

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2021

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

Decision (including any steps ordered)

1. The complainant requested an anonymised list of the caseworkers who had dealt with specific FOIA complaints. The ICO initially said that it did not hold the requested information, before later refusing the request as vexatious.
2. The Commissioner's decision is that the request was vexatious and therefore the ICO was entitled to rely on section 14(1) of the FOIA to refuse it. However, as it failed to issue its refusal notice, citing section 14 of the FOIA, within 20 working days, the ICO breached section 17(5) of the FOIA in responding to the request.
3. The Commissioner does not require any further steps to be taken.

Jurisdiction and nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information 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 in her capacity as a public authority – a duty confirmed by the First Tier Tribunal. 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. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

Request and response

5. On 9 April 2020 the complainant contacted the ICO via the whatdotheyknow.com website and requested information of the following description:

"please provide an anonymised identifier for each caseworker for the following decision notices:

FS50856403 20 December 2019

FS50807165 6 September 2019

FS50794284 7 July 2019

FS50821780 1 July 2019

FS50789890 17 January 2019

FS50788785 14 January 2019

FS50745784 1 October 2018"

6. On 24 July 2020, the ICO responded. It denied holding the requested information.
7. The complainant requested an internal review on the same day, arguing that the requested information could easily be created and that the ICO should have provided him with advice and assistance. The ICO sent the outcome of its internal review on 10 August 2020. It upheld its original position.

Scope of the case

8. The complainant first contacted the Commissioner on 7 July 2020 to complain about the way his request for information had been handled. This was before the ICO had issued its response. Delays in the Commissioner's office meant that, by the time the complaint had been reviewed, the ICO had not only issued its response but also completed an internal review and the case was thus accepted for investigation.
9. At the outset of her investigation, the Commissioner contacted the ICO on 17 November 2020 to explain her preliminary view of the complaint. She noted that, whilst the ICO might not physically possess the particular information the complainant was seeking, it appeared to hold the 'building blocks' that would be required to produce the information.

She therefore asked the ICO to reconsider whether it in fact held the information the complainant was seeking.

10. On 23 December 2020, the ICO responded to the Commissioner to say that it now intended to refuse the request as vexatious and set out its reasons for doing so. A fresh refusal notice was issued on 12 January 2021.
11. As it is a well established principle of FOIA that a public authority is able to change the exemptions on which it wishes to rely, the Commissioner switched the focus of her investigation to whether or not the request was vexatious. Given the detailed refusal notice the ICO provided, the Commissioner did not seek a further submission from the ICO – although she did allow the complainant to make a submission which is set out below.
12. For the avoidance of doubt, the Commissioner did not investigate and makes no formal finding as to whether the ICO does or does not hold the requested information.
13. The Commissioner considers that the scope of her investigation is to determine whether or not the request was vexatious.

Background

14. Section 42 of the FOIA provides an exemption from disclosure for information which would be covered by legal professional privilege. The exemption is subject to a public interest test, but both the Commissioner and the Tribunal have long recognised the strong public interest in protecting the ability of public authorities to seek and receive good quality legal advice without fear of compromising their position at a later date. As such, the inherent value of legal professional privilege will usually carry substantial weight in any public interest test – as the Commissioner's guidance on the exemption explains.¹

Reasons for decision

Section 14 - Vexatious

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf (p15)

15. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

16. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

17. The term “vexatious” is not defined within the FOIA. 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.

18. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

19. *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).

20. The Commissioner has published guidance on dealing with vexatious requests², which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

more of these indicators it will not necessarily mean that it must be vexatious.

21. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies"*.
22. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
23. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: *"In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."*

The complainant's position

24. The complainant informed the Commissioner that he had made his request in order to scrutinise the work of the ICO. He believes that the ICO takes an inconsistent approach to FOIA complaints involving the section 42 exemption – which relates to legal professional privilege. In particular the complainant is concerned that the ICO is applying the public interest test inconsistently in such cases and, in his view, giving too much weight to the public interest in maintaining legal professional privilege in some cases.
25. The decision notices referenced in the request were, the complainant believed, written by different case officers who had taken differing approaches to the public interest test. He argued that there was a public interest in understanding the link between the two. He further argued that this approach was *"inconsistent and contrary to the law."* He noted that in some of the decision notices referred to a requirement for an *"exceptional"* public interest reason for not upholding section 42, but other decision notices only referred to the requirement that the public interest in maintaining the exemption exceed the public interest in disclosure.
26. The complainant also argued that it was unfair and *"against the law"* that the ICO had referenced his behaviour in respect of other public authorities.
27. Turning to the substance of the arguments put forward by the ICO, the complainant countered that:

"I have accused the ICO of incompetence because of this inconsistent approach.

"I have never and will never publicly name the caseworker in my case.

"My persistence on this serious matter is not unreasonable and is not intransigent.

"My few requests on this subject do not represent an unjustified level of disruption.

"If my requests have caused irritation and distress, then this is unfortunate, but with the clear evidence of wrongdoing (inconsistency and not using the correct rule) then any distress and irritation must be justified.

"We have all suffered under the current pandemic. The ICO staff have the luxury of working from home; I work on a building site and do not have such a luxury.

"The provision of the requested information will resolve the matter. I will state in writing now that I will not make any further FOIA requests on the same subject matter.

"If the correspondence so far has been futile, then that is because the ICO has refused to address the central inconsistency of its approach...

"...Your original exemption stated that you did not hold the requested information. Now in your new exemption you state that divulging the requested information would not be feasible. This is yet another example of serious inconsistency of approach.

"You state that DN's issued by the ICO undergo 'a robust quality checking procedure'. Then why does the most recent DN on section 42 still assert the 'very exceptional' argument', when some previous and recent DN's claim this is NOT the ICO's approach, but only 'some authorities'." [sic]

28. In summary, he argued that:

"You state that the requests serve no serious purpose in terms of the public interest. I completely disagree. There is a serious purpose in knowing about the ICO's inconsistency of approach and rule/breaking, especially as the ICO is the very organisation tasked with overseeing the FOIA. In short, there is a public interest in

knowing whether the ICO has a consistent/law-abiding approach to the legislation it deals with."

The ICO's position

29. In explaining why it considered the request to be vexatious, the ICO set out three main arguments as to why the request would create an unjustified or disproportionate burden.
 - The complainant had displayed a pattern of using FOIA requests as a means of litigating a grievance with other public authorities and that he was now directing the same behaviour at the ICO.
 - That the information requested had no wider value beyond the complainant's own personal grudge about the way the ICO had handled previous complaints which he had made and that the substance could be resolved by other means.
 - That the complainant was using his correspondence and comments on the whatdotheyknow.com website to publish unfounded accusations of "cover-ups" and "illegal" activities – as well as making general derogatory remarks about the ICO and its staff.
30. In respect of its first line of argument, the ICO drew the Commissioner's attention to the remarks of the First Tier Tribunal in a recent case where the complainant who is the subject of this notice had appealed another decision notice which found that a request he had made to the Parliamentary and Health Service Ombudsman (the PHSO) was vexatious.
31. In that decision, the Tribunal highlighted the complainant's journey to that point. He had initially been denied tax credits by HMRC but these were restored following a successful appeal to the Adjudicator's Office (which deals with complaints about tax and tax credit decisions made by HMRC). Whilst this appeal was ultimately successful, the complainant was evidently dissatisfied with the Adjudicator's procedural handling of his appeal because he then made a complaint to the PHSO. Several information requests to and a judicial review of, the PHSO later, the complainant began submitting complaints to the ICO.
32. That was the position set out at the Tribunal, but the ICO argued that the complainant had now shifted his focus. Dissatisfied with the way that the ICO had dealt with his complaints about the PHSO (in particular a complaint involving the section 42 exemption), the complainant was now using FOIA requests to try to re-litigate those complaints and (in the opinion of the ICO) would continue to do so.

33. On its second line of argument, the ICO noted that it had explained, to the complainant, the process by which decision notices are reviewed prior to being issued to ensure that its approach is as consistent as possible whilst reflecting the evolving caselaw of the Tribunal. The ICO noted that:

"We also believe that these requests serve no serious purpose in terms of their wider public interest and are simply an attempt to reopen their grievances and matters we consider to be closed. We note that this request seeks the names, or anonymous identifiers of individual case officers (something we do not consider feasible to do, not least as one of the cases referenced relates to a decision notice issued in connection to his own complaints - he will be fully aware of which case officer dealt with these). It may be helpful to explain that Decision Notices (DNs) issued by the ICO undergo a robust quality checking procedure and are signed off by a senior member of staff as a 'signatory' to the DN. This process is detailed in our casework service guides... This process is designed to "check that the decision notice has been adequately researched, reasoned, evidenced and drafted". Any inconsistency in approach will be addressed at this stage. Tellingly, the names of the signatories are readily available in the publicly available DNs and accessible to [the complainant] should he wish to raise any concerns regarding the consistency of approach taken by the ICO. Disclosure of the names of individual case officers will add nothing further to the public understanding of our approach to section 42 complaints and serve only to allow [the complainant] to pursue his own personal grudges, and target individual case officers as part of his ongoing grievances. It is my view that this request was not primarily intended to obtain information about the ICO or to achieve fulsome answers to legitimate questions but was intended to continue the harassment of ICO staff and repeat his dissatisfaction with, and criticism of, the ICO. The appropriate route for [the complainant] to challenge the interpretation of section 42 of the FOIA in a decision notice is via the Information Tribunal. The FOIA is not the appropriate route to attempt to reopen his concerns."

34. Thirdly, the ICO drew the Commissioner's attention to numerous remarks the complainant had made over the course of his correspondence which it considered to be derogatory towards the ICO in general and its staff in particular. The ICO also noted that the complainant repeatedly alleges the ICO has broken the law.
35. For example the ICO noted that the wording of this particular request was:

"In order to ascertain whether there is a pattern of practice in non-adherence to the law please provide an anonymised identifier for each caseworker". [emphasis added]

36. And in seeking an internal review, he stated that there was:

"a pattern of certain caseworkers blatantly breaking the law with regard to their interpretation of Section 42 cases".

37. An earlier request to the ICO had been entitled "Unfair schizophrenia within the ICO" and the complainant had accused the ICO of having

"a deeply schizophrenic and unfair approach to section 42 cases".

38. In another case, when replying to a response the ICO had provided in respect of an information request he had made, the complainant stated

"Your response is exactly what I expected it would be: evasive and unhelpful at best...I expect the ICO internal review to be nothing more than sham, but please be assured that I will take this case to Tribunal as soon as I receive your reply."

39. In responding to a further request, the complainant had commented that the ICO was:

"either grossly incompetent or...being deliberately deceitful. Which is it?"

40. The ICO noted that the complainant's use of the whatdotheyknow.com website meant that his attacks on the integrity and competence of ICO staff members would be visible to a wider audience and indicated that he was using the site as a platform to spread his views. This was done partly through the request correspondence and also through comments submitted on his own and others' request threads.³ One such comment read:

"It is extremely worrying that such a deficient organisation is tasked and publicly financed to deal with freedom of information and data protection issues. One minute they seem quite content to fine companies like British Airways hundreds of millions of pounds

³ Whatdotheyknow.com enables users to add comments on correspondence contained in the request thread. It was evident that the complainant was a frequent user of the comments section both to provide commentary on his own requests and to engage with other site users – particularly those who shared his views.

for data breaches and the next minute they are doing everything they can to protect government departments and government quangos from proper scrutiny and from being held to account for wrongdoing. Such unfair and often arbitrary behaviour should not be tolerated by the tax-payer who expects their taxes to be spend wisely, fairly and efficiently. The ICO are certainly not wise, not fair, and not efficient."

Another read:

"The ICO are up to their usual tricks of peddling falsehoods as truths. In the latest case on section 42 FOIA, dated 11 November 2020 the ICO again state that it has only been OTHER authorities that have made the assertion that cases have to be EXCEPTIONAL for release of legally privileged advice. The ICO continue to propagate this untruth: it is the ICO THEMSELVES that have repeatedly argued for the illegal exceptionality argument. They are an utter disgrace."

41. Finally, the ICO noted that, on informing the complainant that the pandemic was causing delays in its processing of requests due to the restrictions on its staff, he had immediately chosen to make two further information requests. In a comment on his request he noted that:

"It seems to me that the ICO are simply using the current pandemic to avoid answering questions that will expose their unlawful behaviour."

42. In conclusion, the ICO argued that:

"Given the above context and history, and based on the evidence of our contact with the requester to date, it is clearly apparent that provision of information is extremely unlikely to resolve anything to their satisfaction and that responding to their requests generates more correspondence. It does not result in any resolution and usually ends up in a cycle of futile correspondence."

The Commissioner's view

43. In the Commissioner's view, the request was vexatious.
44. The complainant has argued that the ICO is not entitled to rely on his behaviour towards other authorities in determining whether his request was vexatious. He is partly right, in the sense that the mere fact that one public authority has refused a request as vexatious does not mean that any other request that the same person submits to any other public authority must also be vexatious. Each request must be judged on its own merits.

45. However, this is not what the ICO has sought to argue. It has not suggested that the request is vexatious because a previous request to the PHSO has also been deemed vexatious. The ICO considers this request to be vexatious because it follows a strikingly similar pattern to that which caused the PHSO request to be refused. Evidence in respect of other public authorities *can* be considered by the Commissioner where that evidence sheds light on the matters involved in this case.
46. It is the Commissioner's view that the complainant's behaviour towards the PHSO *does* shed light on his behaviour towards the ICO to date and, equally pertinently, how that behaviour is likely to develop.
47. In dismissing the complainant's appeal in respect of the PHSO request, the Tribunal, referring to an earlier court judgement by a Judge Lavender, summed up the complainant's behaviour thus:

"[the complainant] clearly feels that he personally has been the victim of grave injustice in all this. I do not doubt the sincerity of his feelings but I do question how justified they are when things are looked at objectively. As Lavender J pointed out in his decision, [the complainant]'s initial complaint about HMRC resulted in a successful appeal in relation to his working tax credit, compensation for the way his claim had been handled and changes to the published advice as a result of points he had made. His complaint about the Adjudicator's Office's investigation of his complaints about the published advice was rejected by the PHSO and Lavender J considered that there was no basis for suggesting that the PHSO had made any error of law in his investigation...Notwithstanding the lack of objective justification for his feelings of injustice, it is clear from his conduct and statements that [the complainant] considers that they entitle him to wage a campaign against the PHSO. This is a campaign that he is prepared to fight "tenaciously and bloodily" to the end and in fighting it he will make maximum use of FOIA and its procedures. It is reasonable to infer that this campaign has become something of an obsession for him and that it would continue in a similar vein even if the requests we are concerned with in this appeal were answered in full."

48. In concluding that the request was vexatious, the Tribunal Judge commented that the request was:

"part of an unjustified and obsessional campaign in which [the complainant] will use whatever methods he considers helpful to him ...Overall, I have reached the clear conclusion that [the complainant] was using the FOIA process in a way that was manifestly unjustified, inappropriate or improper and that his request was rightly categorised as "vexatious".

49. The Commissioner considers this timeline of events to be instructive. The complainant's journey to this point began with a decision by HMRC. That decision was incorrect and the Adjudicator provided relief.
50. For many people in a similar position, such an outcome would be satisfactory and the matter would end there. But the complainant was evidently not satisfied with this outcome and exercised his right to ask a second complaints-handling body (the PHSO) to investigate the first (the Adjudicator). However, when the PHSO did not reach the conclusion the complainant wanted, he began his "unjustified and obsessional campaign" against the PHSO which included a number of information requests. The campaign then expanded to encompass a third complaints-handling body (the ICO) when the complainant's FOIA responses failed to achieve his desired outcome with the PHSO.
51. This is instructive because, on the basis of the available evidence, it would appear that the complainant, having apparently concluded that his options with the PHSO are unlikely to bear further fruit, is now shifting his focus to the ICO. The behaviour the complainant displayed towards the PHSO is therefore now likely, in the Commissioner's view, to be directed towards the ICO – and indeed already has been to some extent.
52. The complainant has rightly pointed to the Commissioner's own guidance on section 14 which notes that it is the request itself and not the requester which must be vexatious. But as the *Dransfield* ruling makes clear, when considering whether a request is vexatious, a public authority is not obliged to look at the request in isolation, but may take a "holistic" view of the request in the context of any wider background. The wider background to this request incorporates the complainant's view that the ICO is being inconsistent in its application of the section 42 exemption of the FOIA.
53. The Commissioner accepts that every public authority, including herself, deserves and should expect to be scrutinised for the decisions that they take. However, she also notes that providing the information that the complainant has sought would be unlikely to resolve matters.
54. When the ICO issues a decision notice, it must be signed by a senior official who has been delegated the power to authorise such decisions on behalf of the Information Commissioner. Whilst a decision notice may have been drafted by any of the FOIA complaints handlers at the ICO, the decision is the decision of the person who signs on the Commissioner's behalf. The process of reviewing a decision notice prior to issue involves the signatory confirming that they are happy with the investigating officer's assessment of the facts of the case and that the decision is in accordance with the law. The published version of every

decision notice includes the name and job title of the signatory. The full version (provided to the parties involved in the complaint) also includes the actual signature as well.

55. Therefore the complainant already has access to the name and job title of the person who signed each of the decision notices specified in the request. This is the person who ultimately made the decision.
56. Furthermore, the complainant has overlooked the fact that, if any of the individuals who made the complaints covered by the request were dissatisfied with the responses they received, they had the right to appeal the decision to the Tribunal. The Tribunal is able to issue substitute decision notices if the Commissioner has given too much weight to the public interest in legal professional privilege or has made any other error in her application of the law.
57. Not only will making a further FOIA request not correct an erroneous decision but it does not appear to the Commissioner that the ICO has made one. The fact that two different decision notices describe the public interest test in two different ways does not necessarily mean that two different tests have been applied. If too much weight has been attached to the public interest in maintaining the exemption, the route to correction lies with the Tribunal.
58. Indeed the Commissioner notes that the Tribunal recently overturned a decision of the ICO on the basis that the ICO had given too *little* weight to the importance of legal professional privilege in considering the public interest test.⁴
59. Finally, the Commissioner has turned her attention to the way that the complainant has corresponded with and commented publicly about, the ICO.
60. It is (to a certain extent) understandable that the complainant is frustrated by his battles with various public authorities (although the Commissioner notes that these are largely battles that the complainant has brought upon himself). Nevertheless, the tone of his correspondence is frequently derogatory and demeaning towards the ICO. Whilst the Commissioner accepts that this is not directed at any individual in particular, it is inevitable that the staff required to deal with the

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2716/Crown%20Prosecution%20Service%20\(EA-2019-0275\)21.10.20.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2716/Crown%20Prosecution%20Service%20(EA-2019-0275)21.10.20.pdf)

complainant will start to feel demotivated and harassed by the constant barrage of criticism. Being constantly accused of acting unlawfully – especially in the absence of evidence – is beyond the robust criticism that public authorities should be expected to bear. Whilst the tone is not sufficient, alone, to make the request vexatious, it adds to the weight in favour of the exemption.

61. In conclusion, the Commissioner considers that the ICO is entitled to draw a line in the sand. The behaviour that the complainant has previously displayed suggests that (regardless of what he may have asserted) responding to this particular request will not resolve anything and will only serve to prolong the correspondence. On the contrary, the FOIA requests are, as evidenced in previous complaints, merely just a tool that the complainant uses to vent his displeasure at the way his previous grievances have been handled.
62. The complainant appears to believe that the ICO and PHSO are somehow conspiring against him by covering up each other's "wrongdoing." Previous evidence suggests that he will continue his obsessional campaign until he has "proved" that he was right all along. Prolonging this correspondence would not only be futile but potentially detrimental to the staff of the ICO required to deal with him.
63. Whilst there may be some limited public interest in the underlying matter that the complainant is pursuing, the manner in which he is pursuing it, coupled with the very limited relevance of the requested information to the underlying matter, combines to make this request vexatious in the Commissioner's view.
64. As the request was vexatious the ICO was entitled to rely on section 14(1) of the FOIA to refuse it.

Procedural matters

65. Section 17(5) of the FOIA states that:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

66. The Commissioner notes that the ICO's response to this request was not issued within 20 working days and that it did not issue a refusal notice citing section 14(1) of the FOIA until part way through the investigation. She therefore finds that the ICO breached section 17(5) of the FOIA in responding to the request.

Right of appeal

67. 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@justice.gov.uk

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

68. 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.
69. 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

Phillip Angell
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