

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 13 October 2021

Public Authority: The Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested from the Information Commissioner's Office (ICO) the correspondence that passed between it and Highways England (now known as National Highways) on a particular case. The ICO refused to provide the information on the basis that it considered the request to be vexatious under section 14(1) of the FOIA.

2. The Commissioner's decision is that the ICO has applied section 14(1) correctly and that the request is vexatious.
3. The Commissioner does not require the ICO to take any further steps.

Request and response

4. On 5 January 2021 the complainant wrote to the ICO and requested information in the following terms:

"02/11/2020 you wrote(attached) re. ICO Case References IC-43232-D3Y7 & IC-44703-Y9Z8 & IC-42638-X8Z2 & IC-44186-R9J3:

Once you have confirmed which of the above complaints you wish to progress and the scope of your complaints, I will then write to HE [Highways England, now known as National Highways].

We give public authorities 20 working days to provide their submission to us, and so it is likely to be towards the end of December before I've received the submissions and am in a position to progress your complaints further.

Please provide:

Your exchanges with the Authority and their responses. I intend to appeal and wish to possess all information, to be able to make informed decision/comment."

5. The ICO responded on 5 February 2021 and refused to provide the requested information citing section 14(1) of the FOIA – vexatious request and refusing his request under data protection legislation.
6. The complainant asked for an internal review on 8 February 2021.
7. The ICO provided an internal review on 23 February 2021 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 6 January 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be the ICO's citing of section 14(1) and whether this request is vexatious.

Reasons for decision

10. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. Section 14(1) of the FOIA states that section 1 does not oblige a public authority to comply with a request for information if that request is vexatious.
11. The analysis that follows looks at the criteria for vexatiousness and whether this particular request can be considered vexatious in that light.
12. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "*vexatious*" could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
13. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
14. Dransfield also considered 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) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained 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)
15. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance¹ on vexatious requests. In short they include:

¹ [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-work/our-guidance/our-guidance-on-vexatious-requests/)

- Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
16. 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.
17. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
18. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.

The complainant's view

19. The complainant argues that the ICO uses the term 'vexatious' out of context to suit its own purposes. He has made multiple requests to National Highways (NH) which have been undermined, he believes, by the ICO. His complaints have been "*treated dismissively as too complicated*" or the ICO has been "*unwilling to investigate were (sic) appropriate, had serious purpose and backed by evidence*".
20. His view is that the ICO "*fuelled*" NH and "*encouraged obstruction by supporting their every erroneous, obviously misleading statements*"
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blindly accepting..." the public authority's explanations. The complainant provides some examples:

"[the complainant] *has misunderstood the situation.*' Clearly, I had not, the rates exist."

"[the complainant] *has confused DCP rates with ASC rates.*' This is untrue."

"*The rates (defined costs) are a definition not a price.*' This too is false; rates have now been supplied."

The complainant asserts that the ICO accepted the above statements and reiterated them. He says that he did understand the process, he was not confused but the ICO accepted NH's view.

21. The complainant maintains that NH misled the ICO which suited the ICO's ethic which is to avoid the complicated and dismiss a requester. The ICO accepted "*false excuses without question*" and "*did not read the correspondence on one matter*". His position was therefore "*severely prejudiced*" and an appeal upheld the 'not held' position that NH had stated. The complainant persevered. NH "made a statement for a Tribunal that DCP rates '*are not comparable with ASC rates*'". The complainant contends that they are because they are the same and, had the ICO looked at the evidence and investigated, they would have realised this.
22. His view is that, despite "*winning*" his Tribunal case, EA/2018/0088, the ICO has used his persistence against him. His "*tenacity has resulted in rates being provided*". Only by being persistent has he overcome NH and the ICO. It has surprised him that his conduct has been described as 'vexatious' and that the ICO has not taken EA/2018/0088 into account, where his request to NH was found not to be vexatious.
23. He points out that he has been restricted by the ICO in terms of his contact. The complainant suggests that this is because he has presented the obvious and achieved what the ICO could not – demonstrate that rates exist. The ICO has failed him spectacularly. He believes that the conduct he displayed was necessary and probably caused the ICO "*embarrassment*".
24. The complainant explains that he requested the correspondence, not to progress his issues with NH but to seek information exchanges between the ICO and NH to understand what the ICO had been doing and what information is available. He suggests that the ICO should look inwards, find out what went wrong and that it might then obtain the "*necessary*

numbers of staff and professionally competent personnel”.

The ICO's view

25. The ICO responded to the complainant's request by quoting section 14 of the FOIA that it is not obliged to comply with a request if it is vexatious. It went on to quote from the Commissioner's guidance where it highlights the key question to be asked, "*...whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress*". The FOIA permits an authority to take into account the context and history of a request, including the identity of the requester and its previous contact with them. Having reviewed the complainant's request, the ICO concluded that it would represent a burden on its resources and an improper use of the formal procedure designed to give the public access to recorded information held by public authorities.
26. The ICO took into account what it describes as "*the intransigence and persistence of the focus of your correspondence leading up to making this request*". By way of example, the ICO explained that the complainant had been responded to regarding a number of requests (five) with the same response, section 14 FOIA. When this request was refused, the case officer highlighted several points that had been made in a previous refusal notice which had been issued to him on 21 October 2020 which had concluded that it represented a continuation of the same pattern of conduct with the ICO, particularly regarding NH.
27. The ongoing demand on the resources of the ICO are a matter that has been raised with the complainant by members of staff previously in correspondence and refusal notices. "*This has shown no signs of abatement.*" Since the last refusal the complainant had sent at least fourteen further items of casework, either submitted or reopened by him, six of these relating to NH. At the time the complainant made his request three of the four complaints against NH were ongoing. The ICO contends that the complainant had been previously warned that continuing to request information from cases which had not yet been concluded meant that he was unlikely to receive the requested information as it is likely to be exempt by virtue of section 31 of the FOIA. The ICO suggests that this is a strong indicator that the complainant's requests are not genuine.
28. However, the request that is the subject of this decision notice was made following the ICO's decision notice [IC-44703-Y9Z8](#) which had upheld NH's decision to refuse his FOI request as vexatious. The Commissioner notes that this decision is currently under Appeal. The

ICO argues that the decision notice contains a comprehensive explanation of the ICO's reasoning and NH's submissions to the ICO.

29. The subject matter of IC-44703-Y9Z8 substantively followed the same theme as numerous previous information requests made by the complainant. This matter was also investigated by the Tribunal in EA/2018/0104 and EA/2019/0119. The ICO suggests that the reasoning for NH's refusal of the complainant's latest request covers the same ground which had already been exhaustively explored in the process of concluding those matters. IC-44703-Y9Z8 had stated that,

"...had the complainant submitted his request after receipt of EA/2019/0119, the request would have been quite clearly vexatious, in the Commissioner's view. This is because the complainant would have been attempting to pursue and keep 'live' a matter- the matter of DCP rates- quite clearly explained and concluded in the FTT's decision".

30. The ICO emphasised to the complainant that he had made this request, despite being in receipt of EA/2019/0119 and the relevant decision notice, and that the *"request is simply a further attempt to reopen these matters and clearly vexatious"*. The ICO provided further evidence by referring to two more decision notices that had been issued which both upheld NH's refusal of the complainant's requests and stated that the discussions around his complaint are in the same vein already dealt with thoroughly before. It argued that the pattern of requests and complaints leading to the most recent request *"strongly suggest that it is an attempt to use the FOIA and the ICO as vehicles to continue to pursue [his] vexatious campaign"* against NH when there was *"...no further scope for debate"*.
31. The opinion of the ICO is that it is clear that there is no additional information held on the complaint files that the complainant is not already aware of or that would be of any value to him. The conclusion is that responding to the complainant's request would cause a level of disruption and irritation which is disproportionate and unjustified, given its lack of value. The ICO would need to consult with NH before releasing their correspondence to him which makes demands on NH's time as well as the ICO's. This would be disproportionate because of the amount of time and resources already expended by NH. It is also potentially damaging to its relationship with NH.
32. The ICO reserved the right not to respond to further requests in the same vein as it had previously warned of its intention to rely on section 17(6) of the FOIA. Any personal data held in the requested information was also refused under data protection legislation.

33. The internal review stressed the "*questionable relevance*" of the request. The review concluded that the request provided "*additional evidence of unreasonable persistence and intransigence*". The ICO's view is that "*there does not appear to be any prospect of an end to this continuing pattern of correspondence*" or the drain on its resources in order to deal with the ongoing correspondence, complaints and requests from the complainant. The review emphasised the fact that this detracted from the ICO's ability to respond to other individuals and was consequently detrimental.
34. When the ICO responded to the Commissioner's investigation letter it argued that it was clear that there was no new information contained which hadn't already been communicated in previous decision notices and tribunal decisions. It stated that it was reasonable to assume that the complainant was aware of this and that this was not a genuine attempt to obtain information but "*rather a vehicle to keep live otherwise concluded matters*".
35. Finally, the ICO made reference to two of the Commissioner's decision notices which have been issued since the request was made - [IC-72969-D6J4](#) and [IC-66423-Z2L3](#). In the former decision which concerned a request made a few months prior to this request, the ICO draws attention to the following:

"...the correct route to pursue dissatisfaction with a public authority's response to a FOIA request and any resulting Decision Notice issued by the ICO is to appeal to the FtT."

The ICO acknowledges that the complainant had previously gained further information from NH by following this process. However, it was not gained by,

"...inundating the ICO's own Information Access department with FOIA and EIR requests. The ICO does not have access to the systems of other public authorities and therefore could not have assisted in resolving the dispute between the complainant and [NH] regarding the extent of information held by [NH] by complying with this request for information."

36. The ICO explained that correspondence with the complainant has carried on unabated following the request that is the subject of this decision notice which it believes proves that responding would have been unlikely to result in a positive resolution to the matter which it suggests is part of an ongoing vexatious campaign and a misuse of the legislation. IC-66423-Z2L3 also acknowledged the barrage of requests received by the ICO in an attempt to carry on an 'obsessional' campaign regarding NH.

The Commissioner's view

37. The Commissioner's view is that this request in itself would not involve the ICO in a great deal of work or, in itself, be a drain on finite resources. She can accept that the complainant has a genuine need to see the requested correspondence and that he believes that he has proved the value of persistence in obtaining information that he might not otherwise have obtained. The Commissioner understands that the complainant feels that he has been waging a single-minded course of action against NH and against the ICO's apparent support for NH. She accepts that the complainant has detailed knowledge of the technical aspects behind his information requests and the fact that he has had a serious purpose in trying to establish the facts as he sees them.
38. However, the point has been reached where, in his own words, he wishes "*to understand what the ICO is doing*". It seems to the Commissioner that the complainant is trying to investigate the ICO's methods of investigation because he is not content with the ICO's conclusions. A formal process to challenge those conclusions is available through the Tribunal. Making multiple complaints to the ICO, followed up by regular information requests concerning those complaints has involved a considerable burden over a number of years. Context and history have played a large part in the ICO's citing of section 14(1).
39. The Commissioner has therefore reached the conclusion that the complainant no longer has any consideration for the ICO's role as Regulator and is unable to appreciate that it cannot be undermined by devoting so much of its resources to one individual. The Commissioner's guidance² explains that a request which would not be considered vexatious in isolation can "*assume that quality once considered in context*". It gives the example of "*an individual placing a significant strain on an authority's resources by submitting a long and frequent series of requests*" where the most recent request contributes to the "*aggregated burden*". By this measure, the request is clearly vexatious.

² [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-approach-to-handling-requests/our-approach-to-handling-requests-to-organisations/our-approach-to-handling-requests-to-organisations)

Right of appeal

40. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF