that disclosure consisted of and thus without making good its assertion that the surviving requests merely ask again for what has already been provided. As Mr Hale accepted in argument, the ET proceedings were not 'about' whether Miss X's allegations of bad practice were correct. The key issues raised by her 'whistle-blowing' claim were whether her disclosures were protected and, if so, whether she was dismissed or suffered any other detriment because she had made them (see the Employment Rights Act 1996, ss43A, 43B, 43C, 47B and 103A). Protection does not depend on whether disclosures are true but upon what the putative 'whistle-blower' believes the information shows and whether that belief is reasonable. On what has been put before us it is far from clear that the Trust's duty of disclosure in the ET case must have extended to all material covered by the surviving requests which had come into existence by the time of the ET hearing. And in any event, the requests extend to the two years following that hearing. The second difficulty for the Trust is that it impermissibly relies on the unrelated NMC proceedings as having contributed to the burden to which the surviving requests are now added (see its response, para 18). The NMC case concerned Miss X's fitness to practice and arose from misconduct allegations against her which were ultimately found to be unsubstantiated, wholly or largely because of the poor quality of the witnesses supplied by the Trust. It would obviously be quite unfair to Dr King to treat the fact of the Trust's involvement in the NMC proceedings as supporting their case under s14. A third, similar problem with the Trust's case lies in its reliance on its own decision to brand Miss X and Dr King as vexatious and unreasonably persistent complainants under its complaints procedure. That decision of itself proves nothing. No doubt Dr King would say that, had the Trust engaged with her complaint, the requests under FOIA would never have been made. A fourth, more general weakness of the Trust's case as to burden is

that it rests on assertion, not evidence. The response, drafted by its lawyers, is not evidence: it is a statement of the key facts which a party will seek to establish and the legal conclusions which it will ask the Tribunal to reach on the facts it finds. Facts are proved on evidence. We are not assisted by unparticularised assertions in the response of "thousands of hours" being spent on searches for documents requested by Miss X or Dr King since 2013 (para 17) or "frequent" and "overlapping" and "duplicated" requests (para 18).[11] The Trust bears the onus of showing that the requests are vexatious. It cannot do so on the strength of general statements, unsupported by witness or documentary evidence. Moreover, Dr King cannot fairly be asked to defend herself against a case based on assertions which lack any specificity and therefore cannot be the subject of challenge (save by counter-assertion) or constructive debate.

50. Fourth, while we accept that the Tribunal is not limited to considering the requests in isolation and must consider the wider context, we think that the Trust certainly goes too far in seeking to rely on the ET's finding that Miss X acted vexatiously in the 2015 litigation. Dr King acted as Miss X's representative only. They are relatives and Dr King has loyally supported Miss X throughout, but we consider that it would be quite unfair for this Tribunal to allow the ET's costs judgment against Miss X to influence our assessment of whether Dr King's surviving (2017) requests were vexatious.[12]

51. Fifth, no suggestion of bad faith or a malign motivation has been put to Dr King, and, as we have noted, Mr Hale did not request the opportunity to cross-examine her. In these circumstances, we cannot accept the assertion (response, para 24) that the requests were no more than a device to continue the dispute heard by the ET. To repeat, the onus is on the Trust to make out its case. In her written submission responding to the Commissioner's response (undated but apparently sent to the Tribunal on 12 or 22 November 2018) Dr King stated that her motivation in presenting the requests was in part to support Miss X, who feels that she has been denied justice, but that her "overriding purpose" was to further social justice and openness and promote change. Absent any evidence to undermine it, we accept her case on motivation. We also accept her unchallenged statement before us (which at least has the status of evidence, even if unsworn and untested) that the requests were prompted by the new information gathered from the Delivering Our Potential report of August 2016 (already mentioned) which she came across some time after it was published.

52. Sixth, it is common ground that, although she has been determined and persistent throughout her dealings with the Trust, she has not been rude or abusive. There is no suggestion of her activities in support of the requests or in any of the earlier processes having caused any harm or distress to Trust staff.

[11] We do not understand these to relate to the duplicated and overlapping requests now before us (already considered).
[12] The authorities show that the concept of 'vexatiousness' for the purposes of the ET's costs jurisdiction has a different meaning from the s14 sense.

53. We have considered all the circumstances of the case, mindful of the need for a holistic approach. Stepping back and reviewing the overall picture, we are satisfied that the Trust has not made out its case that the surviving requests were vexatious. Accordingly, we consider that the Commissioner was wrong to find that s14(1) was correctly applied. To return to the words of Arden LJ in the *Dransfield* case, the "high standard" which that provision sets has not been met and the ground for depriving Dr King of her "constitutional right" has not been established.

The vexatious requests point - minority view

54. Ms Tatam parts company from the majority on the surviving requests in that she agrees with the Respondents that s14(1) was rightly applied. She has several main reasons which are set out below, often adopting the very words she uses in a note helpfully supplied to the judge.

55. First, Ms Tatam sees very little value or purpose or public interest in the information that would be generated by the requests, especially by the date of the request – being some months after the CQC report was published and the Trust had made changes to rectify problems identified. The published information shows what improvements the Trust did find and what (significant) improvements have been made by the Trust since. Ms Tatam takes the view that the majority opinion on requests (o) and (7) is equally applicable to request (k).

56. Second, Ms Tatam considers that the formulation of the surviving requests makes them vexations. For example, request (p) is both too specific and too detailed, covers the same ground as the CQC investigation and appears to be an impermissible attempt to 'name and shame'. Request (n), while raising the question of improvements while the hospital was in special measures (a matter which has public interest value) also includes elements which overlap significantly with other requests – a relevant factor when considering vexatiousness. And the reference in request (k) to "the administration of drugs by nurses (August 2013 to date)" is excessively wide and open to numerous interpretations. Ms Tatam cannot agree with the majority view that the scope of the surviving requests is narrow.

57. Third, Ms Tatam disagrees with the majority view on the question of the burden on the Trust. There is a clear connection between the issues in the ET proceedings and those raised in the surviving requests, and the scale of the disclosure exercise is evidenced in the bundle and was plainly very considerable. This is relevant. So also, in Ms Tatum's view, is the work invested by the Trust in the NMC case, despite the fact that that case was 'lost'. In addition, Miss X brought 'cases' against 12 members of staff, which had to be refuted. And the Trust's claim, albeit unparticularised and made by

assertion rather than evidence, of having spent "thousands of hours" in searches for documents requested by Dr King and Miss X, is reasonable. Specifically, on the question of burden, Ms Tatam draws attention to bundle documents evidencing what she describes as a sustained campaign of correspondence consisting of three letters between 23 February and 27 March 2017 and eight between 9 April and 8 July of the same year.

58. Fourth, Ms Tatam is not prepared to take at face value Dr King's claimed, "overriding purpose". No evidence in the bundle substantiates such a purpose and she has not shown how the information sought would assist the wider public interest debate.

59. Fifth, Ms Tatam points to a number of illustrations in the bundle of what she sees as Dr King's: (a) persistence, including unreasonable persistence; (b) attempts to re-open an issue via the Chief Executive and the Board member; (c) frustration leading to her overstating her case; (d) refusal to take no for an answer.

Outcome and Postscript

60. The majority view prevails. Accordingly, the appeal succeeds to the extent stated in our Decision above but is otherwise dismissed.

61. The Tribunal is unanimous in expressing the hope that our determination will mark an end to the protracted hostilities in which the parties have been involved (directly or indirectly) for much too long. In any event, it seems a statement of the obvious to say that further freedom of information requests directed to the Trust by Dr King are likely to carry ever-greater risks of being successfully met by s14 defences and that she would do well to take independent advice before venturing down the same road again.

62. Finally, Ms Tatam wishes to put on record two particular concerns arising out of this case. First, she considers it regrettable and unhelpful that the Trust failed to supply Mr Hale with an indexed copy of the bundle and that no representative of the Trust was present to support him. Second, she feels that the Commissioner's Decision Notice, paras 90-95 were unfortunately presented in that it was inappropriate, under the heading "Complainant's representations", to include the Commissioner's comments on such (inferred) representations.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 12/08/ 2019