

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2015

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant submitted two requests for information relating to a tender bid process he had been part of in 2010 for legal aid work. The MOJ responded to both requests and cited section 14(1), vexatious requests.
2. The Commissioner's decision is that the MOJ has properly applied section 14(1) to both requests and he therefore does not require the public authority to take any steps.

Background

3. The Legal Aid Agency was created as an executive agency of the MOJ on 1 April 2013 when the Legal Service Commission (the 'LSC') was abolished. The Commissioner notes that the Legal Aid Agency (the 'LAA') is not a public authority itself, but is actually an executive agency of the MOJ, which is responsible for it. Therefore, the public authority in this case is actually the MOJ and not the LAA; however, for the sake of clarity, this decision notice refers to the LAA as if it were the public authority. The complainant refers to both the LSC and LAA in his requests, but the organisation is now known as the LAA.
4. The complainant is a solicitor whose law practice was part of a tender bid in 2010 for legal aid work; his law practice was not successful. The Commissioner understands that this firm has launched judicial review proceedings against the Legal Aid Agency ('LAA') which are ongoing, as a result of being refused a contract after failing to answer a number of the selection criteria questions on its application.

5. The complainant has made a number of requests relating to the unsuccessful bid and is currently engaged in legal proceedings against the MOJ in relation to the tender process. The Commissioner initially considered the MOJ's handling of these two requests in decision notice *FS50537214*¹, where he upheld the MOJ's decision to apply section 17(6) of FOIA, on the basis that the complainant had already been advised that any future requests on the topic of the tender process or associated proceedings would be deemed vexatious. In other words, section 17(6) of FOIA allows public authorities to draw an 'enough is enough' line so that, when appropriate, they do not have to keep responding to requests which form part of a series of vexatious or repeated requests.
6. This decision was overturned at appeal *EA/2014/0206*² where the Tribunal found that in order for section 17(6) to operate, a public authority has to be able to demonstrate that it has undertaken an assessment that the current request (or requests), do in fact relate to the topic(s) which formed the subject of the previous vexatious request.
7. In the absence of any evidence from the MOJ that this assessment had been carried out, the Tribunal ordered the MOJ to issue a refusal notice in accordance with section 17(5) of FOIA explaining why it was relying on section 14 of FOIA in refusing the two requests. The MOJ did so on 7 May 2015.
8. Although the MOJ's refusal notice and internal review only cited the first part of the 10 February request in addition to the 24 January request, the Commissioner has verified with the MOJ that its section 14 arguments apply equally to both requests in full.

Request and response

9. On 24 January 2014 the complainant wrote to the MOJ about a named firm of solicitors and requested information in the following terms:

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1016132/fs_50537214.pdf

² http://www.informationtribunal.gov.uk/DBFiles/Decision/i1502/EA-2014-0206_09-03-2015.pdf

1. *What is the name of the firm that had its 1 award of a contract withdrawn in August 2010?*
2. *How many Asylum New Matter Starts (NMS) and how many non-asylum NMS were awarded to this the firm that had its 1 award of a contract withdrawn in August 2010?*
3. *On what date was the 1 award of a contract withdrawn in August 2010 from the firm concerned?*
4. *On what date did the LAA first inform [named solicitor] about the fact that its Luton bid was successful.*
5. *What was the initial score of the firm that had its 1 award of a contract withdrawn in August 2010?*
6. *I understand that the LSC received a letter before claim from [named solicitor]. Can you confirm that is the case and if so the date of the letter before claim and the date of the response to the letter before claim?*
7. *Could I have copies of all the correspondence between the LSC and [named solicitor] concerning the Luton tender, between 28 June 2010 and November 2010.*
8. *Could I also have a copy of the full grounds of appeal filed by [named solicitor] concerning their Luton bid?*
9. *Could I have any other relevant material relating to this bid."*
10. The complainant submitted another request on 10 February 2014 for the following:

"Please provide full details of all the instances where the LSC changed the answer given by an applicant in any part of the Immigration Tender.

Please provide full details of all the instances where the LSC changed the answer given by the applicant in any part of the Immigration Tender with or without the knowledge of the applicant. That is with or without the express or implied approval of the applicant.

Also where answers were changed without the knowledge of the applicant.

And all instances where an instances where an applicant was invited to change an answer he has given previously or to fill a

gap where no answer was given. Or to fill a gap where no information was inserted."

11. Following the tribunal appeal decision, the MOJ provided its responses on 7 May 2015. It applied section 14(1) to both requests.
12. The complainant requested an internal review on 4 June 2015. The MOJ provided the result of its internal review on 2 July 2015. It maintained that both requests were vexatious.

Scope of the case

13. The complainant contacted the Commissioner on 1 September 2015 to complain about the way his requests for information of 24 January 2014 and 10 February 2014 had been handled.
14. He specifically asked the Commissioner to consider that the MOJ may have acted dishonestly in its handling of the legal tender bid process; however this is not a section 50 FOIA issue. Further, the Commissioner notes that the bid process is subject to ongoing legal proceedings where this matter can be raised.
15. The Commissioner has therefore considered whether the MOJ was entitled to rely on section 14(1) to refuse the requests.

Reasons for decision

Section 14 – Vexatious requests

16. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
17. The term 'vexatious' is not defined within FOIA. However, it has been considered in the case of *The Information Commissioner and Devon County Council vs Mr Alan Dransfield (GIA/3037/2011)*³. The Upper Tribunal 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 upon the circumstances

³ <http://www.osscsc.gov.uk/judgmentfiles/j3680/GIA%203037%202011-01.doc>

surrounding that request. The Tribunal concluded that 'vexatious' could be defined as the "...*manifestly unjustified, inappropriate or improper use of a formal procedure*" (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

18. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) and harassment or distress of and to staff.
19. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the "*importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*" (paragraph 45).
20. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests⁴. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

Is the request vexatious?

Burden imposed by request

21. The Commissioner understands from the MOJ that the complainant had made 32 information requests relating to the tender bid/legal proceedings up to the point the section 17(6) refusal was issued in December 2013. Since then, the Commissioner understands that between 31 January 2014 and the end of February 2014, the complainant submitted a further six requests on the same subject. The MOJ said that many of the requests had been similar and had

4

http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

overlapped both other requests and multiple queries regarding the proceedings. The MOJ added that these requests in aggregate had imposed a significant burden and had been a distraction for a wide range of MOJ staff.

22. The MOJ said the complainant's information requests had been "*obsessive and repetitive*" and that they had all been similar in nature and were related to the proceedings. The MOJ said that, in its view, the "*industrial volume*" of the requests and their erratic sequencing had been designed to cause disruption or annoyance, and had the effect of harassing the MOJ staff attending to them.

23. The Commissioner's guidance states that:

"a request which would not normally be regarded as vexatious in isolation may assume that quality once considered in context. An example of this would be where an individual is placing a significant strain on an authority's resources by submitting a long and frequent series of requests, and the most recent request, although not obviously vexatious in itself, is contributing to that aggregated burden".

24. The guidance also states that a requester's past pattern of behaviour may also be a relevant consideration. For instance, if an authority's experience of dealing with a requester previously suggests that they are unlikely to be satisfied with any response and will submit further follow-up correspondence, then this evidence could strengthen any argument that responding to the current request will impose a disproportionate burden on the authority.

25. The *Dransfield* tribunal said that "*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*".

26. The MOJ said it believed that the complainant's requests would be unlikely to end with one request about the matter and would therefore contribute to the burden on its resource that his requests and litigation have caused.

27. The Commissioner considers that since the tender process took place in 2010 and that both legal proceedings and FOIA requests are ongoing five years on, it is likely that further requests may be submitted by the complainant about the process.

Motive of the requester

28. It is important to note that it is not the requester who is 'vexatious' but his request(s). However, the Commissioner's view is that different

requesters can make the same request and receive differing outcomes in terms of whether the request is vexatious, once the relevant context and history has been considered for each of those individuals.

29. FOIA is generally considered to be applicant blind but this does not mean an authority cannot take into account the wider context in which the request is made and any evidence the requester volunteers about the purpose behind his or her request.
30. In support of this the MOJ quoted the First Tier Tribunal's decision *EA/2011/0163*, where Judge Angus Hamilton accepted the FOIA request in question "*which in isolation was not particularly burdensome*" was rendered vexatious by a number of characteristics , including:

"15(g) The question is whether a request is vexatious, rather than whether the requester is vexatious. There is no mechanism for an individual to be treated as being the FOI equivalent of a 'vexatious litigant', so as to lose his right to make requests to a specific public authority or to public authorities generally. Each request needs to be considered on its own merits. But that does not mean that requests can be viewed in isolation. A request needs to be looked at in its context and history, and by reference to the previous course of dealing between the requester and the public authority....It follows that it may be proper to treat a request as vexatious, even if the same request made by a different individual would not be vexatious.

15(h) Thus a request which viewed in isolation, is unobjectionable, can still be vexatious because of the previous course of dealing between the requester and the public authority... Likewise, a request that on its face is not burdensome to reply to may nevertheless be vexatious because of the further correspondence to which any response is likely to give rise..."

31. After careful consideration, the Commissioner accepts that the purpose of the complainant's requests is related to a genuine underlying issue and the Commissioner does not consider that the requests were intended to disrupt the main functions of the MOJ. However, this must be balanced against the other indicators of vexatiousness.

Harassment or distress caused to staff

32. The MOJ has not claimed that the requests have caused any of its staff to feel harassed or distressed per se, but rather that the burden imposed by what it considers to be a campaign has resulted in "*irritation*" and staff being distracted.

33. The Commissioner is aware, however, of the context in which the requests have been made and whilst he can find no evidence of, for example, disparaging remarks or inappropriate use of language, he is satisfied that the burden of dealing with so many requests over the five year period has distracted MOJ staff.

Value or serious purpose of request

34. The Commissioner accepts that the complainant's requests have a serious purpose, and has considered the aggregated impact on the MOJ of dealing with complainant's requests and other correspondence.
35. However, after five years, and with reference to the MOJ's arguments under 'Futile Requests' below, and the sheer volume of correspondence on the matter alongside ongoing legal proceedings, diminish the value of making FOIA requests.

Other indicators of vexatiousness

36. The MOJ also submitted the following arguments based on the Commissioner's guidance on vexatious requests (referenced in paragraph 20 of this notice) as being indicators of vexatiousness:

Burden on the authority

The MOJ said that the extensive history of correspondence and the timespan of this correspondence (some five years), highlights the significant burden that responding to the complainant on substantially similar issues has placed upon it, particularly as correspondence has not been limited to FOIA requests and has often been duplicated;

Unreasonable persistence

Additionally, the volume and frequency of highly similar requests and their submission being made repeatedly and alongside ongoing litigation, demonstrates what the MOJ would "*confidently describe as being unreasonable*". In particular, the MOJ highlighted that the complainant's persistence under FOIA to request information which is being addressed in his litigation shows "*an unreasonable persistence to use an inappropriate method to obtain information*".

Intransigence

The MOJ explained that it has, on several occasions, attempted to advise the complainant to limit his correspondence and provide him with the opportunity to change his behaviour (as outlined in the ICO guidance) The MOJ has asked him to reconsider whether FOIA is the most appropriate route to submit information requests given his ongoing legal

proceedings and continued communications with the Central Legal Team. However, the MOJ said that the complainant remains in an entrenched position that it is appropriate to continue to submit overlapping requests to both the legal team and the FOI team.

Frequent or overlapping requests

As previously supplied correspondence logs and representations to the ICO have demonstrated, the frequency of requests from the complainant has been high.

Disproportionate effort

This is linked into the burden on the MOJ and unreasonable persistence. It said multiple teams have had involvement with responding to communications from the complainant. In particular the handling of FOIA requests involve input from a number of teams at a number of grades – LAA, the Data Access and Compliance Unit, Private and Press Offices and Legal. The unreasonable persistence of requesting information which is subject to the litigation under the FOIA causes a disproportionate amount of time to be spent on addressing issues raised by the complainant.

Futile requests

The MOJ has argued that given its eventual application of section 14(1) to many of the complainant's requests, as well as judgements in the public domain about similar requests from other requesters, which the MOJ considers may be linked, and because the information in the requests is subject to existing court orders, the complainant can have had no expectation of obtaining further information from the MOJ on the matters raised beyond that which had already been supplied.

Conclusion

37. After careful consideration of all of the evidence before him, the Commissioner has concluded that the MOJ has properly applied section 14(1) to both the complainant's requests.

Right of appeal

38. 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

39. 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.
40. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF