

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2015

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about a tender bid process in 2010 for legal aid work from the Legal Aid Agency, which is an executive agency of the Ministry of Justice (the 'MOJ'). The request was refused on the basis that the MOJ deemed it vexatious in accordance with section 14(1) of FOIA because the complainant was acting as part of a campaign. In addition, the MOJ sought to rely on sections 44(1)(c), prohibitions on disclosure, contempt of court and 43(2), commercial interests in withholding the requested information.
2. The Commissioner's decision is that the MOJ has incorrectly applied section 14(1) of FOIA to this request. He finds, however, that the MOJ was correct to rely on section 44(1)(c). As a result the Commissioner has not gone on to consider the MOJ's reliance on section 43(2).

Background

3. The Commissioner notes that the Legal Aid Agency (formerly the Legal Services Commission) is not a public authority itself, but is actually an executive agency of the MOJ that is responsible for it. Therefore, the public authority in this case is actually the MOJ and not the Legal Aid Agency; however, for the sake of clarity, this decision notice refers to the Legal Aid Agency as if it were the public authority.
4. The MOJ believe that the complainant is acting in concert with other third parties in order to try to secure information about the 2010 legal

aid tender bid process for legal aid work, as part of a campaign. This issue has been considered by the Commissioner in previously issued decision notices, the starting point being *reference FS50505670*¹. In that case the complainant, who in later decision notices is referred to as 'Individual A', is part of a firm of solicitors involved in the 2010 tender proceedings which were unsuccessful. Individual A had submitted another FOIA request about the proceedings.

5. In *reference FS50505670* the MOJ considered the request to be vexatious because individual A had submitted a number of overlapping requests in relation to his firm of solicitors and had an extensive history of making requests about the proceedings. The Commissioner found that the request was vexatious on the basis that it related to individual A's ongoing litigation, and that the MOJ was subject to unreasonable burden imposed by dealing with his overlapping litigation and FOIA correspondence.
6. Section 17(6) of FOIA allows a public authority not to respond to a request if it has previously issued a notice relying on section 14 and it would be unreasonable for the public authority to issue a further refusal notice. The Commissioner will usually only consider it unreasonable to issue a further notice when an authority has previously warned the requester that it will not respond to any further vexatious requests on the same or similar topics.
7. Such a notice was issued to individual A on 23 May 2013, where the MOJ advised him that it would no longer be responding to FOIA requests in relation to individual A's specific case or further requests which are in some way attributed to his ongoing legal action, the Legal Aid Agency's tender process, or individual tenders which have taken place over the last three and a half years.
8. This means that individual A cannot use FOIA as a means to securing information relating to the tender process or legal action. The MOJ believes that individual A is attempting to circumnavigate the FOIA by attempting to access the same, or substantially similar information, using third parties to make requests on his behalf, one of whom the MOJ believes is the complainant in this notice.

¹ http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50505670.ashx

9. In decision notices references *FS50533887*² and *FS50532809*³ the Commissioner considered requests made by the complainant in this notice and by another third party, both of whom the MOJ believe to be acting as part of a campaign with individual A. In both cases the Commissioner found that, whilst there may be some evidence to support the MOJ's view that the three individuals were acting in concert, he did not find section 14(1), vexatious request, to be engaged. This is because the Commissioner considered that there was insufficient evidence to indicate that they are part of a campaign to disrupt.
10. A High Court Order was issued on 17 July 2013 in relation to the ongoing litigation instigated by individual A which provides expressly that specific information shall not be disclosed save with the express permission of the court. In both the above cases, the MOJ sought to rely instead on section 44(1)(c) on the grounds that the High Court Order was, and remains, in place. The Commissioner accepted that the information within the scope of both requests is caught by the Court Order, and that disclosure in response to those requests would breach this Order and that this would constitute contempt of court. He therefore upheld the MOJ's reliance on section 44(1)(c) in both cases, which have since been appealed. All three parties, (individual A, the complainant and the other third party concerned), have been joined to those appeal proceedings, which have yet to be concluded.
11. It is against this background that the Commissioner has considered the complainant's request of 18 October 2014 which is the subject of this decision notice. The complainant in this case under consideration was also the complainant in *FS50532809*.
12. The Commissioner has also considered a similar case in decision notice *FS50571713* where a request for information about the tender process was submitted by the other individual the MOJ believe is acting as part of a campaign with individual A.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1022082/fs_50533887.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1021704/fs_50532809.pdf

Request and response

13. On 18 October 2014 the complainant wrote to the MOJ and requested information in the following terms:

"I will appreciate greatly if the following information could be released to me:

*Please note all of the following questions relate to the **2010 Immigration Tender in Luton, Bedfordshire area only (MH Access Point).***

- 1. How many organizations that were initially informed that their tenders were successful and therefore entitled to be awarded a contract, had their award of contract withdrawn after 29 June 2010 in the Luton area?*
- 2. If there are such organizations in Luton area, on what date or dates did the notification of the withdrawal of the award of contract take place?*
- 3. What was the initial score of each organization that had its award of contract withdrawn?*
- 4. Was each organization that had its award of contract withdrawn a charity or a private for profit organization?*
- 5. Was the withdrawal caused by the applicant voluntarily withdrawing the bid or was it caused by the LSC stating that the award could not be justified or sustained?*
- 6. In summary what was the cause of the withdrawal of the award?*
- 7. How many cases or New Matter Starts did each organization that had its award of contract withdrawn bid for? With breakdown of Asylum and Non-Asylum Matter Starts.*
- 8. Please state the number of cases or matter starts that was initially awarded to each applicant that had its award of contract withdrawn. With breakdown of Asylum and Non-Asylum Matter Starts.*
- 9. On what date did the organization that had its award of contract withdrawn submit its tender?*
- 10. If as a consequence of a withdrawal of award of contract in the Luton area caused the contract being awarded to the next ranked bidder please state on what date was the next ranked bidder informed about the ward? And how many case (New Matter Starts)*

were awarded to the next ranked bidder (giving breakdown of asylum and non-asylum cases)."

14. The MOJ responded on 13 November 2014. It stated that it considered the request to be both vexatious and repeated and applied sections 14(1) and 14(2) to the request.
15. Following an internal review the MOJ wrote to the complainant on 11 December 2014. It maintained that 14(1) applies and also sought to rely on section 44(1)(c), prohibitions on disclosure. However, it dropped its reliance on the request being repeated under section 14(2).

Scope of the case

16. The complainant contacted the Commissioner on 12 December 2014 to complain about the way his request for information had been handled. He specified that he wanted the MOJ to confirm whether it holds the requested information, even if it refused to disclose it.
17. The Commissioner has considered the MOJ's reliance on the vexatious exclusion contained in section 14 of FOIA, together with its application of section 44(1)(c), prohibitions on disclosure. During the investigation, the MOJ confirmed that it would also seek to rely on section 43(2), commercial interests in relation to the request.
18. Public authorities can rely on new exemptions at the investigation stage; however, they are advised that it is their responsibility to write to the complainant to inform them. The Commissioner is not aware whether the MOJ has written to the complainant to confirm its reliance on section 43(2).

Reasons for decision

Section 14 – Vexatious requests

19. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.

20. The term 'vexatious' is not defined within FOIA. However, it has been considered in the case of *The Information Commissioner and Devon County Council v Mr Alan Dransfield (GIA/3037/2011)*⁴. 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.
21. 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 authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) and harassment or distress of and to staff.
22. 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 unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*" (paragraph 45).
23. 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 requests⁵. 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.

Detrimental impact on the public authority - Campaigns

24. In this case the MOJ told the complainant that it had reason to believe he was acting in a campaign with an individual A who could no longer

⁴ <http://www.osspsc.gov.uk/judgmentfiles/j3680/GIA%203037%202011-01.doc>

⁵ http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

make FOIA requests associated with the 2010 tender process. In addition, the MOJ said it had received an almost identical request to the complainant's from another individual.

25. When determining if a complainant can be seen as acting in concert for the purposes of deciding if the request is vexatious, the Commissioner defers to his guidance on this⁶, which includes *"If a public authority had reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted, then it may take this into account when determining whether any of those requests are vexatious."*
26. His guidance suggests that there must be some tangible evidence to substantiate the claim of a link between requests, for example that the requests are similar, the requesters copy each other into requests, the pattern of requests is unusual or frequent, or the group has a website which references a campaign against the public authority. The Commissioner has considered this point very carefully as he is conscious of the fact that accepting that requesters are acting in concert will add much greater validity to the claims that the request in this case is vexatious.
27. The details of the campaign and whether it constituted a campaign to disrupt are set out in *FS50532809* and have already been considered by the Commissioner, who concluded that whilst there is some evidence to suggest that the complainant and individual A may be working together to try to get the information denied to individual A in court, this could be also be circumstantial. Even if the complainant and individual A are working together, the Commissioner considers that there is insufficient evidence to indicate that they are part of a campaign to disrupt. In that case he therefore concluded that the MOJ wrongly applied section 14(1) to the complainant's request.
28. Rather than reiterate all the detail here, the Commissioner would refer any interested parties to his previously issued notice in *FS50532809*.
29. The Commissioner notes that the complainant submitted his request under consideration here after the decision notice in *FS50532809* had been issued, and that the subject matter relates to the 2010 legal aid

⁶ Paragraphs 89-95
http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

tender bid process. The Commissioner also notes that the information requested in this notice is about Bedfordshire (MH Access Point) and that the questions asked are very similar, and in some cases the same, as those asked by the other party considered to be involved in *FS50571713*.

30. The Commissioner asked the MOJ to provide him with any additional evidence of the complainant, individual A or the other individual concerned acting as part of a campaign, and specifically as a campaign to disrupt or place an unreasonable burden on the MOJ in handling their requests.
31. The Commissioner has already set out his considerations of the 'indicators' as to whether a request is vexatious in the previously issued decision notice *FS50532809*. Rather than repeat those considerations here, the Commissioner will instead focus on whether the MOJ's further submissions in relation to the current request alter his view.
32. In reply to the Commissioner's investigation in this case, the MOJ repeated the arguments it had previously submitted under *FS50532809*, but also claimed that it had received four further requests from the individuals involved and stated that it had "*mounting evidence*" of this complainant working in conjunction with individual A.
33. The MOJ provided copies of the four further requests it had received from the relevant individuals since the earlier decision notices were issued. The Commissioner has reviewed the information submitted by the MOJ and has found that one request is that under consideration in this notice (ie *FS50565043*) and another is that considered in *FS50571713*.
34. Whilst the MOJ has refused both requests on the basis of section 14(1), (together with sections 44(1)(c) and section 43(2)), it has contended that the complainants must be acting as part of a campaign partly because they, and Individual A, all filed appeals against their previously issued decision notices during the period 26 August 2014 to 17 September 2014. The Commissioner does not attach any significance to this as the respective decision notices were issued close together and because any complainant who wishes to appeal must do so within 28 calendar days of the notice being sent. In these cases, any appeals would have had to be submitted within a similar timeframe.
35. In *FS50565043* and *FS50571713*, apart from the reference to the timing of the appeals, the Commissioner has not found any further new evidence put forward by the MOJ to support its view that both requests are vexatious on the grounds that the MOJ believes the requestor is acting in concert with Individual A as part of a campaign to disrupt.

36. Whilst the remaining two requests the MOJ has highlighted have indeed been submitted by the complainant in this case (*FS50565043*) and the complainant in *FS50571713*, the Commissioner's examination of both shows that one request relates to a 2011 tender bid, as opposed to 2010. In any event, the MOJ did not find this request to be vexatious and instead provided the complainant with some of the requested information and applied other exemptions to withhold the remainder.
37. The fourth request, whilst relating to the 2010 tender bid, and whilst having been found to be vexatious by the MOJ, again does not argue specifically that the request has been submitted in concert with Individual A as part of a campaign.

Conclusion

38. After careful consideration of the evidence before him, the Commissioner's previously formed view that that there may be sufficient evidence to link individual A with both the complainant in this case and in *FS50571713* and to accept they may be acting in concert, has not changed. However, even if the complainant and individual A are working together, the Commissioner is still not persuaded on the basis of the additional evidence before him, that they are part of a campaign to disrupt. He has therefore concluded that the MOJ has wrongly applied section 14(1) to the complainant's request.
39. The Commissioner has gone on to consider the MOJ's reliance on section 44(1)(c) in relation to this request.

Section 44 – Prohibitions on disclosure

40. The MOJ confirmed during the course of the investigation that it holds the requested information.
41. Section 44(1)(c) of FOIA provides an exemption for information for which the disclosure would constitute or be punishable as a contempt of court. Section 44(1)(c) is a class based exemption; if the information conforms to the class described in this section, the exemption is engaged.
42. The MOJ explained that there is a High Court Order dated 17 July 2013 and provided the Commissioner with a copy. This Order provides expressly that specific information shall not be disclosed save with the express permission of the court.
43. In this case the Commissioner asked the MOJ whether it considers all the information in the request of 18 October 2014 to be covered by the Court Order. In reply the MOJ confirmed that it considers that all the information within the scope of the complainant's request is caught by

the Court Order. The Order was live at the time of the request and remains in place.

44. The MOJ considered that disclosure in response to the complainant's request would breach this Order and that this would constitute contempt of court.
45. Although the MOJ acknowledges that the request does not ask for the names of firms, it argued that the fact that the request covers a relatively small geographical area, ie Luton, means that the request covers information that related to the litigation, and the names of third party firms referred to in it have been ordered to remain confidential by the High Court. In particular, the MOJ said that disclosure of the information relating to Luton would relate to a specified firm of solicitors.
46. The MOJ argued that it will be relatively easy to identify the specified solicitors if it were to provide the requested information, in that if the MOJ were to disclose the number of New Matter Starts that this particular firm of solicitors were awarded, the complainant, and the public in general, would be able to confirm which firm the information relates to if they compare it with the published list of outcomes.
47. The task for the Commissioner here is to consider whether disclosure of the information in question would breach the Order made by the High Court and, if so, whether this would constitute, or be punishable as, contempt of court.

Conclusion

48. Having carefully considered the High Court Order and the representations of the MOJ, the Commissioner accepts that breaching this Order by responding to the request would constitute contempt of court. The exemption provided by section 44(1)(c) is, therefore, engaged in relation to this information.
49. As the Commissioner has found section 44(1)(c) to be engaged, he has not considered the MOJ's reliance on section 43(2).

Right of appeal

50. 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@hmcts.gsi.gov.uk

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

51. 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.
52. 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

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