

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 3 December 2015

Public Authority: Department for Social Development

Address: Lighthouse Building

1 Cromac Place

Belfast

BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested copies of draft audit reports produced by the Department for Social Development. The Department initially refused the request in reliance on the exemption at section 43(2) of the FOIA. The Department subsequently revised its position and sought to rely on section 14, claiming that the request was vexatious. The Commissioner's decision is that the Department was entitled to rely on section 14(1) of the FOIA. No steps are required.

Request and response

2. On 1 September 2014 the complainant requested the following information from the Department:

"...ask the DSD to make available under the Freedom of Information Act 2000 all draft / interim housing association audit and inspection reports that the DSD have previously prepared and forwarded onto housing associations."

3. The Department responded on 1 October 2014, refusing the request under section 12 of the FOIA. The Department advised that it would take 674 hours to obtain the requested information, which equated to £1675 and which greatly exceeded the cost limit of £600. The Department asked the complainant whether there were any particular reports he wanted to receive, and suggested that he make a refined request. However the Department explained that it could not say

whether it would be able to disclose any information even if a refined request was made.

4. On 1 October 2014 the complainant submitted a refined request to the Department:

"The DSD have within its website published Final DSD Audit Inspection Reports of all Round 1 and Round 2 housing association audits. May I request that the first, draft, interim DSD audit report which preceded each of the Round 1 and Round 2 final reports published within the DSD website be made available free of charge under the FOI Act."

5. The complainant approached the Commissioner on 11 November 2014 as he had not yet received a response to his refined request.
6. The Department issued a refusal notice on 17 November 2014, citing section 43(2) of the FOIA (prejudice to commercial interests).
7. The complainant contacted the Commissioner again on 17 November 2014 as he wished to challenge the Department's refusal of his request. The Commissioner advised the complainant to request an internal review, which he did on 18 November 2014.
8. The Department communicated the outcome of the internal review on 18 December 2014. In this letter the Department upheld its reliance on section 43(2).

Scope of the case

9. The complainant contacted the Commissioner again on 19 December 2014, following receipt of the Department's internal review letter. The complainant argued that the Department ought to have disclosed the draft reports and asked the Commissioner to investigate.
10. On 18 February 2015 the complainant advised the Commissioner that he had been able to examine one of the draft audit reports. Having done so the complainant presented a number of criticisms as to the content of the document he had inspected. Based upon this document the complainant suggested:

"...it is possible that the DSD Draft Reports are no more than 'Fishing Trips', unsubstantiated preliminary explorations by auditors unsure of their own expertise".
11. The complainant considered that this indicated a strong public interest in the disclosure of all draft reports produced by the Department.

12. The Commissioner wrote to the Department on 13 March 2015, requesting a copy of the withheld information. The Department responded to the Commissioner on 14 April 2015. The Department provided the Commissioner with copies of 44 draft reports. The Department also provided details of its reasons for withholding the draft reports.
13. It was not clear to the Commissioner the extent to which information had actually been withheld from the complainant, ie the information contained in each draft report that was not included in the final version. The Commissioner compared the content of some of the draft reports to the content of corresponding final reports that the Department had published on its website.¹ At this stage it became apparent that the Department had not in fact identified the specific information not contained in the final versions. Rather, it had sought to rely on the exemption at section 43 in respect of all the information contained in the draft reports regardless of whether it had subsequently been disclosed in the final published reports. The Commissioner advised the Department that this "blanket" approach was not appropriate. Having reconsidered the request the Department subsequently sought to introduce reliance on section 14(1) on the basis that the request was vexatious.
14. Owing to the circumstances of the case, the Commissioner considered it appropriate to allow this late reliance on section 14(1). This does not mean that the Commissioner decided at this stage that the Department was entitled to rely on this exclusion; rather, the Commissioner agreed to consider the Department's arguments in respect of it. The Department therefore provided the Commissioner with further details of its arguments in relation to section 14(1).
15. The Commissioner understands that the complainant believes the Department should, as a matter of policy, publish all draft audit reports: past, current and future. However the Commissioner's responsibility under section 50 is to make a decision in respect of a particular request for information. Therefore the Commissioner's investigation in this case focused on the request made by the complainant on 1 October 2014.

¹ <https://www.dsdni.gov.uk/publications/inspection-reports-round-3-normal-inspections>

Reasons for decision

Section 14(1): vexatious requests

16. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request if the request is vexatious, but the term vexatious is not itself defined in the legislation. In *Information Commissioner v Devon County Council & Dransfield*² the Upper Tribunal commented that

"The purpose of section 14... must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA."

17. The Upper Tribunal concluded that 'vexatious' could be defined as the

"...manifestly unjustified, inappropriate or improper use of a formal procedure."

18. The Upper Tribunal decision clearly establishes that the concepts of proportionality and justification are central to any consideration of whether a request is vexatious. The Commissioner's published guidance³ sets out a number of indicators that public authorities may find it useful to consider when determining whether a request is vexatious. The guidance clarifies that the fact that a particular request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case must be taken into consideration in order to determine whether the request is vexatious.

19. The key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request. Where relevant, public authorities will also need to take into account wider factors such as the background and history of the request.

² UKUT 440 (AAC), 28 January 2013

³ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

The Department's position

20. The Department's principal argument is that compliance with the complainant's request would cause a disproportionate burden and would seriously disrupt the Department's core business. The Department described the steps it would need to complete in order to comply with the request:
- i. Extract and print out each of the draft and final reports.
 - ii. In each case, compare the draft and final reports in order to identify the information contained in the draft report that was not included in the final report. This is the actual withheld information.
 - iii. Consider the withheld information and decide whether or not it could be disclosed into the public domain.
21. The Department confirmed that it had completed the first step, which had taken a total of eight hours. The Department advised that it had not completed the second step in respect of all 44 draft reports, but had instead examined a representative sample of five draft reports. The Department recorded that it had taken six hours and 20 minutes to compare the five draft reports with the five final reports, which equated to an average of one hour and 16 minutes per report. If this were extrapolated across the 44 draft reports it would take the Department approximately 55 hours and 44 minutes. The Department pointed out that some reports may be shorter, or easier to examine and thus require less than one hour and 16 minutes, whereas more voluminous or complex reports would take significantly longer.
22. The Department explained that it had gone on to complete the third step in respect of two of the five reports. The Department pointed out that there may be a number of revisions between the first draft and the final version of each report. The Department would therefore need to interrogate its system records and clerical files to account for each revision or amendment before it could decide whether or not that information could be disclosed. The Department recorded that it had taken three hours and 56 minutes to examine the two sample reports, which equated to an average of one hour and 58 minute per report. Again, if this were extrapolated across the 44 draft reports it would take the Department approximately 86 hours and 32 minutes. The Department accepted that this step did not fall within the scope of section 12, since it was effectively consideration time that would be required in order to decide what information should be disclosed and what might be exempt.

23. The Department recognised that part of the first step would fall to be considered within the scope of section 12 of the FOIA, but that the remainder would not. However the time taken to complete the first step, ie eight hours, fell far short of the appropriate limit of 24 hours. Therefore the Department confirmed that it did not seek to rely on section 12 as a basis for refusing the request.
24. The Commissioner has considered whether the Department should have been able to rely on the cost limit as set out at section 12 of the FOIA. Only certain specified activities may be included in an estimate of the cost limit, namely:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
25. With regard to these activities, "the information" means the requested information. In this case the requested information was clearly described by the complainant as the "*first, draft, interim DSD audit report*" in respect of each Round 1 and Round 2 housing association audit. The Department was able to provide the Commissioner with copies of the requested information, ie each draft report. Therefore the four steps set out above had been completed by the Department, and section 12 was not a relevant consideration.
26. The Department went on to argue that the time required to complete the second step, ie the process of comparing the draft and final reports, would create a disproportionate burden on it. Although not relying on section 12 and the appropriate limit, the Department referred to its estimate of over 55 hours to complete the second step, and concluded that this rendered the request vexatious as it would distract staff from core duties, thus disrupting the Department's day to day operations.
27. Again the Commissioner has considered whether section 12 would be relevant. It could be argued that the process of comparing the reports to identify the information contained in each draft that had not subsequently been published could be described as "extracting the information" within the meaning of the Regulations. However, the Commissioner is mindful that the Regulations relate to extracting the requested information, not identifying information that may or may not have already been disclosed. As indicated above the requested information was each draft report in its entirety; therefore the

Commissioner is satisfied that the Department was correct not to rely on section 12 in this case.

28. The Department did not include the time required to complete the third step in its arguments for applying section 14. This is because the four qualifying activities described in the Regulations do not include the consideration of exemptions. Nor did the Department seek to rely on any other exemptions at this stage because it had not completed the second step as detailed above; therefore it was unable to comment in detail on the content of the actual withheld information at this point. The Department did however state that even if it was unable to rely on section 14, it would need to consider applying exemptions to withhold the requested information. The Department was concerned that disclosure of the requested information would have a detrimental impact on its audit process as well as co-operation with the audited housing associations.

The complainant's position

29. The complainant argued that his request was not vexatious, for the following broad reasons:
- If the draft audit reports were saved as 'draft audit reports' and the then subsequently amended - surely the subsequent amendments were saved as amendments No1, No2, No3 etc until the Final draft Report draft audit report. If this was the case, surely all that is required is a print-out / forwarding of the original draft audit and the final audit reports.
 - If the Department did not save the information in this form, then any additional costs / expense, is as a result of their 'incompetence' in not saving changing drafts which should be archived documents in their own right.
 - The complainant said that he had written to the Department agreeing that he did not require all 44 draft reports, but would accept a selection of the reports. If the Department was willing, or if the process permitted, a reduced number of draft reports would be acceptable.

The Commissioner's conclusions

30. The Commissioner recognises that this is an unusual application of section 14 in that it focuses entirely on the effect of meeting the request. It is the request, rather than the requester, that must be judged to be vexatious in order to rely on section 14, but it will often be necessary to consider the requester's behaviour or previous dealings with the public authority. However the Department has not submitted

these kinds of arguments. Therefore, the question of whether section 14 is engaged in this case is a question of judging the effect of the request of 1 October 2014 on the public authority.

31. The Commissioner's guidance describes the circumstances in which burden may be a relevant argument in the application of section 14:

"The effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester."

32. The interpretation of burden as the time it would take a public authority to comply with a request will usually fall to be considered under the scope of section 12 and the appropriate limit. However, as set out above, section 12 applies only to four distinct activities:⁴

33. These activities cover steps taken by a public authority to identify and collate the requested information. There is no time limit for consideration of the identified information which falls within the scope of a request, and a public authority may not therefore rely on section 12 in terms of the time required to decide whether or not information can be disclosed.

34. The Commissioner is aware that each draft report held by the Department is likely to contain some information that would be exempt under section 21, since by being contained in the final published version of the report it would already be accessible to the complainant. However, in order to rely on this exemption the Department would need to be able to specify what information has been disclosed and what remains withheld. The Department has estimated that it would take 55 hours to ascertain the extent of the information not contained in the final reports. It has described the process it would need to undertake in order to complete this exercise. Having had sight of the 44 draft reports that fall within the scope of the request, the Commissioner accepts as reasonable the Department's estimate that it would take an average of just over one hour to compare each draft with its accompanying published final report.

35. The Commissioner notes that his guidance on section 12 says that the staff time required to redact exempt information cannot be included as

⁴ As set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

part of the costs of extracting the requested information. The Commissioner would point out that in this case the estimate relates to the administrative process of identifying and separating out the withheld information, so that a decision can then be taken as to whether it ought to be disclosed. Therefore the Commissioner is satisfied that the Department may not seek to rely on section 12 in this case.

36. In *Dransfield* the Upper Tribunal considered various scenarios where burden may be a relevant factor in the consideration of section 14. None of these matched entirely the circumstances in this case, but the comments were nonetheless relevant. The Upper Tribunal said that a "single well-focused request for information" was less likely to be vexatious, but

"...this does not mean that a single but very wide-ranging request is necessarily more likely to be found vexatious – it may well be more appropriate... to provide advice or guidance... failing which the costs limit under section 12 might be invoked."

37. Although the exercise described by the Department does not technically fall within the activities relevant to the cost limit at section 12, it is the Commissioner's view that the FOIA is designed to protect authorities from this type of burden. As section 12 is not available in this scenario then it is arguably reasonable for a public authority to rely on section 14 where it can demonstrate a manifestly disproportionate burden. However the Commissioner would stress that whether the burden is indeed disproportionate will depend on the circumstances of a particular case.

38. The Commissioner has also been assisted in his considerations by the Upper Tribunal's comments in the case of *Wise v Information Commissioner*.⁵

"Inherent in the policy behind section 14(1) is the idea of proportionality. There must be an appropriate relationship 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."

39. The purpose of the request, according to the complainant, is to look for evidence to support his concerns about the quality of audits and resulting outcomes. The Commissioner accepts that the complainant made his request in good faith, and that the complainant believes it has

⁵ GIA/1871/2011

a serious and justifiable purpose. Furthermore the Commissioner acknowledges the importance of public authorities being accountable to the public. However the Commissioner does not agree that the complainant's request represents a reasonable or proportionate means of ensuring accountability in this case.

40. The Department has pointed out that its inspection process is itself subject to annual review by the Northern Ireland Audit Office. Therefore, in the Department's view, the legitimate public interest in transparency and accountability is met. In this context the Commissioner is unable to identify an overriding public need for the draft reports to be published.
41. The Commissioner has considered the complainant's comments on the way the Department holds the draft reports. Having inspected the draft reports the Commissioner is satisfied that they are held as separate documents from the final published reports. It is not immediately obvious where amendments have been made, for example the documents do not have tracked changes. Therefore the Commissioner accepts that the only way to know what amendments have been made would be to go through each page of each version of a report and compare its content. The Commissioner does not agree that the Department ought to be required to publish the draft reports simply because it does not hold them in the way the complainant would prefer.
42. The Commissioner notes the complainant's assertion that he would be happy to accept a reduced number of reports. The Commissioner would always encourage requesters and public authorities to engage in a constructive manner, as complaints and concerns can often be resolved informally if raised at an early stage. Section 16 of the FOIA provides a duty on public authorities to provide advice and assistance to requesters, which may well include advice on how to refine a request that has been refused under section 12. In this case the Department asked the complainant whether there were any specific reports he wished to see, but the complainant responded that he felt they should all be published.
43. Had the complainant limited his request to a smaller number of reports, or even one single report, the Department may have been able to comply with the request (albeit that the Department may have wished to consider applying exemptions). The complainant did advise the Commissioner that he had seen one draft report outside the provisions of the FOIA. The complainant expressed the clear view that he felt the Department should publish all draft reports proactively as a matter of policy. The complainant said that he needed access to the reports in order to conduct research: he wanted to see if there were any patterns or trends across all the draft reports. Therefore the Commissioner does

not consider that submitting a revised request for a small number of reports would be likely to provide the complainant with all the information he would like to access. Rather, it would be likely to lead to further requests for the other reports, which would have the effect of creating an accumulated burden.

44. In conclusion, the Commissioner has carefully considered the submissions put forward by the Department and the complainant. The Commissioner accepts the Department's explanation that compliance with the request would cause a disproportionate burden, even before the decision could be taken as to whether or not the requested information could be disclosed. The Commissioner acknowledges that there is a legitimate interest in the public being informed as to how the Department audits housing associations and that the Department's audit process is effective. However, in the context of the wide scope of this request and what this entails for the Department, the Commissioner is satisfied that the interest in openness and accountability is sufficiently met both by the Department's publication of final audit reports and the fact that the Northern Ireland Audit Office reviews the Department's processes. For the reasons set out above the Commissioner concludes that the complainant's request of 1 October 2014 was vexatious. Accordingly the Commissioner finds that section 14(1) is engaged, and the Department was not obliged to comply with the complainant's request.

Other matters

45. The Commissioner is of the view that the Department in this case failed to properly consider the complainant's request when it was originally received. The Department appears to have assumed that disclosure of the draft reports would have a prejudicial effect, without actually identifying any of the information that had not already been published. The Commissioner would stress that in most cases, a public authority must examine the requested information before making a decision as to whether or not it ought to be disclosed. An obvious exception would be where the authority is considering refusing to confirm or deny that it holds the requested information.
46. If the authority wishes to rely on an exemption to refuse the request it must be able to explain to the complainant, and potentially the Commissioner, how it has made its decision with reference to the requested information. If the authority is unable to provide the Commissioner with a copy of the withheld information it will be difficult for the Commissioner to conclude that it has been properly withheld.

47. Similarly, if a public authority is unable to examine the requested information, for example because it would take too long to identify, locate and retrieve, it should consider the appropriate procedural provisions contained in the FOIA which deal with these circumstances. The authority should always keep a record of its decision making process so that it can demonstrate its position to the Commissioner should a section 50 complaint be made.

Right of appeal

48. 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 123 4504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
50. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF