

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 May 2014

Public Authority: Department for Communities and Local Government

Address: Eland House
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities and Local Government ("the DCLG") concerning the way it had dealt with a previous information request. The DCLG refused to supply the information sought by the complainant by relying on section 14(1) of the FOIA, on the grounds that this new request was vexatious.
2. The Commissioner's decision is that the DCLG is entitled to rely on section 14(1).
3. The Commissioner does not require the public authority to take any further action in respect of this matter.

Request and response

4. On 26 June 2013 the complainant made the following request for information:

"I request any letters or emails between DCLG staff, ministers and SpAds relating to a Freedom of Information request I made, your reference being F0006125. Please also include any letters or emails relating to the internal review and a subsequent case before the Information Commissioner, their reference FS50475366.

In formulating your response, you may wish to note relevant case law such as Home Office and MOJ v ICO (2008); High Court CO/12241/2008(2009)".

5. The DCLG responded to the complainants request on 25 July 2013. It determined that the request was vexatious and therefore issued a refusal notice citing section 14(1) of the FOIA.
6. On 29 August 2013 the complainant asked the DCLG to review its decision to withhold the information he seeks in reliance of section 14(1) of the FOIA.
7. The DCLG completed its internal review and wrote to the complainant on 24 September 2013. The DCLG confirmed its application of section 14(1) of the FOIA and clarified its position in respect of the references made to section 12 and 36 of the FOIA.
8. The DCLG confirmed that section 12 had not been applied to the request, but had been considered in respect of proportionality relevant to section 14(1). The DCLG also clarified that section 36 may be a relevant consideration but did not assert that it applied in this case. The DCLG stated that, 'it [section 36] would only have been tested by actual consideration of any information falling within the terms of your request on its merit', and that, 'such work would be likely to constitute a burden... relevant to the determination of whether your request was vexatious'.

Scope of the case

9. The complainant contacted the Commissioner 4 October 2013 to complain about the way his request for information had been handled.
10. The complainant advised the Commissioner of his belief that the DCLG may have adopted a strategy of using section 36, 'to avoid negative headlines about the DCLG and its ministers and not because there is a real legitimate sense of inhibition of internal processes or of disproportionate impact'.
11. The Commissioner's investigation of this case was focussed solely on whether the DCLG is correct to rely on section 14(1) of the FOIA.

Background to the case

12. The request for information in this case was made by a Political Advisor to a Member of Parliament.
13. The request was made subsequent to the Commissioner's decision notice in case FS50475366.

14. FS50475366 was resolved by the Commissioner by way of a decision notice. In that case, the Commission determined that the DCLG had failed to demonstrate that the exemption provided by section 36 was engaged and therefore the Commissioner ordered the DCLG to disclose the information it had withheld.
15. The Complainant informed the Commissioner that he had made the new request to identify the reason for bottlenecks or the wrong application of exemptions and to establish if his request in FS50457366 had been treated fairly and lawfully.

Reasons for decision

Section 14 – vexatious requests

16. 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.
17. The term 'vexatious' is not defined in the legislation. In *Information Commissioner v Devon County Council & Dransfield*¹ the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as the "...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
18. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public 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.
19. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed 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

¹ UKUT 440 (AAC) (28 January 2013)

unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

20. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request. He considers there is in effect a balancing exercise to be undertaken, weighing the evidence of the request's impact on the authority against its purpose and value.
21. 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 requests². 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.

The DCLG's position

22. The DCLG informed that Commissioner that it had treated the complainant's meta-request as it would treat any other request for information. The fact that the complainant's request was a meta-request did not therefore play a part in the DCLG's considerations.
23. The DCLG advised the Commissioner that it had not based its application of section 14(1) on the grounds that the complainant's request was manifestly unreasonable or objectionable.
24. Rather, the DCLG had concluded that complying with the request would place an unjustified burden on the Department where the information sought by the complainant was, in the DCLG's opinion, of very limited inherent value.
25. In order for it comply with the request, the DCLG assert that significant effort would be required.
26. The DCLG accepts that some of the information sought by the complainant would be held centrally as a result of the complaint the Commissioner had previously dealt with.

² http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

27. Nevertheless, in order to identify and collate all the information within the scope of the complainant's request, the DCLG asserts that it would be required to gather a relatively substantial amount of information from a variety of sources and then decide whether it should be disclosed or withheld.
28. The DCLG has identified approximately 25 persons who would have to spend their time in dealing with the complainant's request. These persons would include Ministers, special advisors, private office staff, lawyers, business area officials, FOI officials and possibly members of the Department's ICT service provider.
29. In order to comply with the request, the DCLG asserts it would be necessary to search individual, shared and personal email accounts, electronic shared record folders and hard copy files. These information sources would be relevant to the ten month period covered by the original request – FS50475366, and its subsequent appeal stages.
30. Consideration of the request would require telephone and face-to-face discussions with personnel and potentially the submissions of ministers. Relevant information would then require the appropriate redaction of personal data, together with any information to which an exemption may have applied.
31. The DCLG advised the Commissioner of its view that, based on its past experience in dealing with the complainant's requests and complaints, on receiving anything other than a response complying with his request, the complainant would have sought an internal review and then, should that review support the original decision, it was highly likely that the complainant would have referred the matter to the Commissioner. Consideration of the complainant's request at the appeal stages would have necessitated reconsideration of all of the information within the scope of the request; this in turn would have been resource intensive and placed an even greater burden on the DCLG.
32. It is the DCLG's opinion that the purpose of the complainant's request is to obtain evidence about the Department's internal deliberations which lay behind its previous use of section 36, and to determine whether the DCLG had treated him fairly and lawfully.
33. The DCLG accept that there would be a public interest benefit in demonstrating that the Department considers requests for information on a case by case and applicant blind basis.
34. It is the DCLG's position that, although there would be a general public interest in demonstrating that the Department treats requests for information fairly and lawfully (or not), there would be nothing in the

requested information that would provide any evidence to substantiate what it considers is the purpose of the complainant's request.

35. The DCLG hold the view that there is no evidence to suggest that it is not conducting itself in a proper manner in respect of the requests for information it receives. Therefore, as the complainant's request would not further his aims, the information would be of little wider benefit to the public.
36. To emphasise its fairness in respect of its past treatment of the complainant's requests, the DCLG drew the Commissioner's attention to the following statistics: According to the DCLG's records the complainant has submitted 86 requests since 1 November 2011. In 68 of these cases, where the Department held information not already available elsewhere, it disclosed the information sought by the complainant in full on 51 occasions. In the remaining 17 cases, the DCLG refused to disclose all of the information sought on 11 occasions, and, refused to disclose some of the information sought on 6 occasions.

The complainant's position

37. In support of this request the complainant has cited the DCLG's handling of his past requests, particularly the three requests he made in preceding three months and which the Commissioner resolved by way of decision notices.
38. The complainant expressed his view that DCLG ministers and Special Advisors are trying to avoid transparency through their repeated attempts to rely on exemptions that are subsequently overturned on appeal. He considers that this constitutes a pattern of non-compliance which itself causes disproportionate effort on the part of all those involved.
39. He considers that the DCLG's position in respect of it having dealt with case FS50475366 is a weak argument and he cited the following comments made by Mr Justice Keith in *Home Office v Information Commissioner* [2009] EWHC 1611 (Admin):
 - "if it was being regarded as a factor of any significance, it would be coming close to creating a new category exemption, not one which was provided by the Act."
 - "The public needs to be confident that internal reviews are vigorously conducted and not self-serving. That can only be seen if members of the public have access to the raw material which shows how their original requests were handled."

- "Relying just on an internal review or an appeal to the Commissioner would be unlikely to result in the disclosure of the information requested. The complaint would be likely to get at best a summary of how the request had been handled."

The Commissioner's conclusions

40. The DCLG's application of section 14(1) of the FOIA is based primarily on the issue of proportionality which is raised by the request itself and by the circumstances in which it was made.
41. The complainant's request in this case, is essentially a request for information about a request for information.
42. The Commissioner resolved a complaint about the initial request by way of a decision notice in case FS50475366.
43. The Commissioner notes that in FS50475366 he determined that the DCLG answered the first part of that request in full, but had failed to demonstrate that disclosure of the second part "would" have had an inhibiting effect. He therefore found that section 36 had not been properly engaged in respect of the second part of the request and ordered the disclosure of the information sought.
44. To make the decision in the first case involved the Commissioner in making significant enquiries of the DCLG in respect of its application of section 36 of the FOIA. These enquiries required the DCLG to revisit its handling of the case and to make detailed representations to the Commissioner. Only after the matter was fully investigated and considered in detail could a decision notice be issued. The process followed in respect of the initial request was time consuming and personnel intensive on the parts of both the Commissioner's Office and the DCLG.
45. In this case, the information sought by the complainant does not have the same quality as the information which he sought in his previous request: In the Commissioner's opinion, it is not information which will have widespread value, serving the greater public interest. It is not information which the DCLG has compiled or used for the purpose of the Department's governmental functions. Rather it is information which is of a more personal, politically motivated value. As such its value is limited.
46. The Commissioner notes the complaint's belief that his requests may not have been dealt with fairly or lawfully by the DCLG. The Commissioner has found no evidence which substantiates or even suggests this. Indeed, in past cases involving the DCLG, even where his decisions have not been in the department's favour, the Commissioner has found no

evidence of any serious or deliberate failings in respect of the DCLG's application of the FOIA, or of the Department withholding information based on anything other than its own reasons of merit.

47. The complaints brought to the Commissioner's attention previously by the complainant, indicate that the DCLG does consider each case on its own merits. Where the Commissioner has found against the DCLG, those cases have illustrated the subtleties of considering the engagement of exemptions or the balance of the public interest test.
48. The Commissioner must emphasise that public authorities must apply the provisions of the FOIA according to the law. They are required to consider the information being sought by the applicant and to determine which, if any, of the Act's exemptions can be applied. Where necessary the public authority is required to identify those factors which are relevant for consideration of the public interest test. These are issues which often require independent and impartial consideration by a third party: That is why the Commissioner is charged to do this under section 50 of the FOIA.
49. The Commissioner is mindful that the DCLG has already considered the information request in case FS50475366 and has spent a significant amount of time in doing so. The effect of the complainant's request in this case is essentially to require the DCLG to revisit the initial case and to spend even more time on it. Having already considered a complaint about FS50475366, the Commissioner can adduce little merit in requiring the DCLG to revisit the now closed case.
50. The Commissioner considers that complying with the substantive request in this case would require significant input on the part of the DCLG's ministers and officials. The DCLG would be required to revisit a case which has already been resolved to the Commissioner's satisfaction and would yield information of limited value. Based on the wider context of the case and on the merits of the request, the Commissioner has concluded that responding to the substantive request in this case would impose an unjustified level of disruption on the DCLG, which is out of proportion to any value that the wider public may derive from the response. The Commissioner is mindful of the judgment of the Upper Tribunal in *Wise v The Information Commissioner* (GIA/1871/2011) which stated that;

"there must be an appropriate balance between such matters as the information sought, the purpose of the request and the time and other resources that would be needed to provide it."
51. The Commissioner's decision in this case is based on the issue of proportionality, which the DCLG solely based its application of section

14(1) of the FOIA. The Commissioner has considered the level of work and disruption that is required of the DCLG to comply with this request and he has measured these against the perceived value of the information sought by the complainant.

52. The Commissioner's decision is that the DCLG is entitled to rely on section 14(1) of the FOIA on the grounds that the complainant's request is vexatious. In making this determination, the Commissioner has been mindful of the Upper Tribunal's approach in Dransfield – that a holistic and broad approach should be taken in respect of section 14(1).
53. The Commissioner does not reject the complainant's suspicions out of hand. However in this case is has seen no evidence which support them.
54. In the Commissioner's opinion there are sufficient grounds for the DCLG to determine that the complainant's request is vexatious. The Commissioner is sympathetic to the points made by the complainant in support of his complaint, particularly those in which he cites Mr Justice Keith. Nevertheless the circumstances of this case appear to illustrate that the exemption to disclosure provided by section 14 has been appropriately applied.

Right of appeal

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

56. 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.
57. 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

Andrew White
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