Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2019

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested from the Ministry of Housing, Communities and Local Government (MHCLG) information relating to the 2012 consultation on changes to the Building Regulations. The MHCLG refused to comply with the request under section 14(1) of the FOIA because it considered that fulfilling the request would place an unjustified burden on the MHCLG and hence was vexatious.

2. The Commissioner's decision is that the MHCLG has failed to demonstrate that the request is vexatious. Therefore, the MHCLG was not entitled to refuse the request under section 14(1) of the FOIA.

3. The Commissioner requires the MHCLG to take the following steps to ensure compliance with the legislation:

    - Issue a fresh response to the request that does not cite section 14(1).

4. The MHCLG must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification for this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Background information

5. In January 2012 the predecessor of the MHCLG, the Department for Communities and Local Government (DCLG), published a consultation package on proposed changes to the Building Regulations and related technical guidance for England and invited stakeholders to provide their responses to various relevant questions.

6. This consultation package was comprised of 4 sections. Each of these sections consisted of one or more parts, as follows:

   - Section 1 – Parts A, B, C, K, M and N (Access Statements, Domestic Security, Changing Places, Toilets and Regulation 7)
   - Section 2 - Part L (Conservation of Fuel and Power)
   - Section 3 – Part P (Electrical Safety in Dwellings)
   - Section 4 – The Building Control System

7. In December 2012 DCLG published a document named "*2012 consultation on changes to the Building Regulations in England – Summary of responses"*. Paragraph 31 of this document stated *"We received 73 responses to the two consultation proposals to amend Approved Document B to resolve practical problems in the application of Requirement B2 (Internal fire spread (linings))."*

Request and response

8. On 8 May 2018, the complainant wrote to the MHCLG and requested information in the following terms:

   "May I request, under the freedom of information act, details

   The 73 responses received by the Department for Communities and Local Government (now MHCLG) regarding the consultation on Amendments to Part B (Fire safety) and changes to Local Acts. (See below)

   https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/38700/2012_BR_SOR.pdf"

9. The MHCLG responded on 15 June 2018. It stated that they were not able to provide the information requested "*because it would place an unjustified burden on the department"* and so the request was refused under section 14(1) (vexatious requests) of the FOIA.

10. Remaining disappointed with the response received, on the same date the complainant requested the MHCLG to conduct an internal review of its initial response.

11. Following an internal review the MHCLG wrote to the complainant on 24 August 2018. The MHCLG did not change its original position.

Scope of the case

12. The complainant contacted the Commissioner on 10 September 2018 to complain about the way his request for information had been handled.

13. During the investigation of this case, the MHCLG stated that it was only using the term "vexatious" because section 14 of the FOIA uses it, but it did not consider the request to be vexatious "*in the dictionary definition of the word."* The principal reason for refusing the request under this provision was that the MHCLG believed that it would place a grossly oppressive burden on them.

14. As part of her investigation the Commissioner asked the MHCLG to provide her with a number of the responses received as representative samples of the information requested. The MHCLG furnished the Commissioner with this additional information accordingly.

15. The analysis which follows considers whether the MHCLG was correct in its application of section 14(1) of the FOIA.

Reasons for decision

Section 14(1)

16. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request if the request is vexatious. The term "vexatious" is not itself defined in the legislation, but in *Information Commissioner v Devon County Council & Dransfield*[1] the Upper Tribunal commented 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."*

[1] UKUT 440 (AAC), 28 January 2013

17. The Upper Tribunal concluded that 'vexatious' could be defined as the:

    "…manifestly unjustified, inappropriate or improper use of a formal procedure."

18. In this case, the MHCLG stated that the burden in preparing the response to the information request, including identifying and redacting any exempt material, would be disproportionate in relation to its value.

19. Normally, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12. This section provides that a public authority is not obliged to comply with requests where the cost of doing so would exceed a set limit. However, a public authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information, which was the concern of the MHCLG in this case.

20. In relation to situations where the concern of the public authority is about the burden of identifying and redacting exempt information, the Commissioner's published guidance[2] on section 14(1) identifies that this section may be relevant where:

    - the requester has asked for a substantial volume of information; **and**
    - the authority has real concerns about potentially exempt information being contained within the requested information; **and**
    - any potential exempt information cannot easily be isolated because it is scattered throughout requested material.

21. The Commissioner's guidance on section 14(1) states at paragraph 70 that a public authority *"may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation."* The guidance goes on to state about situations of this kind *"…we consider there to be a high threshold for refusing a request on such grounds"* and that *"we would expect the authority to provide us with clear evidence to substantiate its claim that the request is grossly oppressive*". In addition, it states that *"the bar for refusing a request as*

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

'grossly oppressive' under section 14(1) is likely to be much higher than for a section 12 refusal."

22. The Commissioner has considered the representations received from the complainant and the MHCLG in order to understand to what extent the request would impose a burden.

23. The MHCLG was asked to provide reasoning in support of its position. In its response, the MHCLG stated that *"The information initially in scope of the request consists of 94 emails which were received which contained responses to the Consultation (or 129 emails if pre consultation email are included)."* The MHCLG added that the majority of emails had at least two attachments relating to different parts of the consultation, and some had a covering letter as well. It stated that it would be necessary to open and review all those 94 emails to establish whether they were within the scope of the request. However, the Commissioner notes that this activity could be included in a section 12 cost estimate, so she does not accept that this task is relevant here.

24. The MHCLG explained that in its consultation document it added a specific clause stating "*The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties."* In order to meet this obligation, it would have to examine each email and identify and redact exempt personal data.

25. As explained above in paragraph 14 of this decision notice, the MHCLG provided the Commissioner with copies of eight emails with corresponding attachments submitted to the MHCLG in its consultation process in 2012. The Commissioner notes that most of the responses received as part of this consultation were provided in form of a completed questionnaire which was comprised of different parts.

26. "Chapter 3: Amendments to Part B", which was the focus of the complainant's request, contained the following questions:

"3.1 Do you agree that the proposed amendments to Table 10 are reasonable and maintain the necessary standards of safety?

3.2 Do you agree that the proposed amendments to Table 11 are reasonable and maintain necessary standards of safety?

3.3 Do you think the proposed new Diagram 28 is necessary to illustrate the changes to Table 11?

3.4 Are you able to provide information to inform further consideration of any of the topics raised in or related to this consultation chapter?"

27. Having carefully examined the copies of eight emails received, the Commissioner notes that the amount of personal information of third parties received in response to this part of the consultation package is very limited and as such it would not appear likely to require a lot of effort to ensure that section 40(2) requirements are met.

28. The Commissioner appreciates that not all respondents submitted their comments by completing the standard form but instead elected to provide their responses in form of email messages. However, taking into account the technical nature of the information requested by those specific questions, it is the Commissioner's view that redacting personal data those email messages would not constitute a significant burden to MHCLG.

29. The Commissioner wishes to refer to a previous decision notice where she considered the application of section 14(1 on the basis of the burden of the request and stated that *"in relation to any information request 34 hours' work is likely to be at the lower end of what may be considered grossly oppressive."*[3]

30. In addition to section 40 considerations, the MHCLG argued that it would also be necessary to examine these 73 responses for potential applicability of section 41 (information provided in confidence) because the consultation document also provided a clause dealing with this aspect, which stated *"If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you provided as confidential."*

31. Furthermore, MHCLG clarified that it would also have to dedicate time to remove out of scope information, assess additional supporting documents attached and conduct third party notification when necessary.

32. The MHCLG has provided the Commissioner with an estimation on how much time it would need if it would be required to respond to the complainant's request in full. In this respect, The MHCLG stated that it would need approximately 90 seconds to open each of 94 emails to identify how many of them contain information within the scope of the request. Further it would need 30 minutes for each of 73 responses in

[3] Decision notice FS50713120 of 17 April 2018 accessible at https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258748/fs50713120.pdf

scope to extract and save the relevant attachments, save them to an appropriate format for redaction, to carry out redactions of personal data and notify respondents.

33. The Commissioner reiterates that activities, such as opening emails to identify the information requested, extracting and saving in a separate location the identified information, removing out of scope information and assessing additional supporting information are activities that can be taken into account when forming a cost estimate in relation to citing section 12 of the FOIA. Since in the present case the MHCLG is relying on section 14(1) as its basis for refusal to respond to the complainant's request, the above activities are irrelevant and as such the Commissioner does not accept them as valid arguments here.

34. Similarly, there is no requirement under the FOIA for the MHCLG to notify third parties that their personal data has been redacted. MHCLG may have chosen to undertake that activity, but the Commissioner does not accept that time spent on a task that it has chosen to undertake is valid reasoning for citing section 14(1).

35. The MHCLG stated that it would require additional time to assess any requests for confidentiality and to determine whether they are robust. According to the MHCLG each identified request for confidentiality would take additional 35 minutes to process.

36. The MHCLG firmly believes that when balancing the amount of work necessary to comply with the present request against its actual value it would result with a grossly onerous burden. According to the MHCLG this burden does not appear to be justified, especially when taking into account that a detailed summary of the responses has been already published and the complainant has access to it.

37. The Commissioner notes that the MHCLG stated that *"the number of responses with confidentiality requests is unknown as we would need to read through all of the responses and the covering emails to identify them."* However, having examined eight responses to the Commissioner, she notes that none of the respondents in these emails made a specific request for confidentiality in relation to the response provided in Part B of the consultation package. With that in mind, the Commissioner finds it difficult to accept the arguments that complying with section 41 requirements would cause a grossly oppressive burden.

38. In summary, the MHCLG argued that it would have to undertake the following activities to respond to the complainant's request:

    - *"Identify the responses which include Section 1, Part B*
    - *Assess additional documentation and covering letters*

- *PDF these responses*
- *PDF any covering letters or additional documentation if in scope*
- *Redact answers not relating to part B*
- *Identify and redact personal data, including for sole traders or very small companies*
- *Check for any requests for confidentiality*
- *Carry out third party courtesy notifications as there are key stakeholders and we would with to protect this relationship."*

39. Having considered the MHCLG's arguments as summarised above, the Commissioner considers that only three out of these eight activities are factors to be taken into account when applying section 14(1) of the FOIA and as elaborated above in this decision notice, the Commissioner does not consider that performing these activities would amount to a grossly oppressive burden to the MHCLG.

40. In conclusion, the Commissioner finds that the MHCLG has not demonstrated that compliance with the request would impose a grossly oppressive burden as elaborated in her published guidance. Consequently, the MHCLG was not entitled to rely on section 14(1) to refuse this request and must take the necessary steps as per paragraph 3 of this decision notice.

Right of appeal

41. 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

42. 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.

43. 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 .....

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