

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2021

Public Authority: The Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant requested information about action taken against Highways England Ltd and on internal reviews. The Information Commissioner ("the ICO") refused the request as vexatious.
2. The Commissioner's decision is that the request was vexatious and therefore the ICO was entitled to rely on section 14(1) of the FOIA to refuse it.
3. The Commissioner does not require further steps.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty, as regulator, to make a formal determination of a complaint made against her in her capacity as a public authority – a duty confirmed by the First Tier Tribunal. It should be noted however that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

Request and response

5. On 24 August 2020, the complainant wrote to ICO and requested information in the following terms:

"This request results from repeated references by the ICO to a 40-day rule for an Authority [sic] to complete an Internal Review(IR) in contradiction to the 20-day 'reasonable' period and seemingly the ability of a Public Authority to take 40 days without explanation. For example, as can be found

here: <https://www.whatdotheyknow.com/request/c...>

- 1. In how many has the Authority, Highways England, undertaken an IR within 20 working days or less [sic]*
- 2. With regard to those outside 20 working days, what explanation was provided by the authority?*
- 3. Please provide me with an (anonymised) spreadsheet of the complaints you have received about the Highways England form [sic] 01/01/2017 to the present detailing:*
 - a. Date of original FoIA request*
 - b. Date of Authority response*
 - c. Date of IR request*
 - d. Date of IR response*
 - e. Date to the ICO*
 - f. ICO reference*
 - g. Date ICO responded to the complainant*
 - h. Date ICO wrote to the Authority*
 - i. Date ICO received a reply from the Authority*
 - j. Present position*

"If there are other dates held, these would be appreciated

- 4. With regard to the 20 day period for an IR, I ask to be provided:*
 - a. The ICO policy with regard to this – the monitoring, enforcement and complaints about Authorities failing to respond within 20 working days*
 - b. The enquiries the ICO makes of an Authority when they fail to complete and [sic] IR within 20 working days*

"I am seeking to understand the '20 day rule for an IR' as it appears this is not the period to which the ICO works, an Authority has carte blanche to respond and the 20 days stipulation is misleading, unrealistic and not enforced.

"Any information to the contrary would also be appreciated.

"... significant or repeated unreasonable delays in dealing with internal reviews by public authorities are monitored and where appropriate further action may be taken."

<https://www.whatdotheyknow.com/request/i...>

5. What is considered 'significant' and what is considered 'repeated' (how many occasions)

6. what Authorities have had action taken against them for repeated unreasonable delays

7. what action is available to the ICO

8. what action has been taken against Highways England

"It appears there is no monitoring, that the 20 days is unenforced and that the reasons given are not considered by the ICO. I would welcome any information that contradicts this appearance."

6. The ICO responded on 22 September 2020. It refused the request and relied on section 14(1) of the FOIA to do so.
7. Following an internal review the ICO wrote to the complainant on 26 October 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 26 October 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of her investigation is to determine whether or not the request was vexatious.

Reasons for decision

Section 14 - Vexatious

10. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

11. Section 14 of the FOIA states that:

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

12. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
13. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
14. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: “...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.” (paragraph 45).
15. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
16. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: “*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*”.

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

17. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
18. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The complainant's position

19. At the outset of her investigation, the Commissioner, in the interests of fairness, offered the complainant an opportunity to make his own submission – although she noted that the responsibility lay with the ICO to justify why the request was vexatious.
20. The complainant provided a lengthy submission in which he took issue with the ICO's approach towards "enforcing" internal reviews being completed within 20 working days.

"this request stems from the ICO failing to act when Authorities fail to comply with the 20-day rule for internal reviews (IR). The ICO does not enforce their process, you do not comply with your own guidance. So why issue it and cause confusion, conflict?"

"There is requirement [sic] to:

- *Provide an IR within 20 working days and/or:*
- *Explain why longer is required*

"When I queried the '20-day rule', I was berated by the ICO and told I knew 40 days was the limit. When I questioned/challenged this, the ICO resorted to a 'vexatious' exemption; you refused to answer."

21. The complainant was adamant that he had:

"made a reasonable request, based on my experience and the discovery of an anomaly."

22. Although he also noted that:

"I doubt I will receive the statistics I sought because the ICO does nothing, holds nothing i.e., the information is 'not held'...I now understand that, like much for the ICO, the 20-day rule enforcement is too complicated, there are not the resources and as a result, it is not attended to. Rather than come to me with open hands...the ICO thought they would front it out."

23. Elsewhere, the complainant accused the ICO of being "obstructive," "anti-request", of indulging in "playground antics", and being "unprofessional, lacking."

24. He continued:

"Th [sic] reality is, as with much, you do not have the resources and rather than get them, rather than explain and act in the best interests of those you serve, you muddle on through and avoid issues. This is the conduct I have, time and time encountered; too complicated, no resources ... take the easy way out – support an Authority, block explanation. It appears tribunals are unaware that your DN's [sic] are considered by those who do not have the time, cannot deal with complicated issues."

25. The complainant also touched on his six-year battle with Highways England Ltd ("HE") and the difficulties he had experienced in accessing information due to the ICO's "inappropriate support" for HE.

26. In summary, the complainant was concerned that:

"well-meaning requestors, self-funded, public spirited people may well falter at the first 'the ICO did not support me' hurdle and capitulate unaware of the ICO sausage-factory, superficial approach akin to the police 'to complicated, file on division' [sic] (place it in the bin) conduct I have encountered. End of the ICO's involvement, another request chalked up as a 'non tribunal, uncontested' matter i.e., a 'win'.

"I have first-hand experience of the complacency of the ICO, of the unwillingness or inability to consider matters that are 'complex' and of the effect this has on Authorities; they understand you are no deterrent and their willingness to sidestep the legislation fuelled. There is no prevention or deterrent provided by the ICO.

"This is another example of the ICO's unwillingness to do their job, to sidestep a role and further dilute the effectiveness of the legislation.

"I am not vexatious, I am concerned about ICO apathy, inabilities, ineffective conduct and that others may not understand the lack of professionalism and enthusiasm their request attracts."

The ICO's position

27. The ICO drew the Commissioner's attention to the arguments outlined in its original refusal notice in which it noted that:

"Of the circa 150 items of casework we hold in relation to your complaint, enquiries and requests, the vast majority relate to Highways England; and these are often attempts to turn your own issues with HE into a broader commentary on their compliance. For example, in this case, you wish to be provided with statistical information on internal review times because you are dissatisfied with HE's response to your recent request. Similarly, you have previously requested information from the ICO on how many times a specific number of requests has been described by PAs as excessive because HE described the amount of your requests as such.

"Your requests appear to stem from your dissatisfaction with the outcomes of the ICO's regulation of the FOIA with regard to HE, principally in relation to your own complaints."

28. The ICO continued:

"Our view, based on the evidence of our contact with you to date, is that provision of this information is extremely unlikely to resolve anything to your satisfaction and that responding to this request would place a further burden on the resources of the ICO, much of which are already dedicated to handling your current concerns."

29. The ICO noted that the complainant had unreasonable expectations about the practical application of its statutory powers and that he appeared to be conducting a private campaign against HE that was of little interest to the wider public.

30. Finally, the ICO drew the complainant's attention to the fact that much of the information he was seeking would already either be in the public domain or otherwise known to him because of his many complaints about HE. Some of the more granular information, it noted, he had already been informed was not held in a format that could be easily searched – necessitating a manual trawl of individual complaint files.

31. The ICO reiterated many of these points in its formal submission to the Commissioner and also drew her attention to Decision Notice IC-72969-D6J4, relating to a similar request made by the complainant which the Commissioner had concluded was vexatious.²

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619902/ic-72969-d6j4.pdf>

The Commissioner's view

32. The Commissioner considers that the request was vexatious.
33. In reaching her conclusion, the Commissioner relies in part on the analysis set out in her earlier decision notice. Although that request was submitted at a later date, the Commissioner does not consider that there had been any material alteration in circumstances between the dates that the requests were submitted on.
34. In that decision notice, the Commissioner noted that:

"The ICO explained that at the time of this request, and taking into account the relevant ICO retention period of two years, the ICO was processing 80 cases in relation to section 50 complaints the complainant had made about FOI and EIR compliance, 21 information requests to the ICO and several related reviews, data protection complaints and a criminal allegation under section 77 of the FOIA. The complainant's wider communications demonstrates the overall burden the requester is placing on the ICO as a whole.

"It went on that the vast majority of the FOIA complaints relate to HE, and more particularly the single topic of a 'defined cost' of repairs. The ICO considers that this request is another front on a broader campaign on the part of the requester to unmask what he sees as criminal activity at HE, and the ICO's complicity in this.

"The ICO argued that the casework and correspondence initiated by the complainant shows no signs of abating, and shows an unreasonable persistence.

"Finally, the ICO argued that the potential distress, caused to ICO (and HE) staff by the now regular accusations of corruption, complicity, criminal behaviour, bullying, intimidation, and at the very least incompetence, is also relevant. The complainant's correspondence has continued and the ICO has provided the Commissioner with evidence of the accusatory language used."

35. In reaching her conclusion, the Commissioner's view was that:

"In this case the Commissioner recognises that the complainant has very real concerns with the way in which HE has responded to his various requests relating to DCP rates, in particular in relation to the extent of information held, and the outcome of the ICO's investigations into the handling of these requests. However the Commissioner accepts that the correct route to pursue dissatisfaction with a public authority's response to a FOIA request and any resulting Decision Notice issued by the ICO is to appeal to

the FtT. Indeed the complainant has demonstrated that by following this process this did lead to further information being provided to him by HE. This issue was not however resolved by inundating the ICO's own Information Access department with FOIA and EIR requests. The ICO does not have access to the systems of other public authorities and therefore could not have assisted in resolving the dispute between the complainant and HE regarding the extent of information held by HE by complying with this request for information. The complainant's request to the ICO therefore had very limited value for this purpose.

"The Commissioner also accepts the level of engagement between the complainant and the ICO is particularly burdensome and indeed resulted in a letter from the ICO's FOIA complaint's department asking the complainant to moderate his correspondence both in terms of volume and length. By responding to this with voluminous and lengthy correspondence the complainant must have been aware that his ongoing requests and engagement would further add to the burden and disruption already caused.

"The Commissioner also acknowledges that the correspondence and engagement has continued without abatement following the request which is the subject of this Notice and therefore accepts that responding would have been extremely unlikely to result in positive resolution to the matter between the complainant and the ICO."

36. The Commissioner considers that all the above factors are equally relevant to the context in which the present request has been made.
37. On the subject of internal reviews, the Commissioner would reiterate what the ICO has already informed the complainant: there is no statutory time limit under the FOIA for a public authority to complete an internal review. As there is no statutory time limit, the Commissioner is unable to issue decision notices under the FOIA (as she can under EIR) requiring a public authority to complete an internal review.
38. The FOIA Code of Practice states that internal reviews "may need longer than 20 working days" to complete internal reviews when the issues

involved are complex.³ The Commissioner's published guidance states that reviews should be usually be completed "within 20 working days."⁴

39. Neither in the Code of Practice, nor the Commissioner's guidance (both of which are publicly available and accessible to the complainant) does it state that a public authority must provide an explanation if it wishes to take in excess of 20 working days to complete an internal review. Indeed, under EIR, there is a statutory time limit of 40 working days.
40. In addition, the Commissioner notes that the complainant has shown and continues to show disregard for the ICO's letter to him, asking him to moderate his correspondence so that it could be better managed. The Commissioner considers that a reasonable person would, at that point, have realised that their correspondence was imposing a burden. She also considers that a reasonable person would have appreciated the benefits of their cases being dealt with more efficiently and expeditiously in the event that their correspondence was better managed. The complainant instead responded with a nine-page letter, engaged in line-by-line rebuttal and has refused to comply with the reasonable requests that were made of him.
41. One example in the process of dealing with this complaint highlights the needlessly antagonistic approach the complainant takes. Having received notification that he wished to submit a fresh complaint and a link to the whatdotheyknow.com website, an ICO caseworker wrote to the complainant to explain that the link did not appear to work.
42. The Commissioner notes that there were some formatting issues that may have prevented the link from working as it should have done. She also notes that the link the complainant provided was to a page explaining how a person dissatisfied with a response to a request might go about complaining to the Commissioner, not the request thread itself – although she notes that there was a further link to the request from that page.
43. Most reasonable people, in receipt of such correspondence, would have simply responded by providing a fresh link that they had verified. The complainant responded with:

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁴ <https://ico.org.uk/for-organisations/request-handling-freedom-of-information/#internal>

"I provided a link in the attached. It is correct and pertinent. It does not take you to an information page. You can also access the topic [different link]. But I have read my email (attached) of 26/10/2020 again and the link is clearly:

[different link]

"please direct me to the link I am stated to have provided...[the caseworker had already provided a copy of the originally-provided link and the correspondence was quoted below the complainant's email]

"I do not recognise the link you have provided and question from where this was obtained and why it is associated with my request/complaint. please provide me with a copy of the complaint (if not the attached) in which the above link appears

"My suspicion is that this obfuscation has arisen because the matter about which I am complaining is your repeated bully-like tactics when I raise the issue of an authority not responding within 40 working days and that the complaint IC-53464-D2X3 relates to the ICO."

44. The Commissioner agrees that having to deal with such correspondence places an unnecessary and disproportionate burden upon the ICO. Although the ICO is a relatively large organisation, the task of dealing with the complainant's information requests and complaints will, in practice, fall upon a relatively small number of staff.
45. In his submission, the complainant drew attention to a recent Tribunal judgement, partially upholding his appeal, which he appeared to believe vindicated the approach he was taking and his general view that HE was either engaged in or enabling fraud by concealing information.
46. The Commissioner notes that the full judgement was more nuanced than the complainant appears to suggest and also notes the comments of the judge that:

*"I would make a point of praising HE's witnesses for being open and forthcoming and **there was not even a hint that there has been any attempt to hide anything from the Appellant.** Although it was unusual to call so many witnesses to attempt to establish that no further evidence was held, in my view HE was right to do so and to be as open with the Appellant as possible..."*

"...In addition, although it might have happened sooner, HE is to be commended for providing the information exhibited to [the witness]'s statement when it became clear in the preparation for

*this case that it was in existence. **If the Appellant was right and HE and its employees are engaged in some sort of fraud or corruption, then the logic would be that HE would not have disclosed this list**, especially as its view – genuinely held in my judgment- is that the material does not fall within the Appellant's request" [emphasis added]*

47. However, even leaving those points to the side, the Commissioner is not persuaded that the findings of the Tribunal are particularly pertinent to the matter at hand.
48. The Tribunal was asked whether HE held further information. This request seeks information about how long it takes HE to complete internal reviews. It is not clear from anything the complainant has submitted why HE would be any more likely to hold information if it completed more of its internal reviews on time or if the ICO intervened more frequently to require it to do so. Nor is it clear why the ICO would have reached different decisions in respect of any of his complaints had the internal reviews been conducted earlier, or if the ICO had acted earlier to require the internal review.
49. Given that the subject matter involved is, by the complainant's own admission, complex, it is not clear why the complainant considers it so unreasonable that HE might need up to 40 working days in which to complete a review. Given the complainant's preference for frequent, overlapping and unreferenced correspondence, the Commissioner can see why the process of matching correspondence and comparing previous responses might be time-consuming.
50. The Commissioner considers that a thorough review completed on the 21st working day will be preferable to a poor one completed on the 19th working day. There is no requirement under the FOIA for a public authority to place all its other functions on hold until it has answered a request or completed a review. The Commissioner therefore accepts that the target date for completing a review must include consideration of the other work or other requests that a public authority is dealing with at the time.
51. The Commissioner therefore accepts the ICO's argument that, in making this request, the complainant is merely seeking to vent his displeasure at the way the ICO has dealt with his previous complaints.
52. Indeed, the Commissioner notes the language used by the complainant when seeking an internal review. Following on from a lengthy complaint about the ICO's apparent unwillingness to take the sort of enforcement action that he might find satisfactory, the complainant noted:

"If you wish to reduce the impact on your resources of my writing, I suggest you look to the cause, not the result. It is beginning to appear the ICO has taken such a lax approach to the FoIA that Authorities (such as HE) do not take it seriously."

53. The Commissioner considers that this comment indicates that the complainant is using his requests to attempt to bend the ICO to his will and ensure his complaints result in a favourable outcome. That would be an abuse of the FOIA process.
54. Whilst recognising that there is always some value in information showing how regulators (including the ICO) go about their work, the Commissioner notes that this particular request is, for the most part, focused narrowly on the ICO's interactions with HE – which would considerably reduce its value. Most of the information that would have wider value (such as the ICO's guidance, the FOIA Code of Practice and case outcome statistics) is already in the public domain.
55. The Commissioner is therefore not persuaded that this request has any wider public value. Rather, it simply opens up a new front in the complainant's long-running campaign against HE a campaign which, overall, can only reasonably be described as obsessional.
56. It is evident to the Commissioner that answering this request would not move matters any further forward and would only serve to encourage the complainant to continue his behaviour.
57. Having considered the matter, the Commissioner is satisfied that the request was vexatious and therefore the ICO was not obliged to respond to it.

Right of appeal

58. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

59. 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.
60. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF