

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2021

Public Authority: Council of the University of Durham
Address: The Palatine Centre
Stockton Road
Durham
DH1 3LE

Decision (including any steps ordered)

1. The complainant made an identical request for information to one that another individual had already made. The Council of the University of Durham ("the University") refused this new request as vexatious.
2. The Commissioner's decision is that the University has not demonstrated that the request was vexatious and was therefore not entitled to rely on section 14(1) of the FOIA to refuse it.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not rely on section 14(1) of the FOIA.
4. The University 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 Act and may be dealt with as a contempt of court.

Background

5. On 3 March 2020, an individual ("the previous requestor") submitted a request to the University in the following terms:

"I require the following in relation to the 2020 Student Union election,

- 1) *Any email (including attachments) sent or received by any member of the University Secretary's Office in relation to the 2020 Durham Student's Union election.*
 - 2) *A breakdown of results for the 2020 student's union election*
 - 3) *The number of votes cast for 'RON' for each position. I note 'RON' has been disqualified, I require the raw number of votes cast for the 'RON' not the votes which have been counted as being valid."*
6. After taking extra time to consider the balance of the public interest, the University responded to the request on 22 May 2020. It stated that it held no information in respect of elements 2 and 3. In respect of element 1, it withheld the information and relied on section 36 of the FOIA to do so. The University upheld this position following an internal review.

Request and response

7. On 3 July 2020, the day that the University issued the outcome of its internal review to the previous requestor, the complainant contacted the University via the whatdotheyknow.com website and requested information in the following terms:

"Please disclose the following information in an electronic format:

- 1) *Any email (including attachments) sent or received by any member of the University Secretary's Office in relation to the 2020 Durham Student's Union election.*
- 2) *A breakdown of results for the 2020 student's union election*
- 3) *The number of votes cast for 'RON' for each position. I note 'RON' has been disqualified, I require the raw number of votes cast for the 'RON' not the votes which have been counted as being valid.*

"I am aware that this same information has already been requested via the WhatDoTheyKnow website and that you issued a refusal notice citing section 36. I consider that your reliance on section 36 is misconceived, for reasons detailed below, and invite you to reconsider, failing which I will appeal to the Information Commissioner's Office. (I appreciate that this is, therefore, a duplicate request, however I am unable to appeal your response to another FOIA applicant to the Information Commissioner, so have no choice but to resubmit the request in my own name.)"

8. The University responded on 4 August 2020. It refused the request as vexatious.

9. Following an internal review the University wrote to the complainant on 3 September 2020. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 4 August 2020 to complain about the way his request for information had been handled.
11. The Commissioner considers that the scope of her investigation is to determine whether the request was vexatious.

Reasons for decision

Section 14 - Vexatious

12. 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.*

13. 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.

14. 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.
15. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
16. *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).

17. 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.
18. 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*".
19. 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.
20. 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

21. The complainant did not provide a submission arguing why his request was not vexatious – although the Commissioner is aware that he was under no obligation to do so.
22. However, the Commissioner notes that, in making his request, the complainant stated that he felt that the University had applied section 36 incorrectly when responding to the previous requestor and was aware that he needed to submit his own request in order to challenge it.

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

The University's position

23. The University provided the Commissioner with a submission setting out its reasons for considering that the request was vexatious. It relied on two main arguments: that the complainant had demonstrated unreasonable persistence and that there was no obvious intent to obtain information. It also drew attention to the complainant's "confrontational" attitude in correspondence.

24. In respect of the first argument, the University argued that:

"In the opinion of the University, the original request was completed and had been subject to internal review by a party independent to the department of the University responsible for processing FOI requests, and independent to the Durham Student Union, the organisation which was the subject of the request. The University considers this approach to be independent scrutiny."

25. The University noted that the previous requestor:

"did not submit a complaint to the Information Commissioner's Office and despite this we considered therefore that this issue was comprehensively addressed. By submitting the request, taking into consideration the wording of the applicant's request the intention was clearly to re-open this issue."

26. In support of this point, the University also drew attention to the text of the complainant's correspondence when making his request – which made an explicit link between his own request and the University's response to the previous requestor.

27. Finally, when the Commissioner pointed out that the fact that the previous requestor had not submitted a complaint to her office did not indicate that the matter had been subjected to comprehensive independent scrutiny, the University responded to say that the request met:

"the threshold for refusal under Section 14(1), which in accordance with Section 7.3 of the FOI Code of Practice, should not be considered as something to be applied as a last resort or in exceptional circumstances.

"ICO guidance on dealing with vexatious requests defines unreasonable persistence as the requester attempting to reopen an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny. It is not the understanding of the University that 'comprehensively addressed' means a request must have been

scrutinised by the ICO, given that the original requester did not make a complaint to the ICO and appeared satisfied with the findings of the internal review."

28. In relation to its second argument, the University argued that:

"the University believes that the complaint to the Information Commissioner's Office was a foregone conclusion; the applicant submitted this request for the sole purpose of complaining against the University engaging S36(2), rather than actually providing them with the information requested..."

"...Further, the University believes the requester had no obvious intent to obtain information; the requester is abusing their rights of access to information by using the legislation as a means to vent their anger at a particular decision, in this instance by submitting a request purely as a means of making a complaint to the ICO that they were in disagreement with the University engaging a particular exemption on information requested by another applicant."

The Commissioner's view

29. The Commissioner's view is that the request was not vexatious.

30. Section 14(1) of the FOIA relieves a public authority of its obligation to communicate information that has been requested or even to determine whether relevant information is held. It therefore follows that the threshold for the exemption to apply is set high. The Commissioner considers that the University's submissions and evidence fall considerably short of that threshold.

31. In the Commissioner's view a requestor will usually have displayed "unreasonable persistence" when their latest request forms part of a long-running wider battle they are having with the public authority. For example, a person whose gripe about a planning matter has already been through the local council's complaints process, the Local Government and Social Care Ombudsman and the courts is likely to be considered "unreasonably persistent" if their information requests are an attempt to perpetuate the dispute.

32. In this particular case, the complainant appears to have had no wider dispute with the University at the point he made his request. True, the previous requestor had had their response considered via an internal review, but this is not indicative of any broader grievance that the complainant was attempting to re-open.

33. The complainant explained his motivation for the request clearly at the outset – he felt that the University had applied the law incorrectly,

wished to have that view considered by an expert outside of the University and recognised that he needed to submit his own request in order to do so.

34. In terms of the intent to obtain information, the Commissioner again considers that the University has misunderstood her guidance. This is not a situation where the complainant obviously already has the information (or knows that the public authority does not have it) nor does the evidence suggest he has done it for the purpose of annoying or harassing the University. The complainant has simply asked the University to rethink its response.
35. The complainant in this case is a frequent exerciser of his rights under the FOIA. The Commissioner is aware that his style of correspondence can often be brusque or sardonic. She accepts that the way the correspondence was phrased may have given the impression that the complainant was only interested in the complaint (not the information) and had already decided that a complaint was inevitable.
36. However, the Commissioner also considers that the complainant would have expected the University to have relied on section 36 once again to withhold information – indeed, he was counting on it. The motivation for this request was focussed on the complaint to the Commissioner because the complainant, being knowledgeable about FOIA processes, was aware that the complaint was the stage of the process when he was most likely to be successful with his arguments. It might not have been the wisest idea to have been quite so disdainful of the first two steps of the process, but this is not sufficient to render the request vexatious.
37. The implication of the University's argument is that the complainant has picked a fight for the sake of picking a fight and does not care about the information. The Commissioner considers that the complainant's correspondence demonstrates the opposite: he has judged that there is a public interest in the information being disclosed and recognises that he must submit a fresh request so that he can challenge any refusal via a complaint to the Commissioner.
38. Had the University refused the previous requestor's request as vexatious, it might have had grounds to refuse the complainant's request for the same reason. This would be the case where a requestor is attempting to subvert the legislation. However, that is not what happened here. The University's previous response was not dependent on the identity of the previous requestor and therefore the complainant is not attempting to circumvent the exemption.

39. The University has not suggested that the complainant and the previous requestor are working together and the Commissioner has seen no evidence that would indicate that they were.
40. It is ironic that the complainant's honesty in drawing such an explicit link between the previous request and his own appears to have been what caused his request to be treated as vexatious. Had he submitted the same request in isolation, the University would, at the very least, have had much more difficulty in advancing the arguments that it has done.
41. It is entirely open to the University to fall back on its reliance on section 36 to withhold information when it issues its fresh response. The complainant will then have an opportunity to bring the matter before the Commissioner – should he wish to do so.
42. The Commissioner concludes that the request was not vexatious and therefore the University was not entitled to rely on section 14(1) of the FOIA to refuse it.

Right of appeal

43. 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@justice.gov.uk

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

44. 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.
45. 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

Pamela Clements
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