

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2015

Public Authority: The National Gallery

Address: Trafalgar Square
London
WC2N 5DN

Decision (including any steps ordered)

1. The complainant requested information from the National Gallery about a contract for providing visitor services and security. The National Gallery refused the request under section 14(1) of FOIA on the basis that the request was vexatious.
2. The Commissioner's decision is that the National Gallery has correctly applied section 14(1) to the request and so he does not require it to take any further steps to ensure compliance with the Act.

Request and response

3. On 24 June 2015 the complainant wrote to the National Gallery and requested information in the following terms:

"I would like to request the following information and believe that I have a right to receive it under the Freedom of Information Act 2000.

1) The cost of the contract provided by the company CIS for Visitor Services and Security during the course of the Rembrandt exhibition in 2014/2015.

2) The monthly costs of the CIS contract for services in the Sainsbury Wing since the end of the Rembrandt exhibition for which figures have been finalised.

3) Which budget allocations have the cost of these contracts been paid from."

4. The National Gallery responded on 29 June 2015 and refused to provide the requested information citing section 14(1) of FOIA.
5. The complainant requested an internal review on 29 June 2015. The National Gallery provided the outcome of the internal review on 22 July 2015 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 23 July 2015 to complain about the way his request for information had been handled, specifically that the National Gallery had applied section 14(1) to his request.
7. The Commissioner considered whether the National Gallery was correct to rely on section 14(1) in responding to the complainant's request.

Reasons for decision

8. Section 14(1) of FOIA provides that a public authority is not obliged to comply with a request if it is vexatious.
9. The term "vexatious" is not defined in FOIA, however, the Upper Tribunal in *The Information Commissioner v Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013)* took the view that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question of whether a request is vexatious ultimately depends on the circumstances surrounding that request.
10. The Upper Tribunal's decision establishes the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious. The Commissioner's guidance on section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
11. In its decision, the Upper Tribunal emphasised the need to protect public authorities' resources from unreasonable requests when it defined the purpose of section 14 as follows:

"Section 14...is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)...The purpose of Section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA..." (paragraph 10).

The National Gallery's arguments

(i) The request was made as part of a campaign

12. The National Gallery informed the Commissioner that in October 2014, it outsourced security at its temporary Rembrandt exhibition to the private security firm CIS. The contract was subsequently extended in scope and CIS undertook visitor-facing and security services within the Sainsbury Wing at the Gallery.
13. The Gallery went on to explain that it is being affected by ongoing strike action, which commenced in February 2015, held by the PCS trade union ("PCS") which opposes the outsourcing of some visitor-facing and security services and that this was also linked to a campaign over the dismissal of a member of its staff. It stated that, whilst the strike action represented the most prominent aspect of the campaign, this had been supplemented with announcements on PCS's website and through the use of social media. A petition was started on the 38 Degrees website and an open Facebook group page was also set up. The National Gallery explained that PCS sent emails to signatories of the petition encouraging them to submit a request under the Freedom of Information Act to it.
14. The Commissioner was informed by the Gallery that the complainant's request was one of 883 identical requests that it received between 12 June and 30 June 2015. In addition to the texts of the requests being identical, it stated that it had been able to establish that all of the emails originated from the same source, the PCS's website. Following the issuing of a refusal notice on 29 June 2015, the Gallery stated that it had received 149 requests for internal review, including one from the complainant.
15. The Gallery explained that its internal review was completed by 22 July 2015 and upheld its original decision. The outcome of the internal review was sent to 147 recipients, including the complainant, after two requesters had specifically stated that they did not wish to receive notification of the outcome. Following the internal review, a further response was received from 20 correspondents.

16. To provide some context, the Gallery gave the Commissioner details of the number of requests that it has received in each year since the Act came into force in 2005. The number of requests in any year, prior to 2015, never exceeded 45.
17. The National Gallery explained that it gave careful consideration to how to respond to the many identical requests received, including the complainant's. It informed the Commissioner that the complainant had argued in correspondence with the Gallery that he held a legitimate and genuine interest in receiving the information that he had requested. It pointed to an email that he sent on 22 July 2015 in response to the Gallery's decision to apply section 14(1) to his request. In this email he stated that:

"I am neither a part of the stated campaign group, nor did I submit a request designed to cause disruption. Although the matter was brought to my attention via said campaign group, I contacted you as a concerned and interested patron."
18. The Gallery noted that the complainant had conceded that the matter was brought to his attention by PCS's campaign. It argued that it was reasonable to expect that those individuals who submitted requests under the Act via PCS's website understood that they were not acting alone and that they were part of a larger campaign. It indicated that this point had been explicitly acknowledged by a number of individuals.
19. The Gallery contended that by acting in unison with a large number of individuals, the complainant submitted a request that formed part of a campaign. It believed that it was justified in grouping his request with the many others that were received and viewing it as vexatious regardless of his stated intentions. It went on to state that, at all times, it had focused on the request and not the individual making the request.
20. The Gallery informed the Commissioner that it believed that it was appropriate to look past the complainant's individual request and to consider PCS as the source of the multiple requests, given that they were all identical. In reaching this conclusion, the Gallery considered advice issued by the ICO that a seemingly reasonable request may be defined as vexatious when considered in a wider context. Regardless of any legitimate purpose behind the complainant's request, the Gallery emphasised that it was identical to 882 other requests received during a two-and-a-half week period. At least 661 identical requests for information had already been submitted to the Gallery by the time the complainant submitted his request.

(ii) Significant burden of the requests in terms of expense and distraction

21. The National Gallery explained to the Commissioner that its archivist has responsibility for Freedom of Information as the Gallery's Freedom of Information 'specialist'. Requests under the Act were submitted to the Gallery's 'information' email address and then forwarded to the Gallery's archivist. The Gallery's archivist had responsibility for coordinating the Gallery's response to requests, for acknowledging receipt of requests, logging them and sending a reply. This work was undertaken in addition to other duties such as cataloguing, reading room invigilation and records management tasks.
22. The Gallery went on to explain that to process 883 identical requests would have put a significant burden on both the archivist and the Gallery in terms of both expense (staff time) and distraction (the inability to carry out other duties). The number of requests it received via PCS's website was more than double the total number of requests received by the Gallery since the Freedom of Information Act came into force. The Gallery informed the Commissioner that it did not have the infrastructure to easily deal with such a large number of requests. Due to the relatively small number of requests that had been received since 2005 it did not believe that it would be appropriate to allocate greater resources to Freedom of Information requests. It explained that, since 2005, placing the responsibility for Freedom of Information with the Gallery's archivist had worked well. However, the unexpected submission of hundreds of requests would have been overwhelming had they been dealt with individually in the usual manner. The Gallery was of the view that the generation of a large number of requests was intended to place a significant and disproportionate burden on it. It believed that the disproportionate and significant burden being placed on it by the requests would have been fully understood by PCS.

(iii) The requests were designed to cause disruption and annoyance

23. The National Gallery informed the Commissioner that it had been able to establish that the multiple requests were part of a campaign orchestrated by PCS. It contended that as PCS had previously submitted a Freedom of Information request to the Gallery, it was aware of its process for handling such requests. The Gallery believed that PCS could have submitted a single request and publicised that action and the Gallery's response. Instead, PCS chose to orchestrate a campaign, encouraging multiple identical requests to be submitted with a campaigning rhetoric that such requests would keep pressure

on the Gallery. The Gallery contended that PCS situated the Freedom of Information requests within the wider context of their campaign to have a member of staff reinstated.

24. The Gallery explained that, due to the approach taken by PCS, in contrast to a previous request for information under the Act, it concluded that the intention of PCS, and by extension those requests submitted via PCS's website, was to cause disruption and annoyance. It informed the Commissioner that following the Gallery's issuing of a refusal notice, a post was made to the campaign's Facebook page which read: *"Thank you to everyone who's contacted us about the Gallery's F.O.I. reply. We'll be in touch soon to let you know the next step. So we're vexatious hey?"*. This was accompanied by a winking 'emoji'. The statement was viewed by the Gallery as being irreverent in nature. It believed that it was intended to incite group action, particularly given that advice on further action was stated as being forthcoming. The Gallery considered that PCS's incitement of group action, manifested through the many identical requests, as intended to cause disruption and annoyance. Therefore, the multiple requests received, including the complainant's, were designed to cause disruption and annoyance.

(iii) The requests had the effect of harassing the public authority or its staff

25. The Gallery explained to the Commissioner that once the volume of identical requests became apparent, it reached the conclusion that PCS was employing a tactic intended to harass the public authority and its staff. It believed that PCS had sought to instigate an email bombardment. It noted that a representative of PCS sent emails encouraging the submission of requests under the Act.
26. Following the issuing of the Gallery's refusal notice, it informed the Commissioner that a number of individuals engaged in argumentative or pestering email correspondence. One individual sent eight emails between the issuing of the refusal notice and the circulation of the internal review. Others targeted the archivist personally or professionally. It believed that such emails amounted to harassment of its staff. Whilst such emails were received after the refusal notice was sent they were received before the internal review had been concluded and helped to inform its conclusion that the original decision to view the requests as vexatious was correct.
27. It was noted by the Gallery that, although the correspondence received after the refusal notice was sent by individuals and not via PCS's website, it had evidence to show that PCS continued to encourage email contact with it. Whilst the Gallery accepted that PCS

did not encourage the sending of impolite emails, it believed that such emails were an inevitable consequence of conducting a campaign intended to apply pressure on the Gallery. In this regard, it contended that the campaign led to the harassment of its staff.

28. The Gallery informed the Commissioner that it accepted that the complainant's correspondence had been courteous and was not, in itself, intended to harass its staff. However, it had concluded that his request was part of a campaign, the purpose of which, whether he appreciated it or not, was intended to harass its staff.

(iv) The requests characterised as manifestly unreasonable

29. The Gallery explained that it had reached the conclusion that PCS was acting in a manifestly unreasonable manner by prompting multiple identical requests. It believed that this was particularly evident as the Union's representatives understood the process for submitting a Freedom of Information request to the Gallery and could have followed this process with a single request.
30. The Gallery informed the Commissioner that, as it had previously noted, a representative of PCS had sent email reminders to encourage individuals to submit a request. Posts were also added to the 'No Privatisation' Facebook page which prompted requests to be submitted. The Gallery had concluded that such behaviour was manifestly unreasonable. It viewed such behaviour as simply an attempt to increase the number of identical requests which were being submitted. In the Gallery's view, the email reminders and Facebook posts did not represent a reasonable attempt to obtain information.

(v) No serious purpose or value to the requests

31. The Gallery accepted that, taken in isolation, the Freedom of Information request submitted by the complainant did have serious purpose or value. However, it believed that PCS's representatives would also have been aware of this point. It had concluded that, as PCS chose not to submit a single request but rather to incite hundreds of individuals to submit identical requests, the requests taken as a whole lacked serious purpose or value. The Gallery believed that the intention behind the requests, as they originated from a campaign orchestrated by PCS, was not to acquire information but to apply pressure. The Gallery had concluded that by encouraging multiple identical Freedom of Information requests, for information they did not expect to receive, PCS disregarded any serious use of the Act and instead engaged in misuse of the legislation.

The Commissioner's view

32. The Gallery argued that the complainant's request should be seen as part of a campaign by PCS connected to industrial relations issues at the Gallery.

33. As regards the issue of requests linked to campaigns, the Commissioner's guidance on section 14 states that:

"If a public authority has reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted, then it may take this into account when determining whether any of those requests are vexatious."
(paragraph 89)

34. The guidance goes on to state that:

"The authority will need to have sufficient evidence to substantiate any claim of a link between the requests before it can go on to consider whether section 14(1) applies on these grounds. Some examples of the types of evidence an authority might cite in support of its case are:

- *The requests are identical or similar.*
- *They have received email correspondence in which other requesters have been copied in or mentioned.*
- *There is an unusual pattern of requests, for example a large number have been submitted within a relatively short space of time.*
- *A group's website makes an explicit reference to a campaign against the authority."* (paragraph 90)

35. The Gallery provided the Commissioner with evidence to support its conclusion that the complainant's request was part of a campaign orchestrated by PCS. This evidence included the following:

- Screenshots from PCS's website. The images show a form that could be completed. The Gallery explained that by clicking "Send email", an email was generated and sent directly to it. Each email purported to be from an individual sender. However, the Gallery informed the Commissioner that, following an investigation by its Head of Information Services, it had been able to identify a common source for all of the original 883 requests as part of the PCS's campaign.

- A screenshot of PCS's website giving information and advice about the Union's wider National Gallery campaign. It contains a link to the Freedom of Information request form.
 - A screenshot of the 38 Degrees petition regarding privatisation at the National Gallery which links the petition with PCS.
 - Examples of emails sent to signatories of the 38 Degrees petition by a representative of PCS which provided a link to the Freedom of Information request form. The Gallery gave the Commissioner details of spikes in the number of requests being received following the circulation of these emails.
 - A screenshot of the Facebook campaign page, with a comment about the Freedom of Information request form set up by PCS.
 - A screenshot of the Facebook campaign page, with a comment in response to the Gallery's refusal notice.
 - Example of an email sent to signatories of the 38 Degrees petition in response to the Gallery's refusal notice.
 - A screenshot of PCS's website offering advice to requesters following the issuing of the Gallery's refusal notice
 - A YouTube video showing a PCS representative at a rally prompting the crowd to submit Freedom of Information requests to the Gallery.
36. The Commissioner notes that the wording of the complainant's request is identical to the one that was available on PCS's website and which the PCS had suggested that people send to the Gallery as part of its campaign. He also notes that the complainant indicated in an email to the Gallery that he was aware of PCS's campaign and that his request was sent during the same short period of time as over 800 other identically worded requests.
37. In light of the evidence presented to him, the Commissioner is satisfied that the Gallery was entitled to consider the complainant's request in the context of the campaign initiated by PCS.
38. When taken in the context of the extremely large number of other identical requests received by the Gallery, particularly given the number of requests it normally received annually, the Commissioner accepts that this imposed a very significant and disproportionate burden on the Gallery in terms of the expense and distraction that was caused. The Commissioner acknowledges that the complainant may have had a genuine interest in obtaining the information

requested and may not have intended to cause inconvenience to the Gallery. However, again taken in the context of the other requests, the Commissioner is satisfied that PCS's campaign, which gave rise to these requests, was designed to cause unjustified levels of disruption and annoyance to the Gallery and inevitably had the effect of harassing its staff. The Commissioner has therefore determined that the Gallery was entitled to characterise these requests as manifestly unreasonable and has consequently correctly applied section 14(1) to the complainant's request.

Right of appeal

39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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