

## **Advice on the use of s.50(2)(c) FOIA 2000**

When the Commissioner receives an application under s.50 of the Freedom of Information Act 2000 ("FOIA") for a decision as to whether a request for information has been dealt with in accordance with the requirements of Part 1 of FOIA, she must make a decision unless one of the grounds listed in s.50(2) FOIA applies.

Under section 50(2)(c) FOIA, the Commissioner has the power not to make a decision and therefore not issue a Decision Notice ("DN") if it appears to her that "the application is frivolous or vexatious".

If 50(2)(c) FOIA is applied and the Commissioner does not make a decision as per s.50(1) FOIA in respect of the information request complained about, the Commissioner must notify the complainant, as per s.50(3)(a) FOIA, that she has not made any decision under s.50 FOIA and detail her grounds for not doing so.

The relevant extracts of s.50 FOIA are as follows (emphasis added):

### **"50 Application for decision by Commissioner.**

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision **unless** it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

**(c) that the application is frivolous or vexatious,** or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) **notify the complainant that he has not made any decision under this section as a result of the application** and of his **grounds** for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

....

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

..."

The FTT commented on the ICO's use of 50(2)(c) in the case of **Webber v Information Commissioner (EA/2017/0134)** in which the Tribunal endorsed the view of the House of Commons that it was arguable that the Appellant's request was '*frivolous or vexatious*' given his earlier request and refusal (regarding the same information) and that section 50(2)(c) may therefore be engaged. The Tribunal found that "*It was open to the ICO to curtail this profligate waste of public resources by using her power under s.50. She had a duty to consider exercising this power and she should have exercised it*" (para 17). (emphasis added)

The FTT were therefore questioning why the Commissioner did not consider using her power under s.50(2)(c) when the requester was making a request for the same information and the Commissioner were looking at the same issue.

### **Complaints about use of s.50(2)(c)**

If a decision (under s.50 i.e. a DN) is not made by the Commissioner and a DN is not issued then the complainant will not have the right of appeal stated in s.57 FOIA because a notice has not been served.

The complainant may decide to make a complaint to the ICO about the way in which their case has been handled; which may then be referred to the PHSO. Alternatively the complainant may decide to apply to bring a claim for Judicial Review.

Therefore any decision to use s.50(2)(c) must ensure that it fully provides grounds per s.50(3)(a) and provides thorough reasons.

### **Judicial Review**

Judicial review ("JR") is the procedure by which the courts examine the decisions of public bodies to ensure that they act lawfully and fairly.

A decision of a public body must be reasonably arrived at.

Any person with 'sufficient interest' in a matter can challenge a decision made by a public body, such as the ICO, by making an application to the Administrative Court for JR.

There are a number of grounds for JR, including:

### Illegality

Illegality arises when a decision-maker:

- Misdirects itself in law.
- Exercises a power wrongly.
- Acts *ultra vires*.

### Irrationality

A decision may be challenged as irrational, if:

- It "is so unreasonable that no reasonable authority could ever have come to it" (*Wednesbury unreasonableness*). The courts are very reluctant to find that a decision was *Wednesbury* unreasonable, particularly where the decision-maker is an expert.
- The decision-maker took into account irrelevant matters or failed to consider relevant matters.

### Procedural unfairness

This ground arises, if the decision-maker has not properly observed:

- The relevant statutory procedures, such as a failure to consult or to *give reasons*.
- The principles of natural justice in the decision-making process (for example, if the decision-maker has shown bias or has failed to hear an affected party).

A flawed consultation process is now a common ground for judicial review claims.

The court will often infer a duty to give reasons for a decision.

### Legitimate expectation

A public body may, by its own statements or conduct, be required to act in a certain way, where there is a legitimate expectation as to the way in which it will act. A legitimate expectation only arises in exceptional cases and there can be no expectation that the public body will act unfairly or beyond its powers.

### **Setting out 'reasons' for using the power under s.50(2)(c)**

To demonstrate that the Commissioner's decision to use s.50(2)(c) was reasonably arrived at, it is necessary to give reasons for the decision.

As the court often infers a duty to give reasons for a decision, we need to keep a record of those reasons. This can help to demonstrate compliance and reasonableness.

The courts are required to consider 'proportionality' of a public body's decision. They must look at whether a fair balance has been struck between the competing interests at stake.

### Demonstrating the complainant's behaviour

In cases when the Commissioner is considering using s.50(2)(c) FOIA, it is necessary to demonstrate why the complainant's frivolous or vexatious behaviour is relevant.

In such cases, in our letter to the complainant notifying them that a s.50 decision will not be made, it will be necessary to:

- Detail what the complainant's underlying issue is.
- Clearly demonstrate how much time and attention has been spent by ICO (and others if relevant) on addressing the complainant's issues.
- Gather as much evidence as possible to give full reasons for our decision to use s.50(2)(c).

It would be advisable to list all of the previous cases / dealings that the ICO has had with the complainant to demonstrate the complainant's behaviour.

For example, it would be advisable to include details of all:

- DNs
- FTT decisions
- Costs orders
- Information requests to ICO

This will help to paint a picture of the complainant's behaviour and detail the reasons for using s.50(2)(c).

It is also relevant to note the resources used in respect of the matters complained of as a public body needs to use its resources wisely, as commented on by the Judge in the Webber case above.