

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 March 2017

**Public Authority:** Attorney General's Office  
**Address:** 20 Victoria Street  
London  
SW1H 0NF

### Decision (including any steps ordered)

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1. The complainant has requested information about unduly lenient sentences. The Attorney General's Office applied section 14(1) of the FOIA (vexatious requests) to the request. The complainant complained about the application of section 14(1) of the FOIA and also that the AGO had not complied with section 16(1) (duty to provide advice and assistance) of the FOIA.
2. The Commissioner's decision is that the Attorney General's Office has applied section 14(1) of the FOIA appropriately. She also considers that the AGO has not breached section 16(1) of the FOIA.
3. The Commissioner does not require the Attorney General's Office to take any further steps as a result of this decision.

### Request and response

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4. On 22 September 2015 the complainant wrote to the Attorney General's Office (AGO) and requested information in the following terms:

*"I wish to know the following information regarding referrals of sentences to the Court of Appeal (Criminal Division) by HM Attorney General under sections 35 and 36 of the Criminal Justice Act 1988.*

1. *In respect of such referrals, are the referrals made by HM Attorney General, or HM Solicitor General on behalf of HM Attorney General?*
2. *Does HM Attorney General's Office retain a database of Defendants'*

*sentences that HM Attorney General applied for leave to refer to the Court of Appeal (Criminal Division) as being "unduly lenient", and if so, how many years does it cover?*

*3. How many sentences has HM Attorney General applied for leave to refer to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years?*

*4. Of those sentences that HM Attorney General applied for leave to refer to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years, how many applications were granted leave and how many were refused?*

*5. Of those sentences that HM Attorney General applied for leave to refer to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years, of those that were granted leave, how many sentences were increased and how many sentences were not increased?*

*6. What were the names of the Defendants in each case that HM Attorney General applied for leave to refer their sentences to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years?*

*7. What were the names of the Defendants in each case that HM Attorney General applied for leave to refer their sentences to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years whose sentences were increased?*

*8. What were the names of the Defendants in each case that HM Attorney General applied for leave to refer their sentences to the Court of Appeal (Criminal Division) as being "unduly lenient" within the past five years whose sentences weren't increased?"*

5. The AGO responded on 21 October 2015 refusing to provide the requested information citing section 14(1) – vexatious requests. It also provided the complainant with links to information already publicly available about unduly lenient sentences (ULS).
6. Following an internal review the AGO wrote to the complainant on 20 January 2016, upholding its original decision. It also explained that he had complained that it had not complied with its duty under section 16 to provide him with advice and assistance, as it should have done given that it was relying upon section 12 (cost of compliance). The AGO pointed out that it had not, in fact, relied on section 12.

## **Background**

7. The AGO explained that it has a history of involvement with the complainant, particularly through the exercise of the Attorney General's vexatious litigant function. The complainant was the subject of a vexatious litigant order under section 42 of the Senior Courts Act 1981, which provides that the High Court can make such an order if, on an application by the Attorney General, it is satisfied that a person has "habitually and persistently and without any reasonable ground"

instituted vexatious proceedings. Being subject to this order means that the individual cannot bring proceedings without the leave of the High Court.

8. The AGO also explained that the Attorney General (or his deputy, the Solicitor General) is responsible for applying to the High Court for a vexatious litigant order. The Attorney General supports this application with evidence of an individual's vexatious behaviour gathered by the Government Legal Department (GLD), which is instructed on behalf of the AGO. The AGO explained that the relationship between it and the GLD is one of client and solicitor.
9. Furthermore, the AGO explained that when making an application for a vexatious litigant order, the Attorney General is acting in his capacity as guardian of the public interest, in safeguarding the administration of justice. He is not acting as a Minister of the Crown.

### **Scope of the case**

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10. The complainant contacted the Commissioner 20 April 2016 to complain about the way his request for information had been handled. He explained that he does not agree with the application of section 14(1) and sent the Commissioner copies of various decision notices dealing with the application of section 14(1). The complainant also complained that the AGO had not provided him with advice and assistance, under section 16.
11. The complainant also sent the Commissioner a House of Lords judgement regarding discrimination issues.
12. The Commissioner will consider whether the AGO has applied section 14(1) appropriately.

### **Reasons for decision**

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#### **Section 14(1) – vexatious request**

13. Section 14(1) states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
14. The term "vexatious" is not defined in the FOIA. The Upper Tribunal (UT) considered the issue of vexatious requests in the *Information*

*Commissioner v Devon CC & Dransfield* (UKUT 440 (AAC), 28 January 2013).<sup>1</sup> The UT commented that “vexatious” could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. This definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

15. The UT also looked whether a request is vexatious by considering four broad issues:

- the burden imposed by the request (on the public authority and its staff);
- the motive of the requester;
- the value or serious purpose of the request; and
- any harassment or distress caused to staff.

16. In light of the above, the Commissioner considers 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.

17. The Commissioner has identified a number of “indicators” which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests.<sup>2</sup> 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 when deciding whether a request is vexatious.

18. Furthermore, the Commissioner’s guidance states:

*“Section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress”.*

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<sup>1</sup> <http://www.osspsc.gov.uk/Aspx/view.aspx?id=3680>

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

19. The guidance also recognises that sometimes a request may be so patently unreasonable or objectionable that it will obviously be vexatious, but that in cases where the issue is not clear-cut the key question is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
20. This will usually mean weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request.
21. The Commissioner will go on to consider evidence submitted and both parties' arguments regarding the application of section 14.

### **Complainant's arguments against the application of section 14**

22. The complainant explained that he considered that the AGO had not applied section 14 appropriately.
23. He explained that the AGO has stated that it is entitled to consider his past behaviour, as acknowledged in *Dransfield*. He argued that this was a total misconstruction of the *Dransfield* judgment and that although previous history and applications may be relevant, the merits of the present request have to be considered first in its own right.
24. The complainant also complained that the AGO had stated that he would be dissatisfied with a response and would be likely to request a review. The complainant explained that he had only asked for reviews on narrow issues which he considered had not been adequately or fully addressed. The complainant also argued that the real reason the AGO was making these allegations about him was because it did not want to disclose the "full data" and information relating to referrals of unduly lenient sentences to the Court of Appeal, in case it gets into the mainstream media and may cause political embarrassment for the AGO. He further argued that declaring this request "vexatious" provided the AGO with an excuse not to disclose the information.
25. Furthermore, the complainant explained that, taken by itself, the present request was perfectly "benign". He argued that it fulfilled a public interest regarding accountability of the AGO and its statutory duty to consider unduly lenient sentences and referring them to the Court of Appeal.
26. The complainant also pointed out that he had not harassed AGO staff or used improper language. He explained that all of his requests have been presented in a proper and respectful tone and use of language; he also explained that the AGO had not alleged that there has been any improper motive on his behalf, either in respect of previous requests or the present one.

27. In addition, the complainant argued that by applying section 14(1) to his request it interfered with his right to “freedom of expression” guaranteed by article 10(1) of the European Convention on Human Rights (ECHR) as incorporated in schedule 1 of the Human Rights Act 1998.

### **AGO's arguments supporting its application of section 14**

28. The AGO argued that it was appropriate to apply section 14(1) in this case. It explained to the Commissioner that it had carefully considered various requests and complaints submitted by the complainant and concluded that the request would create a significant burden in terms of expense and distraction. The AGO also explained that it considered that the request had no serious purpose or value.
29. In addition, the AGO explained that it had a long history of correspondence with the complainant. The complainant had sought unsuccessfully to appeal his vexatious litigation order and had entered into a lengthy chain of correspondence with the AGO and the GLD, seeking to challenge the basis on which the vexatious litigant order was made. This culminated in the GLD writing two letters on behalf of the AGO, applying section 14(1) to two separate requests.
30. With regard to the present request creating a significant burden in terms of expense and distraction, the AGO explained that the complainant had made 13 fresh requests since October 2014. These requests were submitted under either FOIA or both FOIA and Data Protection Act 1998 (DPA). The AGO explained that these requests related to the vexatious litigant order against him, the appointment of an advocate to the court in criminal proceedings, the AGO's contempt functions, decision about whether to prosecute under the Hunting Act and the present request.
31. Furthermore, the AGO explained that previous requests tended to ask multiple questions and request significant amounts of detailed material, as in the present request. Additionally, the AGO explained that in requests for internal reviews, the complainant advances, in extensive detail, unmeritorious legal arguments, for example his arguments about Article 10 ECHR (as in the present case).
32. The AGO argued that responding to the present request would be excessively burdensome as it would require it to examine each unduly lenient sentence case in the last 5 years to identify the defendant; it would then need to consider whether there were exemptions that applied in relation to the defendant's name. It also explained that exemptions which may be relevant included section 21 (information accessible by other means), section 32 (court records), section 40 (personal information) and section 44 (statutory prohibitions on disclosure). In addition, the AGO explained that section 44 was

particularly relevant because disclosure of some defendants' names may breach reporting restrictions. It also explained that although section 12 would be relevant for the costs of locating, retrieving and extracting information, it would not apply in relation to considering whether any of these exemptions apply. By way of indication as to volume, there were 122 unduly lenient sentence referrals in 2014.

33. The AGO also explained that in the 12 months since October 2014, it had dealt with 34 pieces of correspondence in relation to the complainant. It explained that this meant that it was handling more than one piece of correspondence a fortnight. The AGO went on to explain that because of the way the complainant approaches information requests (with multiple questions, requesting significant amounts of detail in a highly legalistic way) none of the correspondence was straightforward.
34. Furthermore, the AGO explained that it considered that the complainant was taking steps with no purpose other than to increase the burden on itself and other public authorities. For example on 31 October 2014 the complainant submitted an FOIA request concerning all applications for contempt made by the Attorney General, against media organisations since the coming into force of the Contempt of Court Act 1981. The AGO explained that although it had refused to answer the request on the grounds of section 12, it had responded to a follow up request for such applications during a limited period of time. It also explained that the complainant had complained to the Commissioner that it had not provided sufficient advice and assistance in relation to the first request after he had received a response to the second, time-limited request. The AGO pointed out that this complaint had been dealt with in a previous decision notice (FS50574020)<sup>3</sup> which had upheld its approach.
35. The AGO pointed to the Commissioner's guidance on section 14 which provides that a public authority may take in account "*any other previous dealings between the authority and the requester.*" It pointed out that the complainant submits requests under both FOIA and the DPA regimes, based on his reading of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. The AGO explained that whilst his argument made no legal sense because of section 40(2), it had to consider these requests carefully on both FOIA and DPA grounds before ultimately reaching a decision on how to respond to them.

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<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560046/fs\\_50574020.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560046/fs_50574020.pdf)

36. The AGO also explained that it is a small ministerial department with the equivalent of 36 full time members of staff, which undertakes a wide range of functions. As there is no specific individual whose sole job it is to deal with information requests, the AGO explained that requests are dealt with by staff, in addition to their existing, busy jobs. In addition, the AGO explained that a significant amount of time and resource had already been expended corresponding with the complainant. It argued that responding substantively to the request would result in a disproportionate level of disruption for little benefit to either the complainant or to the wider public.
37. The AGO explained that the GLD holds information on its behalf and that the complainant has submitted identical requests for information to both it and the GLD. This meant that it must, in addition to dealing with requests made to it by the complainant, also devote time and resources to liaising with the GLD to ensure that it holds no information within the scope of a request, whenever necessary.
38. Additionally, the AGO argued that responding substantively to this request would, in its opinion, risk undermining the credibility of the FOIA system by scarce public money being expended on vexatious requests. It argued that this would obscure the obvious public interest served by the FOIA regime.
39. The AGO also explained that it considered that, as per *Dransfield*, it was entitled to take into account an applicant's past behaviour and the history of its relations with him when considering whether the current request is vexatious. It explained that, based on previous history, if it was to respond to this request, the complainant was likely to adopt a similar approach to the one taken to previous requests ie likely to request an internal review and subsequently complain to the Commissioner. The AGO also explained that this request was received a day after another, unrelated request had been received from him.
40. The AGO pointed out that the present request was on a different topic to his usual requests; it explained that it considered that this was indicative of the complainant attempting to prolong the resource implications for the AGO of his requests since October 2014.
41. The AGO provided the Commissioner with a log of requests received from the complainant, including duplicate ones sent to the GLD.
42. With regard to whether the request has any serious purpose or value, the AGO explained that in this case, the complainant would be dissatisfied with any response provided to him. It also argued that even if it was possible when viewed in isolation that there may be a serious purpose behind the request, taking into account the wider context, the request lacks legitimate motivation and does not serve any real purpose.

43. The AGO went on to explain that it considered that the complainant's pattern of behaviour is indicative of an intention to disrupt the working of it. The AGO explained that, given that the avenue of civil litigation has been restricted through his vexatious litigant order, the complainant had used FOIA as a way to gratify his personal interest in litigation through the quasi-litigious process of information requests, internal reviews and the Commissioner's complaint process.
44. The AGO also pointed out that since it had started to apply section 14 to the complainant's requests, he had not submitted any further requests. It explained that if it could not rely on section 14 when considering the complainant's requests, it would end up receiving numerous requests.
45. In addition, the AGO explained to the Commissioner that in the past it had applied section 14(1) to requests from the complainant where the requests were about similar topics to other requests. It also explained that in the past it had applied section 14(2) (repeated requests) to other requests of the complainant's. The AGO pointed out that the complainant was familiar with how section 14 operates and would understand that the AGO would not have to answer repeat requests.
46. The AGO also confirmed that as early as January 2015, it had informed the complainant that it was considering applying section 14 to his requests.

## **Conclusion**

47. The issue for the Commissioner to determine is whether the request of 22 September 2015 is vexatious. Section 14(1) can only be applied to the request itself and not the individual who submitted it.
48. She considers that the key question when weighing up whether this request is vexatious is whether the request was likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
49. In her guidance on dealing with vexatious requests, the Commissioner recognises that the FOIA was designed to give individuals a greater right of access to official information with the intention of making public bodies more transparent and accountable.
50. While most people exercise this right responsibly, the Commissioner acknowledges that some may misuse or abuse the FOIA by submitting requests which are intended to be annoying or disruptive or which have a disproportionate impact on a public authority.
51. The Commissioner acknowledges that public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance.

52. The Commissioner also recognises that dealing with unreasonable requests can place a strain on public authorities' resources and get in the way of delivering mainstream services or answering legitimate requests. Furthermore, these requests can also damage the reputation of the legislation itself.
53. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the UT in the *Dransfield* case.
54. In weighing the evidence regarding the impact of the request of 22 September 2015 on the AGO and balancing this against the purpose and value of the request, the Commissioner has taken into account that the complainant considered that the request had a serious purpose and value.
55. Regarding whether the purpose and value of a request justifies the impact on the public authority, the Commissioner's guidance states:

*"The key question to consider is whether the purpose and value of the request provides sufficient grounds to justify the distress, disruption or irritation that would be incurred by complying with that request. This should be judged as objectively as possible. In other words, would a reasonable person think that the purpose and value are enough to justify the impact on the authority".*
56. The Commissioner has considered the evidence and arguments submitted by both parties.
57. The Commissioner notes the complainant's explanation that the AGO had stated that it is entitled to consider his past behaviour, as acknowledged in *Dransfield*. The Commissioner also notes the complainant's argument that this was a total misconstruction of the *Dransfield* case and that although previous history and applications may be relevant, the merits of the present request have to be considered first in their own right.
58. The Commissioner considers that, although each request should be dealt with on its merits initially, *Dransfield* makes it clear that the past behaviour of the requester can be taken into account when considering the application of section 14(1). Therefore, she considers that the AGO has not misconstrued the *Dransfield* ruling.
59. The Commissioner also notes that in his request for an internal review, the complainant argued that the real reason the AGO was making these allegations about him was because it did not want to disclose the "full data" and information relating to referrals of unduly lenient sentences to the Court of Appeal, in case it gets into the mainstream media and may cause political embarrassment for the AGO. He further argued that declaring this request "vexatious" provided the AGO with an excuse not

to disclose the information. The complainant also made the same argument in his complaint to the Commissioner.

60. The Commissioner has not been provided with any evidence that the reason the AGO has applied section 14(1) to the present request, was an attempt to avoid any political embarrassment. She further notes the complainant's comment that the AGO was applying section 14 to avoid disclosing the requested information. However, if a public authority applies section 14(1) to a request, it has to be able to explain why it has done this.
61. Furthermore, as explained in paragraph 17, in her guidance the Commissioner provides a list of indicators which might suggest that a request is vexatious. In this instance, she considers that the complainant's accusation falls under the following indicator: unfounded accusations, where a request contains completely unsubstantiated accusations against the public authority (as in the present case) or specific employees.
62. The Commissioner also notes the AGO's explanation that in the past, it had applied section 14(1) to requests that had topics which related to previous requests received from the complainant. She also notes that the AGO explanation that it had applied section 14(2), to repeated requests from the complainant in the past. Furthermore, the Commissioner notes the AGO's explanation that the present case is not related to subject matters the complainant has not previously made requests about.
63. In her guidance on section 14, the Commissioner notes that some requests could appear to be made randomly. The guidance explains that these types of requests are sometime referred to as 'fishing expeditions' because the requester casts her/his net widely, hoping that this will catch information that is noteworthy or useful to requester. The guidance explains that this would not be enough to render a request vexatious. However, the guidance also explains that some requests may, for example, impose a burden on a public authority by requiring it to sift through a substantial volume of information in order the isolate and extract relevant details or create a burden by requiring a public authority to spend a considerable amount time having to consider any exemptions and redactions.
64. The Commissioner accepts the AGO's explanation that if it had complied with the present request it would have considered various exemptions (see paragraph 32). She therefore accepts that in this case, the request could be seen as a random request and therefore can be considered as vexatious for the purpose of section 14.
65. She also notes the AGO's explanation that there is information already in the public domain about ULS, including statistical information and that

this had been explained to the requester in both its refusal notice and internal review response. Additionally, the Commissioner also notes that the complainant had complained to the AGO that it had not provided him with any advice and assistance as required under section 16; the complainant claimed that the AGO had to do this as it was relying on section 12. The AGO explained that it was relying on section 14, not section 12.

66. The Commissioner also notes the AGO's explanation about a previous request it dealt with from the requester, where it had complied with a narrower time period and provided the complainant with information, yet the complainant still complained to her.
67. Furthermore, the Commissioner notes the complainant's assertion that the application of section 14(1) interfered with his right to "freedom of expression" guaranteed by article 10(1) of the ECHR as incorporated in schedule 1 of the Human Rights Act 1998. The Commissioner does not consider this to be the case in this instance, as Article 10 deals with the media and journalism.
68. The Commissioner has balanced the purpose and value of the request against the detrimental effect on the public authority and is satisfied that the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
69. Taking everything into account, the Commissioner's view is that compliance by the AGO with the present request would create a significant burden in terms of expense and distraction for it.
70. Accordingly, the Commissioner finds that section 14(1) has been applied appropriately in this instance.
71. The Commissioner will go on to consider the complainant's complaint about section 16.

### **Section 16 – the duty to provide advice and assistance**

72. Section 16(1) provides that it is the duty of a public authority to provide advice and assistance where reasonable.

73. However, the section 45 Code of Practice<sup>4</sup> provides that a public authority does not have to provide advice and assistance when it has applied section 14 to a request.
74. The Code of Practice is about good practice by public authorities, rather than obligations which arise under the FOIA. Although failure to follow the code would not necessarily be a breach of section 16, where a public authority has satisfied the provisions of the code it will not be in breach of section 16.
75. The Commissioner recommends that a public authority should treat the code as a minimum standard and go beyond its provisions as a matter of good practice.
76. The Commissioner has considered the duty to offer advice and assistance and the application of section 14(1), in her guidance on section 14. The Commissioner acknowledges that a public authority does not have to provide advice and assistance if it is relying on section 14(1). However, she considers that if part of the problem was that the requester's request was hard to follow and the public authority was therefore unsure what was being requested, it might consider whether the problem could be solved by providing guidance on how to reframe the request.
77. The Commissioner does not consider that this is the case here.
78. The Commissioner is satisfied that the AGO did not have to provide any advice and assistance as it has cited section 14(1) and therefore has not breached section 16(1).
79. The Commissioner notes that the AGO provided the complainant with links to publicly available information regarding ULS.

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<sup>4</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235286/0033.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf)

## Right of appeal

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80. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

81. 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.

82. 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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