

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2016

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to Operational Policy Instructions (OPIs). The Home Office refused to comply with the request because it considered it vexatious under section 14(1) of the FOIA.
2. The Commissioner's decision is that the request was not vexatious and so the Home Office incorrectly relied on section 14(1). It is now required to issue a fresh response to the request.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Provide to the complainant a fresh response to his request that does not rely on section 14(1).
4. The Home Office 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 FOIA and may be dealt with as a contempt of court.

Background

5. The Home Office provided the following description of what an OPI is:

"An OPI is an Operational Instruction aimed primarily at entry clearance staff. OPIs can vary from just a few lines, for example to announce a forthcoming change to legislation, to relatively complex

operational instructions on how to handle a particular type of application, or training materials for a major legislative change."

Request and response

6. On 27 October 2014, the complainant wrote to the Home Office and requested information in the following terms:

"I would like request all OPIs (which might also be called eGrams) issued after the OPI entitled 'Gratis Visas for LE Staff' (number 361, issued 10 August 2012), up to and including OPIs issued on 26 October 2014.

For each OPI I would like the full text of the OPI. Where it is not clearly marked in the text, I would like to also know OPI number, its title, and its date of issue.

Should any portion of a requested OPI be exempt from release by statute, I ask that the minimal possible portion of material be redacted, and the rest of the material be released in its entirety. Please mark each individual redaction with the relevant FOI legal excuse(s) for withholding that specific section.

Should any OPI be withheld in its entirety, I would request that the 'title', 'date of issue', 'number', and number of pages be provided, along with the specific reason(s) that the OPI was withheld."

7. The Home Office responded on 19 November 2014 refusing to comply with the request citing section 12 (costs) of the FOIA.
8. The complainant requested an internal review on the 21 November 2014. After being prompted by the Commissioner the Home Office responded to the complainant's internal review request on the 1 May 2015; it stated that it had applied section 12(1) incorrectly and instead now cited section 14(1) (vexatious requests) in response to the complainant's request.

Scope of the case

9. The complainant initially made a complaint to the Commissioner regarding the time taken to respond to his request for internal review. Following receipt of the outcome of the internal review the complainant contacted the ICO about the refusal of his request. He disputed the decision by the Home Office that his request was vexatious.

10. The Commissioner has considered whether the Home Office was entitled to rely on the vexatious provision at section 14(1) of the FOIA.

Reasons for decision

11. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if it is vexatious.
12. The term "vexatious" is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* (UKUT 440 (AAC), 28 January 2013). In that case the Upper Tribunal defined a vexatious request as one that is a "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
13. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
14. In its submission, the Home Office referred to the Commissioner's guidance on section 14(1)¹ recognising (at paragraph 68), 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*".
15. The Home Office provided an explanation to the Commissioner of what would be involved in complying with the complainant's request. The Home Office explained that the Foreign and Commonwealth Office (FCO) had an intranet site called FCONet and that this was where operational guidance for entry level staff, including OPIs, was published. It explained that FCONet was accessible from any computer with an

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

internet connection and by someone who had an FCONet user account. The Home Office went on to explain that in 2014 the FCO chose to move to SharePoint, which the Home Office explained is accessible only from an FCO network called Firecrest. The Home Office stated that only a few members of its staff in the UK currently have access to Firecrest.

16. The Home Office explained to the Commissioner that UK Visas and Immigration Network Operations has one full time member of staff who is responsible for managing the central SharePoint content, however it explained that the time this member of staff has available for this is limited.
17. The Home Office explained that UK Visas and Immigration Network Operations issues its own OPIs from time to time. However, it explained that UK Visas and Immigration Network Operations does not own the information on OPIs it has not issued itself and therefore is not generally in a position to decide what information in an OPI might be exempt from disclosure.
18. The Home Office described the process for collating the requested information. It explained that any OPI being considered for disclosure under the FOIA will need to be sent to the various information owners to decide what information should be disclosed.
19. The Home Office explained that not all owners of the information have access to a Firecrest workstation and therefore they have no access to SharePoint which the OPIs are held on. However, the Home Office explained that in most cases it would be necessary for someone who does have access to SharePoint to carry out the following actions:
 - Download each OPI from SharePoint into a Word document, along with any attachments;
 - Send it from Firecrest to the main Home Office POISE IT system;
 - Identify the information owner and their contact details – in some cases, due to organisational changes, this is not straightforward;
 - Send it to them for review;
 - Collect the reviewed OPI along with any requested redactions – this will include ensuring that deadlines are met and chasing the information owners where required;
 - Collating the responses and send them to the FOI team.
20. The Home Office stated that it would take 10 to 15 minutes per OPI to carry out the steps above, but also explained this estimated time would

not include any time spent by information owners reviewing an OPI for exempt information and making the redactions.

21. The Home Office stated that the request covers 160 OPIs and would therefore take from around 27 to 40 hours of work to process. It explained that if it added an average of 15 minutes per OPI to identify exempt information and make redactions, this would be an estimated total of between 67 and 80 hours work.
22. For the following reasons, the Commissioner does not find the Home Office's reasoning convincing. First, his view is that some of the tasks described above may not relate primarily to considering exemptions. Instead, they may be tasks that it would be necessary to carry out in order to comply with the request, even without any exemptions being considered. Those tasks may be relevant to a costs consideration under section 12 of the FOIA, but they are not a valid argument for the request being vexatious.
23. Secondly, the Commissioner does not believe that the requirement from his guidance for a public authority to provide *"clear evidence to substantiate its claim that the request is grossly oppressive"* has been met. On the issue of which exemption it believed may apply, the Home Office stated that *"nearly all information will at least contain personal information"*, suggesting that it believed the exemption provided by section 40(2) would apply to this information. It appears, however, that this personal data would relate to individuals in their professional capacities. As the Home Office is aware, this means that the Commissioner's view is that this information would not necessarily be exempt under section 40(2). Neither, therefore, would it necessarily be the case that significant time would be required to consider and redact that personal data. In addition, most of the samples provided by the Home Office do not appear to contain any personal data.
24. In its submission, the Home Office also stated that *"some [OPIs] contain more sensitive information"*. Where a public authority is citing section 14 on the basis of time spent considering exemptions and redacting exempt information, it needs to explain clearly why that would be necessary and provide evidence to support this. A public authority will most likely have a convincing case where it can supply samples of the information showing where it would be necessary to consider exemptions and make redactions. Referring to *"sensitive information"* without specifying which exemption may apply in relation to this information and without providing any evidence in support of this is unlikely to be convincing reasoning.
25. Overall, the Commissioner is not satisfied that the Home Office has made a clear case about the time spent on considering exemptions and

redacting exempt material. He does not, therefore, accept that the request was vexatious on that basis.

26. During the investigation of this case the Home Office also advanced other reasoning for the request being vexatious, first explaining to the Commissioner that the complainant's request was believed to be a "*fishing expedition*". This is a term used to describe requests that are worded broadly in the hope that they will catch noteworthy information, but where the requester has no idea of what will be caught by the request. The Commissioner's view is that such a request may be vexatious in some circumstances, such as if it would impose a significant burden on the public authority.
27. As to whether the request in this case could be accurately characterised as a fishing expedition, the Commissioner notes that the Home Office acknowledged elsewhere in correspondence with his office that it did not know what the complainant was interested in. The Commissioner is not aware of any evidence upon which the Home Office would have been able to assess the value or purpose of the request, but considers that this means there was also no sound basis for concluding that the request was a fishing expedition. Instead, his view is that the complainant may have had a good reason for wording his request as he did, and so does not agree that it could be considered vexatious on the grounds of its scope.
28. Second, the Home Office explained that the complainant had made a number of requests to them and provided evidence to support this. The Commissioner notes that the complainant has made a number of requests to the Home Office, however only some of these requests relate to OPIs. The Commissioner also notes that some of the complainant's requests appear to be clarifications of earlier requests that were made following communications between the complainant and the Home Office.
29. Furthermore, the evidence from the Home Office shows that the complainant's previous requests relating to OPIs were made over two years prior to the request in question in this case. The Commissioner therefore does not accept that the request above was vexatious due to the number of previous requests the complainant had made to the Home Office.
30. Turning to the conclusion, the Home Office's position on the complainant's request has been inconsistent. First the request was refused on cost grounds under section 12 of the FOIA. Later, the Home Office cited section 14(1) on the basis of time that would be spent on redacting exempt material. The reasoning it supplied to the ICO then suggested that it was citing section 14 on the basis of tasks that may be

relevant to section 12 and provided an explanation on redaction which suggested that it had no clear notion of how long it would be necessary to spend on redaction or under which exemption.

31. The Commissioner therefore does not consider that this request meets the criteria for being considered vexatious and his finding is that the Home Office was not entitled to rely on section 14(1) to refuse to comply with the request. At paragraph 3 above the Home Office is now required to provide a fresh response to this request.

Right of appeal

32. 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@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

33. 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.
34. 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

Ben Tomes
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