

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **27 May 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 made a request for information relating to Highways England's (HE) compliance with FOIA and the ICO's position where a public authority does not complete an internal review within 20 working days. The ICO refused to comply with the request under section 14(1) FOIA as it considered the request to be vexatious.
2. The Commissioner considers that the ICO correctly applied section 14(1) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 1 September 2020 the complainant made the following request for information under the FOIA for:
 - Please explain what action you have taken with regard to the Authority and their failure to comply with the Act since 2013
 - Apparently you have feedback within the ICO about my submissions. Please provide this feedback about my requests, the information to which you refer. I have made SAR's of the ICO without receiving any such information.
 - a. Please consider this a SAR and
 - b. Explain why no such information has been forthcoming previously
 - What is the ICO's stance toward an Authority who does not complete an IR in 20-working days? Please ignore the current, different, situation. I doubt HE has furloughed staff (this appears illogical). 24/08/2020 I was subject to on-line criticism for not waiting 40 days for an IR, by the very person at the ICO to whom I spoke to some while ago about the 20/40 days and your application of the period, your seemingly non-enforcement of the 20-day guidance. I was told to make an FoIA if I wanted information about this. I have now done so. ->This has only been included because of the statement "I have now done so"
 - Please provide all exchanges between you and the Authority about my approaches, their conduct etc.
5. On 21 October 2020 the ICO responded. It refused to comply with the request under section 14 FOIA as it considers it to be vexatious.
6. The complainant requested an internal review on 23 October 2020. The ICO sent the outcome of its internal review on 25 November 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled as he does not accept that his request is vexatious under section 14(1) FOIA.

8. During the Commissioner's investigation the ICO confirmed that parts of the request had been processed under the Data Protection Act 2018 rather than FOIA as they amounted to requests for the complainant's own personal data. It therefore confirmed that the following parts of the request were not dealt with under FOIA:

- Apparently you have feedback within the ICO about my submissions. Please provide this feedback about my requests, the information to which you refer. I have made SAR's of the ICO without receiving any such information.

a. Please consider this a SAR and

b. Explain why no such information has been forthcoming previously

And the majority of the following request:

- Please provide all exchanges between you and the Authority about my approaches, their conduct etc

These aspects of the ICO's response therefore fall outside the scope of this Notice.

9. The Commissioner has considered whether the ICO was correct to refuse to comply with the rest of the request by virtue of it being vexatious.

Reasons for decision

Section 14(1) – vexatious request

10. In this case, the ICO had applied section 14(1) FOIA and the Commissioner has therefore considered whether the request has been correctly categorised as vexatious in this case.

11. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance¹ and, in short, they include:

- Abusive or aggressive language;

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden;
 - Personal grudges;
 - Unreasonable persistence;
 - Unfounded accusations;
 - Intransigence;
 - Frequent or overlapping requests;
 - Deliberate intention to cause annoyance.
12. 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.
13. The Commissioner's guidance goes on to suggest 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.
14. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
15. The ICO explained that this request followed a letter written to the complainant by one of the Group Managers in the FOIA complaints department on 21 August 2020 asking him to moderate his engagement with the ICO. The ICO advised the complainant that, "In particular your requests should be short, clear, concise, and not confused with enquiries or requests for explanation or comment; or confused with lengthy backgrounds or contexts." The ICO said that the complainant responded with a 9-page, 39 point request/enquiry/complaint from which the bullet points quoted at paragraph 4 were taken. The ICO argued that the complainant's reply can only be seen as deliberately provocative and a wilful attempt to direct ICO resources in a way he had been specifically requested not to.
16. It went on that it is relevant to consider the broader context of the complainant's engagement with the ICO which led both to the letter referred to above, and the refusal to comply with the subsequent request which is the subject of this Notice.

17. The ICO explained that at the time of this request, and taking into account the relevant ICO retention period of two years, the ICO was processing 80 cases in relation to section 50 complaints the complainant had made about FOI and EIR compliance, 21 information requests to the ICO and several related reviews, data protection complaints and a criminal allegation under section 77 of the FOIA. The complainant's wider communications demonstrates the overall burden the requester is placing on the ICO as a whole.
18. It went on that the vast majority of the FOIA complaints relate to HE, and more particularly the single topic of a 'defined cost' of repairs. The ICO considers that this request is another front on a broader campaign on the part of the requester to unmask what he sees as criminal activity at HE, and the ICO's complicity in this.
19. The ICO argued that the casework and correspondence initiated by the complainant shows no signs of abating, and shows an unreasonable persistence.
20. Finally, the ICO argued that the potential distress, caused to ICO (and HE) staff by the now regular accusations of corruption, complicity, criminal behaviour, bullying, intimidation, and at the very least incompetence, is also relevant. The complainant's correspondence has continued and the ICO has provided the Commissioner with evidence of the accusatory language used.
21. The complainant does not accept that this request is vexatious and that there is a very serious purpose behind his requests to HE relating to 'defined costs' for repairs and the linked requests to the ICO. This is due to his dissatisfaction with the way in which HE has responded to his requests and the outcomes of the ICO's section 50 investigations into the same.
22. In particular he has referred to a recent decision of the First-tier Tribunal (FtT) (reference EA/2019/0390) in which it was found that HE did in fact hold further information and this was provided to the complainant during the proceedings. He considers that this demonstrates the very serious purpose behind his request to the ICO as the FtT did not uphold the Commissioner's finding in that case that HE did not hold any further information relevant to a request relating to Damage to Crown Property or DCP rates.
23. The Commissioner asked the ICO whether the outcome of the above FtT case had any bearing on its application of section 14 FOIA in relation to this request to the ICO.

24. The ICO considers that whether HE holds information is not really of any relevance to the Information Access Team at the ICO and their application of the FOIA. Its principal concern when responding to the complainant's FOIA requests to the ICO is the burden these requests are increasingly placing upon it as a public authority, weighed against the value of the requests made. Furthermore it explained that the outcome the complainant appears to be looking for, that HE does indeed hold further information in which he is interested, seems to have been arrived at not by information requests to the ICO, but by appeal to the FtT. The ICO argued that this is the best route for the complainant to direct and resolve his concerns regarding HE's handling of his requests and any subsequent ICO Decision Notice as a result of a section 50 investigation.
25. Furthermore that ICO remains of the position as set out in their response to the complainant that it is unlikely that responding to this request would have brought resolution or a positive closure to the complainant's interactions with the ICO.
26. In this case the Commissioner recognises that the complainant has very real concerns with the way in which HE has responded to his various requests relating to DCP rates, in particular in relation to the extent of information held, and the outcome of the ICO's investigations into the handling of these requests. However the Commissioner accepts that 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. Indeed the complainant has demonstrated that by following this process this did lead to further information being provided to him by HE. This issue was not however resolved 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 HE regarding the extent of information held by HE by complying with this request for information. The complainant's request to the ICO therefore had very limited value for this purpose.
27. The Commissioner also accepts the level of engagement between the complainant and the ICO is particularly burdensome and indeed resulted in a letter from the ICO's FOIA complaint's department asking the complainant to moderate his correspondence both in terms of volume and length. By responding to this with voluminous and lengthy correspondence the complainant must have been aware that his ongoing requests and engagement would further add to the burden and disruption already caused.

28. The Commissioner also acknowledges that the correspondence and engagement has continued without abatement following the request which is the subject of this Notice and therefore accepts that responding would have been extremely unlikely to result in positive resolution to the matter between the complainant and the ICO.
29. For these reasons the Commissioner is satisfied in this case that the complainant's request is vexatious under section 14(1) FOIA.

Right of appeal

30. 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

31. 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.
32. 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.....

Gemma Garvey
Senior Case Officer

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