



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0247

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50689299

Dated: 11 September 2017

Date of Hearing: 09 May 2018 at Birmingham Civil Justice Centre

**Before
JUDGE ROBERT GOOD
TRIBUNAL MEMBERS
MR NARENDRA MAKANJI AND MRS JEAN NELSON**

**Between
ANDREW KERR**

Appellant

**And
THE INFORMATION COMMISSIONER**

Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

Section 14(1) (Vexatious Requests)

Representation:

For Appellant: Elizabeth Kelsey (Counsel)

CORRECTED DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal. The requests dated 29 September 2016, 18 May 2017, 24 May 2017 are to be considered and responded to by the Ministry of Defence.

REASONS FOR DECISION

Factual background

1. The appellant, Mr Andrew Kerr, is a Director of Englands Safety Ltd. He requested information concerning a procurement conducted by the Ministry of Defence (MoD) for a contract for the manufacture and supply of covert body armour (SSP/00135).
2. There is a history of requests. One of these requests was considered by this Tribunal on 8/05/2018 and is the subject of a separate decision.
3. On 29 September 2016 Mr Kerr made a request for information concerning this procurement process. The MoD replied on 27 October 2016 that it was refusing to comply with the request because it consider that the request was vexatious.
4. Mr Kerr then made two further requests on 18 May 2017 and 24 May 2017. In its response on 21 June2017 the MoD stated that it was not intending to answer these requests or respond to further correspondence relying on S14(1) FOIA.
5. After receiving a 'standstill letter' of 13 July 2017 Mr Kerr made a third request, which was dealt with in the same way.

6. A complaint was accepted by the Commissioner about the way in which these three requests were dealt with by the MoD.
7. Following investigation, the Commissioner decided that the MoD was entitled to rely on S14(1) FOIA.
8. In his appeal, Mr Kerr states (p24) the merits of each request should have been considered and that the decision taken by the MoD was not warranted and that as the information sought was not extensive and was easily provided it did not place a disproportionate burden on MoD staff. Mr Kerr also argued that the Veloss decision was relevant.
9. The MoD has not been joined as a party in this appeal. The Information Commissioner had indicated that no-one representing the Commissioner would be attending the hearing. Ms Kelsey of Counsel represented Mr Kerr.
10. The open bundle consists of 90 pages. There was no closed bundle. In addition, Ms Kelsey provided a written submission and copies of the decision of the Court of Appeal in Dransfield, a case she refers to in her written submission.

Request, decision notice and appeal

11. On 18 May 2017 Mr Kerr made a request for information in the following terms:

“I would be grateful to be informed of the current status of the competition [ie the tender for SSP/00135].

May I formally request to be informed of the detailed reasons for our rejection from the competition, including the notes that gave rise to the scoring of points to enable us to effectively review the decision-making

process in respect of our tender and those two companies selected to go forward.

I am informed we are entitled to be informed of this under European legislation and that this should be provided as 'rapidly as possible'. Please also treat this as a formal request under the Freedom of Information Act."

12. On 24 May 2017 Mr Kerr made a request for information in the following terms:

"Thank you for letter of 24 May but it has failed to give the information requested that I believe our Company was entitled to, once the contract was awarded and in addition even prior to this date when our Company had not been selected to go forward. May I request that you also supply the notes and or other information that determined how the points were allocated to enable our company to have an opportunity to review the decision process. Please accept this as formal notification that this company is dissatisfied and that you implement the process to resolve our complaint."

13. On 19 July 2017 Mr Kerr mad a request for information in the following terms:

"Phase 2. We had been informed by 2 MoD persons prior to the decision to award the contract that [company name] were to be awarded the level 2 armoured plate contract that indicates a proper decision process was not followed. This is supported by the fact that [company name] and another company failed the initial shoot tests and contrary to normal tendering competition rules, were allowed to resubmit rather than being disqualified. Now a decision has been made, may I formally request on behalf of [name redacted], the following information to enable us to consider making a formal challenge to the decision to award the contract.

1. The evaluation notes of individual evaluators.
2. Notes of evaluation meetings particularly moderation meetings.

3. Reports and records required to be maintained for compliance of European Communities Act 1972 that I believe is contained within The Defence and Security Public Contracts Regulations 2011 (DSPCR).
4. Price tendered for the award-winning contract by the winner.
5. The price tendered for the company taken to phase 3, but unsuccessful to evaluate if [name redacted] should have been allowed to proceed to phase 3.
6. The detailed reasons why in the initial tender those two companies who were taken to Phase 3 previously failed and why instead of being excluded from the competition they were allowed to continue in the subsequent revised tender for the same contract. I understand normal MoD and international tender rules should have meant both companies should have been excluded, so allowing other companies to proceed. I am informed we are entitled to be informed of this under European legislation and that this should be provided as 'rapidly as possible'. Please also treat this as a separate formal request under the Freedom of Information Act".

14. Mr Kerr contacted the Information Commissioner to complain about the MoD's refusal to comply with his requests and the Commissioner then conducted an investigation.

15. The Information Commissioner issued her decision on 11 September 2017. Her conclusion was that the requests were vexatious and that the MoD is therefore not obliged to answer them.

16. Mr Kerr appealed to the Tribunal on 26 September 2017. In his grounds of appeal, he states his requests are not vexatious and that each request should be considered on its merits. He also stated that case T-667/11 Veloss International SV v European Parliament ('Veloss') was relevant to the Commissioner's consideration.

Reasons and Conclusions

17. The Commissioner, in her response, refers to the Court of Appeal decision, *Dransfield & Craven v Information Commissioner* [2015] EWCA Civ 454 (Dransfield) and identifies the definition of vexatious as one which is “manifestly unjustified, inappropriate or improper use of FOIA”. It was accepted by the Court of Appeal that the threshold is high.
18. The Commissioner accepted that the requests were not extensive and would be relatively easily complied with. The Tribunal finds that this is the case. The Commissioner also accepted that the requests had a genuine purpose and value and that there was a public interest in the MoD demonstrating that its procurements are run in an open and honest way. The Tribunal finds that this is the case.
19. In upholding the MoD’s decision, the Commissioner relied on the number and timing of the previous requests and the cumulative impact of these requests on the MoD. In considering this impact the Commissioner also took into account the impact on the MoD of requests outside of FOIA.
20. The MoD has stated that The Commercial Manager has spent 10% of his time in the last eight months dealing with Mr Kerr’s requests, including 5 FOIA requests. The Project Manager has reported that he has been spending between 20% and 40% of his time on these requests. These time estimates do not simply cover Mr Kerr’s FOIA requests but all his dealing with the MoD. This is a considerable amount of time. It is not clear how much time has been spent on the 5 FOIA requests, as two of these requests were not replied to as they were regarded as vexatious.
21. In the Tribunal’s view the argument put forward by Ms Kelsey is persuasive. It is accepted that the requests are not onerous, that there is merit in the

requests and public interest in the response. Taking account of these points it cannot be said that the requests have 'no reasonable foundation' .

22. The Upper Tribunal in its decision upheld by Dransfield identified four broad issues. The issue relied on by the Commissioner is that of the burden on the authority. The other issues identified do not support the decision that these requests are vexatious. The Commissioner accepts that there is value in the request. Evidence has not been produced that Mr Kerr has been harassing members of staff at the MoD. They report a time burden on them dealing with Mr Kerr but do not report harassment. The Tribunal does not doubt that Mr Kerr has a genuine belief that his company's product is superior to that of his competitors and that the product has been unfairly marked down. It is this perceived unfairness that has motivated these requests. This is not vexatious behaviour.

23. Applying the test in Dransfield, the Tribunal concludes that these requests are not vexatious and should be responded to by the MoD. This does not presume the nature of the response of the MoD, which may be either to provide the information sought or to refuse the request under one or more of the provisions of FOIA.

Signed R Good
Judge of the First-tier Tribunal
Date: 10 JUNE 2018