

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2013

Public Authority: Ministry of Justice (MOJ)
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested documents relating to the decision by the Ministry of Justice (MOJ) on a tender for business submitted by a named firm of solicitors.
2. The Commissioner's decision is to uphold part of the complaint. He found that MOJ had disclosed some of the information requested on 5 February 2013. The Commissioner accepted that some of the requested information was not held, and noted that MOJ had relied upon section 43(2) FOIA to withhold other information which the Commissioner has not considered.
3. The Commissioner found that MOJ had been wrong to rely on section 17(6) FOIA in not responding to one of the complainant's letters of 19 April 2013. He requires MOJ to respond to the 5 February 2013 request for "*The [MOJ's] initial decision on the applicant's tender*", as clarified on 19 April 2013 to include "*The initial decision letter on this tender*".
4. The Commissioner decided that the remainder of the complainant's letter of 19 April 2013 had correctly been found to be vexatious and that the complainant had been told this on 20 May 2013.
5. The Commissioner requires MOJ to respond to the complainant's 5 February 2013 request for "*The LSC's initial decision on the applicant's tender*", as clarified on 19 April 2013 to include "*The initial decision letter on this tender*". MOJ must do this 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.

Request and response

6. The complainant corresponded with MOJ's Legal Services Commission (LSC), the relevant parts of which became the Legal Aid Agency (LAA) in April 2013. For clarity and consistency the Commissioner has referred to MOJ through.
7. On 5 February 2013, the complainant wrote to MOJ and made a four-part request for information. The first two parts were for:
 1. The **complete** [applicant's emphasis] ITT response and Tender Form.
 2. The [MOJ's] initial decision on the applicant's tender.

As regards the third and fourth parts of the information request, MOJ later said that no relevant information was held, a position the complainant has not disputed.

8. At the time of the information request, the complainant was engaged in legal proceedings against MOJ in the courts in relation to connected matters (the proceedings). The complainant has sought background information from MOJ to inform his case in those proceedings by means which have included making information requests, including that of 5 February 2013. For the avoidance of any doubt the Commissioner makes clear that the proceedings are not a matter for him.
9. On 28 March 2013 MOJ told the complainant that it held the information requested in part 1 of the information request but was withholding it relying on the exemption at section 43(2) FOIA (Commercial interests). As regards part 2 of the request, MOJ provided summary information held on its files. MOJ made no reference to holding any decision letter which may have been sent to the tender applicant. The 28 March 2013 MOJ refusal notice made no reference to the section 14(1) FOIA exemption.
10. On 19 April 2013 the complainant wrote to MOJ in the following terms, a letter which MOJ refers to as request 83206:

Your reply states that you have the LSC's initial decision in this case and it is being attached. However, no formal decision letter addressed to the tenderer was attached.

My request included for information relating to the LSC's "initial decision"

Therefore, it was not proper for the LSC to make a distinction between information relating to the "initial decision" and the "initial decision letter" and thereby not disclose initial decision letter.

I think it is necessary to disclosure urgently

1. The initial decision letter on this tender.

2. Subsequent written information relating to this tender. For example responses to representations from the applicant firm or another material written down such as notes or emails or correspondences surrounding the tender application.

11. Also on 19 April 2013 the complainant made a further, separate information request to MOJ on a connected matter. MOJ refer to this second 19 April 2013 request as request 83205.
12. On 20 May 2013 MOJ replied to the complainant regarding request 83205 saying it was vexatious and applying the section 14(1) FOIA exemption to it. MOJ added that it would now apply the provisions of section 17(6) FOIA and would no longer be responding to freedom of information requests in relation to this specific case or to further requests which were in some way attributed to the proceedings. MOJ added that its application of section 17(6) FOIA included request 83206.

Scope of the case

13. On 19 July 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He told the Commissioner that on 19 April 2013 he had requested a review by MOJ of its handling of his 5 February 2013 information request but that there had been no response from MOJ.
14. The Commissioner noted that there has been extensive correspondence between the parties over several years, much of it in relation to the proceedings, and that the proceedings remained in progress at the time of the information request. His decision relates solely to the 5 February 2013 information request and the complainant's connected 19 April 2013 letter, MOJ reference 83206.
15. In reaching his decision, the Commissioner has taken account of the detailed representations he received from both parties.
16. The Commissioner considered the application by MOJ of section 17(6) FOIA and the section 14(1) FOIA exemption to the complainant's request of 5 February 2013 as clarified by the complainant in his letter of 19 April 2013 (83206).

17. The Commissioner has not received representations from either party about MOJ's application of the section 43(2) FOIA exemption to the 5 February 2013 request and he has therefore not considered that matter.
18. The Commissioner did not consider MOJ's handling of the complainant's second 19 April 2013 request, 83205.

Reasons for decision

19. The complainant told the Commissioner that his letter of 19 April 2013 (83206) had included a request for an internal review of MOJ's decision, of 28 March 2013, regarding his 5 February 2013 information request. MOJ told the Commissioner that it regarded the 19 April 2013 (83206) request as a new request and had not interpreted it as a request for an internal review.

New request

20. The Commissioner saw that part 2 of the 5 February 2013 information request had been for:

"The LSC's initial decision on the applicant's tender."

He also saw that, while the 19 April 2013 (83206) letter from the complainant had made new information requests, it had also included the following:

"... it was not proper for the LSC to make a distinction between information relating to the "initial decision" and the "initial decision letter" and thereby not disclose initial decision letter..."

21. The Commissioner decided that in saying this the complainant was not making a new information request but was clarifying that, in his request of 5 February 2013, he had expected MOJ to include the relevant initial decision letter as part of any information disclosure - which it had not done.

Section 17

22. Section 17(5) of the FOIA provides that:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

23. Section 17(6) of the FOIA states that a public authority is not required to provide a refusal notice where:

"(a) the public authority is relying on a claim that section 14 applies, (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

24. On 20 May 2013 MOJ told the complainant that it would be applying the section 14(1) FOIA exemption to his 19 April 2013 (83205) information request. MOJ also said that it would apply section 17(6) FOIA from then on and would no longer be responding to FOI requests that it regarded as being related to the proceedings. MOJ added that the complainant's 19 April 2013 (83206) letter would be caught by its application of section 17(6) FOIA.
25. The Commissioner decided that it was reasonable for MOJ to apply section 17(6) FOIA to those parts of 83206 that were new information requests but that it was unreasonable to apply it to the clarification of the 5 February 2013 request. In deciding this he had regard for the fact that MOJ's 28 March 2013 refusal notice had made no mention of the section 14(1) FOIA exemption. He requires MOJ to consider and respond to the complainant's request, as clarified on 19 April 2013 (83206), for the relevant initial decision letter.

Section 14

26. Section 14(1) FOIA says that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious"

27. Section 14(1) FOIA provides that a public authority is not obliged to comply with an information request that is vexatious. The Commissioner's published guidance on section 14 FOIA at the time of the request cited five factors for public authorities to take into account when considering refusing a request as vexatious:

- (i) Whether compliance would create a significant burden in terms of expense and distraction.
- (ii) Whether the request is designed to cause disruption or annoyance.
- (iii) Whether the request has the effect of harassing the public authority or its staff.

- (iv) Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable.
 - (v) Whether the request has any serious purpose or value.
28. Guidance on vexatious requests provided by the Upper Tribunal in *Information Commissioner and Devon County Council vs Mr Alan Dransfield (GIA/3037/2011)* placed emphasis on the importance of adopting a holistic and broad approach to the determination of whether or not a request is vexatious.
29. The Upper Tribunal's judgment proposed four broad issues that public bodies should keep in mind when considering whether FOI requests are vexatious: (i) the burden of meeting the request; (ii) the motive of the requester; (iii) the value or serious purpose of requests; and (iv) any harassment or distress caused. It concurred with the earlier First-tier Tribunal decision in *Lee vs Information Commissioner and King's College Cambridge (EA/2012/0015, 0049 and 0085)* that vexatious implies an unjustified, inappropriate or improper use of a formal procedure.
30. The judgment noted that the four broad issues are "*not intended to be exhaustive, nor are they meant to create an alternative formulaic checklist*". It stated the importance of remembering that Parliament has expressly declined to define the term 'vexatious'. Consequently, the four broad issues, it said "*should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms*".
31. The Commissioner's current guidance on the application of section 14(1) indicates that the key question for the public authority is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. The public authority should take into account the background and history of the request where this is relevant.

Burden of requests and level of disruption, irritation or distress

32. The Commissioner understands from MOJ that the complainant has made 32 information requests since August 2010 in addition to other queries with regard to the proceedings. MOJ said that many of the requests had been similar and had overlapped each other and with other multiple queries regarding the proceedings. MOJ added that these requests in aggregate had imposed a significant burden and had been a distraction for a wide range of MOJ staff.
33. MOJ said that the complainant's information requests had been obsessive and repetitive. They had all been similar in nature and had related to the proceedings. MOJ added that, in its view, the "industrial

volume" of the requests and their erratic sequencing had been designed to cause disruption or annoyance, and had the effect of harassing the MOJ staff attending to them.

34. The complainant told the Commissioner that his requests had been focussed and had not been obsessive; they had been polite and could not have caused distress or annoyance to any reasonable person.
35. The complainant told the Commissioner on 29 November 2013 that the only reason for seeking the information requested was to strengthen his case in the proceedings against MOJ. He said that the information requests became necessary as MOJ was not following the court disclosure process.
36. When considering the complainant's 5 February 2013 and 19 April 2013 (83206) requests, the Commissioner decided that:
 - MOJ had not sought to persuade either the complainant or himself that the complainant's 5 February 2013 request was vexatious, and in his view it had not been.
 - Setting aside the point of clarification regarding the 'initial decision letter' - to which he requires MOJ to respond - the Commissioner decided that the requests contained in the remainder of the 19 April 2013 (83206) letter were vexatious. In so deciding he found persuasive: the totality of the history and context of the request; the burden of the request and level of disruption, irritation or distress caused by it set in the context of other related requests; and, the complainant's use of the FOIA legislation to seek information to further his cause in the proceedings.

Summary

37. The Commissioner has partially upheld the complaint.
38. The Commissioner noted that MOJ had disclosed some of the information requested on 28 March 2013. He accepted that some of the requested information was not held and noted that MOJ had relied upon section 43(2) FOIA to withhold other information but did not consider MOJ's application of that exemption.
39. The Commissioner found that MOJ had been wrong to rely on section 17(6) FOIA in not responding to a part of the complainant's letter of 19 April 2013 (83206). He requires MOJ to respond to the 5 February 2013 request for "*The LSC's initial decision on the applicant's tender*", as clarified on 19 April 2013 to include "*The initial decision letter on this tender*".

40. The Commissioner decided that the requests in the remainder of the complainant's letter of 19 April 2013 (83206) had correctly been found to be vexatious as the complainant had been told on 20 May 2013.

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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://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

Jon Manners
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