

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2013

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant requested information to evidence how the public authority had reached its conclusions when dealing with one of his information requests; the public authority determined the request to be 'vexatious' under section 14(1) of the FOIA. The Commissioner has concluded that the request was not 'vexatious' and he requires the public authority to take the following steps to ensure compliance with the legislation:
 - It should issue a fresh response.
2. The public authority 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 of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

3. The request this decision relates to can be followed on the "*What do they know*" ("WDTK") website¹. It is a lengthy request to follow and contains several other information requests.
4. The complainant has made several further requests to this public authority, for similar subject matters, the responses to which are being investigated at the same time as this complaint. These can also be found on WDTK.
5. On 4 August 2012, the complainant made his first information request in this WDTK string. As part of its response, on 4 October 2012, the public authority advised: "*I can confirm that we hold information on the subject you have requested*". The complainant raised further queries on 5 October 2012 and was subsequently advised, on 12 October 2012, that: "*I have reviewed the response I provided and believe that I should have stated clearly that the response was 'information not held'. I must apologise for this error.*" The change of position by the public authority forms the basis of this current complaint.

Request and response

6. On 15 October 2012, the complainant wrote to the public authority and requested information in the following terms:

"Thank you for your response dated 12th October. In your response you stated that that [sic]:

'upon reflection, the material you have asked us to look at does not affect the response provided to you on 4th October.'

However, you also stated that you 'reviewed the response provided' and believe that you had made an 'error' and 'should have stated clearly that the response was 'information not held'.'

In my belief these two statements - taken in the context of the previous letter referred to - constitute a contradiction.

¹https://www.whatdotheyknow.com/request/use_of_directed_energy_device_s_i

I would like to politely ask that you provide digital copies of the communications you made and received [sic] in order to establish the position you came to."

7. Whilst dealing with a further request within the same WDTK string, on 9 November 2012 the complainant clarified that: *"the request to have the communication information leading to the response given should be treated as a new Freedom of Information request"*.
8. On 3 December 2012 the complainant again advised: *"that the component request for communication info on 15th October (and mentioned on 9th November) has still not received [sic] a response"*. This correspondence was acknowledged by the public authority on 4 December 2012.
9. The public authority responded to other requests within this WDTK string but did not respond to this particular request. The complainant also went on to make further requests within the same WDTK string, which received various responses.
10. On 24 December 2012 the complainant again drew the public authority's attention to its lack of response to this request, advising that it had responded to a similar type of request which post-dated this one.
11. On 3 February 2013 the complainant again advised the public authority: *"I would like to mention that I am still awaiting any kind of response to my previous request for the e-mail generated in coming to the first response (15th October)"*. This was reiterated on 21 February 2013.
12. On 20 February 2013 the public authority responded to some queries that were raised in the 3 February 2013 correspondence referred to above, but it again failed to respond to, or directly acknowledge, this information request.
13. Following correspondence sent to it by the Commissioner, the public authority eventually responded on 30 April 2013. It found the request to be vexatious. It maintained this position following internal review.

Scope of the case

14. The complainant contacted the Commissioner on 27 May 2013 to complain about the way his request for information had been handled. The Commissioner has considered whether or not the request is vexatious.

Reasons for decision

15. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
16. The term "vexatious" is not defined in the FOIA. The Upper Tribunal recently considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*². The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure.*" The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
17. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests³. 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.
18. The new guidance suggests that 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. Where this is not clear, the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request. Where relevant, public authorities will need to take into account wider factors such as the background and history of the request.
19. In its refusal notice of 30 April 2013, the public authority initially apologised to the complainant for failing to register his correspondence of 15 October 2012 as an information request. It advised him that it held information within the scope of his request but continued saying:

"It is clear ... that you are seeking the information in order to review whether MOD has properly complied with an earlier request of 4 August 2012. As previously advised there is a process set out in the

² GIA/3037/2011

³http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

FOI statutory Code of Practice for requesters who wish to complain about a public authority's FOI response. This involves requesting an internal review by the public authority in the first instance, and then if still not satisfied thereafter raising a complaint with the Information Commissioner's Office (ICO). I am aware that you have followed this complaints process in respect of your original request of 4 August for a review about the use of directed energy devices, and following MOD's internal review your complaint to the ICO is currently being actioned".

20. The Commissioner here notes that the complainant had, as suggested by the public authority, asked for an internal review in respect of the earlier request of 4 August 2012. This was provided and resulted in a complaint being made to the Commissioner and a decision notice being issued on 10 July 2013⁴. These actions post-dated this information request.

21. The public authority also said to the complainant:

"I have to advise that the request for this information places an unreasonable burden on the Department when, at the same time, it is responding to the Information Commissioner on the same subject. Regardless of the correctness of the MOD's handling of your original request, there can be no useful purpose in you "establishing the position (ie MOD) came to" as in raising your complaint with the ICO you have effectively asked the ICO to take the issue forward on your behalf. Use of the FOI regime by requesters to conduct their own investigations would be likely to confuse and complicate the investigation process and therefore prejudice the effective and efficient conduct of the ICO's independent investigatory process and hinder MOD's ability to respond in [a] timely manner to their requests. The Information Commissioner will obtain from MOD such information as he requires to reach a statutory decision on whether MOD has met its statutory FOI obligations in responding to your requests and will advise you of the outcome. In the circumstances MOD finds that it is not obliged to comply with your request of 15 October for the meta-data relating to your previous request under the exemption at section 14(1) of the Act (Vexatious Request)".

⁴[http://www.ico.org.uk/~media/documents/decisionnotices/2013/FS50477818.pdf](http://www.ico.org.uk/~/media/documents/decisionnotices/2013/FS50477818.pdf)

22. The Commissioner notes that, at the time of this request, he had not yet commenced an investigation of the 4 August 2012 request, and therefore had not commenced any associated enquiries with the public authority. Although there had been earlier correspondence with the public authority about requests made by the complainant, the Commissioner first formally advised the public authority that he had accepted the request for investigation in question here on 16 January 2013.
23. The Commissioner accepts that on 30 April 2013, when the public authority first wrote to the complainant in response to this request, he was in active correspondence with the public authority as a consequence of his investigation into the 4 August 2012 request. However, it is important to note that this was only necessary because of its failure to respond to the request when it was made more than six months beforehand.
24. In response to the complainant's subsequent request for an internal review the public authority said:
- "... as explained in my letter dated 30 April, it was assessed as meeting a number of qualifying criteria for the use of the section 14(1) (vexatious request) exemption which meant the Department was not obliged to comply with it. These considerations apply equally to your request for an internal review of that decision. There would be no purpose served by such a review. It would be manifestly unreasonable for a public authority to be obliged to review its response to a request in circumstances where the primary purpose of the requester is to determine whether an earlier substantive request for information which he is actually interested in receiving (and which is still being handled by that public authority and pending adjudication by the ICO), has been handled properly. I therefore do not propose to comment further on MOD's handling of your request of 15 October 2012".*
25. The Commissioner here notes that in its refusal notice of 30 April 2013 the public authority advises the complainant: *"If you remain dissatisfied following an internal review, you may take your complaint to the Information Commissioner"*. Whilst this refusal covers more than one information request it does not differentiate between them and, in the Commissioner's view, the complainant would therefore expect to have to go through the internal review process prior to contacting the Commissioner.
26. During his investigation the Commissioner invited the public authority to support its position that this request was vexatious. It provided a number of arguments which are considered below. It also advised:

"For a reason I have been unable to determine, the Department was unaware of this request until it was brought [sic] to our attention by the ICO in April 2013 when the complainant raised it during the processing of his complaint about the MOD's response to his 4 August request.

Between the 15 October 2012 and April 2013 the complainant had the opportunity to advise MOD that it had not received a reply to this request, but did not do so. During part of this period MOD was conducting an internal review on the 4 August request, which it provided to the complainant on 3 December 2012. On the 4 December 2012, the complainant asked for all meta-data relating to the internal review of his request dated 4 August (but did not expand this to all meta-data relating to the initial request handling or advise that a response to his request of 15 October was still outstanding). MOD provided all of the meta-data relating to the internal review of the complainant's 4 August request on 21 December 2012".

27. The Commissioner would draw attention here to the *Background* element of this decision notice above. This indicates that the complainant attempted to elicit a response from the public authority on a number of occasions. On two of these occasions the public authority responded directly to his correspondence but, inexplicably, ignored this request. The Commissioner further notes that the public authority chose to answer a similar request from the complainant for the background information about the handling of his internal review, as indicated above, and provided this information without finding it to be a vexatious request.
28. The public authority provided the Commissioner with further arguments to support its position that the request is vexatious which the Commissioner will address in turn below.

29. Its first argument was:

"A public authority can only decide on the handling of a request at the time it becomes aware of it. Although it may been [sic] reasonable to have complied with the request on the date it was made by April 2013 when MOD first became aware of its existence, the burden of handling the request was considered disproportionate to its original aim".

30. The Commissioner does not accept that this is a sound argument to conclude that a request is vexatious. The public authority failed to respond to the request until more than six months had elapsed, despite being advised by the complainant on five occasions (as evidenced

above) that he was awaiting a response. On two of these occasions the public authority directly acknowledged the correspondence containing the complainant's 'chase-up' but it failed to deal with this element. The public authority then implies that, had it realised that it had received the request, then it would have been 'reasonable' to comply with it at that time. The Commissioner cannot accept that the public authority's poor request handling on this occasion can be used to the complainant's disadvantage. Had it actually dealt with any of the complainant's five reminders then the Commissioner can only assume, given its other responses, that it would not have refused the request under section 14.

31. The next argument cited by the public authority is:

"The burden of auctioning [sic] the request was considerable because it would have fallen to the same staff who were staffing questions from the ICO and this would have prejudiced timeliness of responses to the ICO investigation. The very purpose of s14 is to protect the resources of a public authority being squandered on the disproportionate use of FOIA. [The complainant] had accessed the formal complaints procedure to establish whether the Department had properly complied with his request of 4 August, and his request placed a further burden on the Department for the identical purpose. MOD contends compliance would [sic] have been a manifestly unreasonable, unjustified and inappropriate use of a formal procedure".

32. The Commissioner considers that any 'burden' is largely as a result of the public authority's failure to recognise and respond to the request when it was made – and on the occasions when the complainant tried to draw its attention to its non-compliance. He further notes that, assuming that the public authority is indicating that it was already considering the same information in order to respond to the Commissioner, that the staff involved would already have the necessary information to respond to the request readily to hand. Also, the public authority itself has previously mentioned that, had it realised that it had received the request at that time, then it would not have refused it as vexatious. The Commissioner therefore infers that to do so would not have been particularly onerous.

33. The next argument provided was that:

"The underlying grievance ([the complainant]'s view that the MOD had not properly complied with his request of 4 August []) has been exhaustively considered at both internal review and through an ICO investigation and Decision. In these circumstances MOD strongly considers that the complainant does not have a continuing

justification for his meta-data request of 15 October to be dealt with".

34. The Commissioner does afford this argument some weight in that he has since concluded, by virtue of the decision notice referred to in paragraph 20 above, that no further information is held in relation to the original August request; this upholds the public authority's changed position which formed the basis of this request. Nonetheless, his other decision notice does not specifically cover the aim of this request which was, at the time it was made, an attempt by the complainant to obtain any recorded information to enable him to understand why the public authority initially claimed information was held then subsequently changed its position. Indeed, it is the Commissioner's view that, had the public authority properly responded to this request at the time it was made, then a viable explanation may have been accepted by the complainant which may have negated any subsequent redress to the Commissioner.

35. The public authority also argued:

"The aim of the 15 October 2012 request was to allow the complainant to judge how we came to the conclusion we advised on the 12 October. However, this was the purpose of both the internal review and the ICO investigation the complainant had instigated. [The complainant]'s meta data request had become disproportionate to the aim of his original request and the FOI complaints process which the Department was fully complying with".

36. The Commissioner accepts that this position is accurate, to a degree. However, it is important to recognise that this request seeks copies of any internal communications which allowed the public authority to reach its amended position. It is therefore different to what has already been considered in the other decision notice which looks at the conclusions of any such communications but not actual provision of them as such.

37. The public authority's final argument to support its position is:

"Provision of the meta-data would be a particularly time consuming process because the information does not relate to specifically to [sic] DE devices, but is a dialogue on what information may or may not be in scope of the original request. Without a detailed narrative to explain the meta-data (much of which was not based on authoritative held [sic]) its provision would not serve to help the requester understand the position the Department arrived at ... It is already clear that the requester is obsessive about this issue and the Department has made the requester vexatious under FOI on the

subject of DE weapons and information operations. Given the Department's past dealings with [the complainant] there are strong grounds for believing that further burdensome requests would follow compliance with the meta-data request".

38. The FOIA requires a public authority to provide recorded information. If it is able to provide further assistance to help a complainant understand that data then the Commissioner considers that to be best practice and in compliance with its duties under section 16 of the FOIA. However, a lack of such clarification does not mean that a public authority can refuse to provide the information requested on the basis that it may be difficult to understand.
39. Whilst this request may now seem futile to the public authority as the Commissioner has already made a decision about the initial request of 4 August 2012, in the Commissioner's view this request is for different information. This is because the complainant asks for any recorded information that substantiates the public authority changing its initial position. Therefore, even if the ultimate aim of requesting that data is to try to consolidate what has since become the Commissioner's decision, it must be noted that the request pre-dates the Commissioner's decision by some considerable time.
40. The Commissioner is also of the view that the complainant should not be further disadvantaged as a result of the public authority's poor handling of this request. Had the public authority recognised the request at the time it was made, it seems apparent to the Commissioner that it would not have been classed as vexatious.
41. For the reasons given above the Commissioner concludes that, in these particular circumstances, the request is not vexatious.

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

**Graham Smith
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