

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2015

Public Authority: Ministry of Justice (Legal Aid Agency)

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 26 November 2014 which is the subject of this decision notice. The complainant in this case under consideration was also the complainant in *FS50533887*.
12. The Commissioner has also considered a similar case in decision notice *FS50565043* 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.

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 26 November 2014 the complainant wrote to the MOJ and requested information in the following terms:

"I kindly request that you release the following data:

Introduction / background

My requests below are in respect of Bedfordshire procurement area (MH Access Point), 2010 Immigration Tender in Luton area.

The purpose of my request is to assist the LSC to release the information in a way which assists me and which also enables the LSC to release the information by way of statistics for example saying two applicants withdrew their bids in Luton area and each bid for 150 and 180 cases respectively.

I would also ask the LSC to release the names of the firms concerned by way of anonymisation. For example Joe Blo [sic] solicitors can be written down as JB 1 or J1.

If for some reason you fail to answer the below questions please state whether you hold the answer to each question, even if you decide to not release the information. So I could take this up with the ICO if need be.

Questions

- a. How many applicants that were originally told that their applications for contract succeeded, "had their award of contract withdrawn" after 2 July 2010 in the Luton procurement area?*
- b. On what date was each applicant informed about the withdrawal of the award of contract?*
- c. What was the original score of each applicant that had its award of contract withdrawn?*
- d. Please state the nature of the business of each applicant that had its award of contract withdrawn. For example two were charity and one was private business.*
- e. Was each withdrawal caused by the applicant withdrawing the application or was it caused by the LSC taking the initiative to cause the withdrawal of the application. Please state for example X*

number withdrew the applications by their own initiative and X number were forced to withdraw by initiative taken by the LSC.

- e2. In summary what was the cause of each withdrawal. Please state for example the applicant desiring to not contract with the LSC.*
- f. How many New Matter Starts (number of cases to be opened each year or size of the contract bid for) did each applicant that had its award of contract withdrawn tender for for [sic]? Please provide breakdown of Asylum and Non-Asylum Matter Starts.*
- g. Please state the number of New Matter Starts (number of cases to be opened each year or size of the contract bid for) that was originally awarded to each applicant that had its award of contract withdrawn. Please state how many were Asylum and how many were Non-Asylum Matter Starts.*
- h. If as a result of a withdrawal of award of contract in the Luton area caused the contract being given to the next ranked applicant please say on what date was the next ranked applicant notified about the award? And how many cases (New Matter Starts) were awarded to the next ranked applicant (stating how many asylum and how many were non-asylum cases.*
- i. On what date did each applicant that had its award of contract withdrawn submit its tender?"*
14. The MOJ responded on 24 December 2014. It refused to provide the requested information on the grounds that the request was vexatious under section 14(1) of FOIA.
15. In addition, the refusal notice also contained a section 17(6) refusal to respond to any future requests which are in some way attributed to ongoing legal action, the Legal Services Commission/Legal Aid Agency's tender process or individual tenders that have taken place.
16. The MOJ provided the outcome of its internal review on 23 January 2015. It upheld its original position on section 14(1) but additionally expressly relied on section 44(1)(c), prohibitions on disclosure, contempt of court, and section 43(2), commercial interests.

Scope of the case

17. The complainant contacted the Commissioner on 17 February 2015 to complain about the way his request for information had been handled.

He specifically asked the Commissioner to consider certain paragraphs in the 2010 invitation to tender bid which contain details of how FOIA requests about the tender process will be handled. In particular, the document states that even where a party to the tender has identified certain information submitted as part of the tender to be confidential, the MOJ cannot guarantee that that information will not be disclosed in response to an FOIA request where the public interest favours disclosure.

18. 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, and section 43(2), commercial interests.

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.

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

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 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

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

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

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 *FS50533887* 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 considered 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 *FS50533887*.
29. The Commissioner notes that the complainant submitted his request under consideration here after the decision notice in *FS50533887* had been issued, and that the subject matter relates to the 2010 legal aid tender bid process. The Commissioner also notes that the information requested 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 *FS50565043*.
30. The Commissioner has already set out his considerations of the 'indicators' as to whether a request is vexatious in the previously issued decision notice *FS50533887*. 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.
31. 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.
32. 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 *FS50571713*) and another is that considered in *FS50565043*.

33. 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.
34. In *FS50571713* and *FS50565043*, 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.
35. Whilst the remaining two requests the MOJ has highlighted have indeed been submitted by the complainant in this case (*FS50571713*) and the complainant in *FS50565043*, 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.
36. 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

37. 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 *FS50565043* 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.
38. 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

39. 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.
40. 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.
41. In this case the Commissioner asked the MOJ whether it considers all the information in the request of 26 November 2014 to be covered by that 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.
42. The MOJ considered that disclosure in response to the complainant's request would breach this Order and that this would constitute contempt of court.
43. 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.
44. 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.
45. 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

46. 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.
47. As the Commissioner has found section 44(1)(c) to be engaged, he has not considered the MOJ's reliance on section 43(2).

Other matters

48. As the Commissioner has found that section 44(1)(c) is engaged, he has not considered any further the complainant's concerns about the wording in the tender bid document (as described in paragraph 20).

Right of appeal

49. 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

50. 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.
51. 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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