

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2022

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

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to a Tribunal hearing. The Information Commissioner ("the ICO") originally denied holding the information, before refusing the request as vexatious.
2. The Commissioner's decision is that the ICO was entitled to rely on section 14(1) to refuse the request as vexatious. As the ICO failed to issue its refusal notice within 20 working days, it breached section 17(5) of the FOIA.
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

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. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his 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.

4. 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 13 March 2021, referring to an earlier appeal that she had made to the Tribunal, the complainant requested information of the following description:

"Considering differences in ICO explanations of how the patient numbers were disclosed and contradictory ICO actions during tribunal proceedings as described above, please can I have any and all information under the FOIA, that the ICO holds which relates to the patient numbers listed in the letter dated 23 October 2009 and any other document. Any correspondence from the ICO to their counsel, MHRA, GLD, Tribunal or any other interested party regarding the above. (Please don't include correspondence to the appellant.)"

6. On 13 April 2021, the ICO responded. It denied holding the requested information.
7. The complainant requested an internal review on the same day. The ICO sent the outcome of its internal review on 28 May 2021. It revised its position and now refused the request as vexatious.

Scope of the case

8. The complainant contacted the Commissioner on 18 June 2021 to complain about the way her request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether or not the request was vexatious.

Background

10. The request relates to a previous Tribunal appeal by the complainant. A First Tier Tribunal judgement in 2010 dismissed the complainant's appeal. The complainant successfully appealed this judgement to the Upper Tribunal – who remitted the matter back to First Tier Tribunal. In 2016, the Tribunal considered the matter afresh and, again, dismissed the appeal. In the course of the protracted litigation, the ICO, or one of its legal representatives, inadvertently disclosed some of the withheld information in the open bundle of papers.

Reasons for decision

Section 14 - Vexatious

11. 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.*

12. 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.

13. 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.

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

15. *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).

16. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
17. 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*".
18. 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.
19. 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 ICO's position

20. The ICO largely relied on the arguments it had advanced in its internal review. It pointed out that the complainant's Tribunal case had been concluded in 2016 and that, in making the most recent request, the complainant was merely trying to re-open issues that the Tribunal had already determined.
21. The ICO noted that it had received 18 requests related to this or broadly similar matters from the complainant. It noted that there may have been more requests, but that earlier ones may have been deleted in accordance with its retention schedule.
22. By dealing with the complainant's previous requests the ICO had, it argued, provided the complainant with all the information that she was entitled to receive and that submitting further requests was merely a way for the complainant to make

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

"yet another attempt to subvert the findings of the decision notice and the First-tier Tribunal"

23. The ICO also pointed to a previous decision notice in which the Commissioner had found a similar request made by the complainant to be vexatious.²

The complainant's position

24. The complainant insisted that the present request was not an attempt to revisit previous grievances and that she had made her request to stop the information from being destroyed in accordance with the ICO's retention schedule.
25. She explained that she wanted the withheld information as it would ensure that the ICO was transparent in discharging its obligations under FOIA – in particular its duty to promote good practice.
26. The complainant also noted that she considered that the information would be of use to the legal community. She noted that her original Tribunal decision is cited in an authoritative legal textbook on the law of confidence and that book had been cited in a High Court judgement as recently as 2021.
27. Whilst the complainant accepted that she had made several requests for information, she considered that each request had been different and noted that most had been made whilst the previous litigation had been ongoing. In addition, she noted that a previous request had brought to light some poor record-keeping practices on the part of the ICO.

The Commissioner's view

28. Despite the complainant's strong insistence to the contrary, the Commissioner considers that this request is an attempt to revisit the 2016 Tribunal decision. As such it is an abuse of the FOIA process and therefore vexatious.
29. The request relates to a litigation that lasted over six years. The complainant exercised her right to appeal the ICO's decision notice, but the First Tier Tribunal dismissed the appeal. The complainant then successfully persuaded the Upper Tribunal that the earlier decision contained an error of law, the Upper Tribunal consequently asked the

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553810/fs50742630.pdf>

First Tier Tribunal to look at the matter again. The First Tier Tribunal did so in 2016 and again upheld the ICO's position. As is her right, the complainant appealed that decision to the Upper Tribunal once more, but this time was unable to persuade the Upper Tribunal that the decision involved an error of law.

30. The First Tier Tribunal is able to conduct a "full merits review" of decision notices issued by the ICO – meaning that it can consider the matter again afresh and consider evidence not presented to the ICO. It is therefore not bound by the ICO's investigation and can reach an independent view – regardless of any deficiencies in the ICO's investigation. The Upper Tribunal is then able to re-consider the First Tier Tribunal's decision if it considers that there is an arguable error of law.
31. The complainant is entitled to these avenues of appeal and she has availed herself of them comprehensively. The appeal of her original decision notice has been dismissed and the matter cannot now be re-opened.
32. The complainant is correct to say that Tribunal's 2010 judgement has been cited in a legal textbook. However it is not clear what aspect of the judgement was cited and in what context. The complainant has not provided a copy of the book or even the relevant passage. The most recent High Court case which cited this textbook cited a passage which appears completely unconnected to the Tribunal's judgement.
33. Without proper context, it is speculative to imply that the textbook cites the Tribunal judgement incorrectly or that disclosing any information that the ICO holds would shed any light on the matter. It is even more fanciful to imply – as the complainant appears to be doing – that the senior courts are being misled by the textbooks reference to the 2010 judgement.
34. The Commissioner notes the complainant's arguments that most of her requests were submitted whilst the Tribunal litigation was ongoing. He accepts that a distinction should be drawn between requests that are intending to service ongoing litigation and those submitted after the litigation has been resolved.
35. The Commissioner recognises that there is a moderate public interest in understanding the ICO's decision-making process – and slightly more so when it involves a mistake that has been made. However, the Commissioner considers that the narrow matter the complainant is pursuing – which is about the procedural handling of a Tribunal case – is a matter that is personal to her and of little wider public interest –

especially given the comprehensive manner in which both the First Tier and Upper Tribunal have dealt with the substantive case.

36. In any case, the ICO's original response to the complainant's request indicates that it may no longer hold the complete records – further undermining any public interest in disclosure.
37. Therefore, if the complainant genuinely does not wish to pursue, undermine or subvert the decision of the Tribunal, the requested information serves no wider public interest. Conversely, if the request has been made for the purpose of keeping the grievance alive, it is an abuse of process.
38. Either way, the Commissioner considers that the ICO has devoted a considerable amount of resources to this matter over a period exceeding a decade. More than five years since the Tribunal issued its judgement, the ICO is entitled to draw a line and to require it expend further resources would be disproportionate.
39. The Commissioner is therefore satisfied that the request was vexatious and therefore the ICO was entitled to refuse it.

Procedural matters

40. Section 17(5) of the FOIA requires a public authority, relying on section 14(1) to refuse a request, to issue a response, citing section 14(1), within 20 working days of receiving the request.
41. In this case, the Commissioner accepts that because of the two Easter bank holidays and the St Patrick's Day bank holiday in Northern Ireland (which the ICO is entitled to treat as a non-working day for the purpose of complying with a request) the ICO did issue its original response on the 20th working day. However, it did not begin relying on a claim that the request was vexatious until it completed its internal review.
42. The Commissioner therefore finds that the ICO breached section 17(5) of the FOIA in responding to the request.

Right of appeal

43. 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

44. 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.
45. 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

Roger Cawthorne
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SK9 5AF