

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 May 2022

**Public Authority:** The University Council  
**Address:** University of Southampton  
University Road  
Southampton  
SO17 1BJ

### Decision (including any steps ordered)

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1. The complainant has requested from the University of Southampton (the university) the confidential annex to the Commissioner's decision notice [FS50772671](#), dated 18 December 2019. The university refused this request, citing section 32 – court records, later also citing 14(1)(vexatious request) and section 40(2)(personal information).
2. The Commissioner's decision is that the university is entitled to rely on section 14(1) to refuse the request.
3. He does not require the public authority to take any further steps.

### Background

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4. The Commissioner's decision notice FS50772671 concerned requests that had been made to the university regarding the 'Mountbatten Archive' (the papers of Lord and Lady Mountbatten). The university provided some information, stated that it did not hold some information and cited various exemptions to other information it held. The Commissioner's conclusion was that some of the exemptions had been

cited correctly and some incorrectly, that the university had not provided some information it held, and that other information was not held. His decision was that certain information should be disclosed and there was a confidential annex setting out what redactions could be made and details of certain information that he accepted was exempt from disclosure. The confidential annex was only provided to the university.

5. The decision was at appeal at the time the request for the confidential annex was made. The university explained to the Commissioner that there have been several appeals and cross-appeals which were joined in this matter.
6. There has recently been a decision (EA/2020/0021) in this matter.
7. The Commissioner notes that the complainant is not the requester/appellant in FS50772671 or EA/2020/0021 and therefore is asking to see a confidential annex that formed part of a third party's decision notice.

### **Request and response**

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8. On 15 May 2021 the complainant wrote to the university and requested information in the following terms:

"1. Disclose the confidential annex provided to you in ICO decision number FS50772671."
9. The university responded on 16 June 2021, stating that it held the information but refusing to provide it, citing section 32 FOIA (court records).
10. The complainant asked for an internal review on the same date.
11. The university provided an internal review on 16 June 2021 in which it maintained its original position – that the requested information was exempt under section 32(1)(b).

### **Scope of the case**

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12. The complainant contacted the Commissioner on 15 July 2021 to complain about the way his request for information had been handled.

He disagreed with the citing of section 32 and the withholding of the information on that basis.

13. The Commissioner wrote his investigation letter to the university on 3 February 2022 in which he said that he was not persuaded that section 32 applied to the requested information. However, the university maintained its position that section 32(1)(b) applied whilst also citing section 14(1) and section 40(2).
14. The Commissioner considers that the scope of this decision is the university's citing of section 14(1), section 32(1)(b) and section 40(2).

### **Reasons for decision**

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15. Section 1(1) of FOIA provides a general right of access to recorded information that is held by public authorities.
16. Section 14(1) of FOIA states that section 1 does not oblige a public authority to comply with a request for information if that request is vexatious. The term 'vexatious' is not defined in FOIA.
17. What follows looks at vexatiousness and considers whether this particular request is in fact vexatious.
18. The Commissioner's [guidance](#) makes it clear that engaging section 14(1) is a high hurdle. It explains that FOIA gives individuals the right to access to official information in order to make bodies more transparent and accountable.
19. Alongside this, section 14 also exists to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This was reinforced by [Information Commissioner vs Devon County Council & Dransfield \[2012\] UKUT 440 \(AAC\), \(28 January 2013\)](#), known as the Dransfield decision.
20. The Upper Tribunal considered the issue of vexatious requests. 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.
21. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request

is vexatious. The Commissioner's guidance states that section 14 does not have to be used in extreme circumstances or as a last resort.

22. Dransfield also considered four broad issues:

the burden (on the public authority and its staff);  
the motive (of the requester);  
the value or serious purpose (of the request); and  
any harassment or distress (of and to staff).

23. 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)

24. The Court of Appeal "did not depart from the Upper Tribunal's approach of using the four broad themes"<sup>1</sup>.

25. The fact that a request contains one or more of these indicators does 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.

26. The Commissioner's guidance suggests that if a request is not patently vexatious 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. In doing this, the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.

27. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.

### **The university's view**

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<sup>1</sup> [What are the four broad themes? | ICO](#)

28. The university argues that there is no inherent public interest in the request. It contends that the larger public interest issues have already been resolved (or were being resolved at the time of the request) through the section 50 FOIA decision and the section 57 Appeals processes.
29. The university's view is that the complainant is clearly aware of the decision notice and its confidential annex since they have referenced both. It is reasonable to infer from this that they have read the decision notice or at least the part that relates to the confidential annex. The university suggests that the complainant is therefore aware that the confidential annex is designed to provide third party protection under section 40(2).
30. The request is an attempt to "circumvent the operation of, and the protections afforded by, section 32(1)(b) and section 40(2)" FOIA. The university draws the Commissioner's attention to the Dransfield (see paragraph 19) judgment and argues that the right to information is a significant but not an overriding right. There are countervailing public interests that include the importance of an efficient system of public administration. The university expresses the view that section 14 serves the legitimate public interest in public authorities not being exposed to an irresponsible use of FOIA, especially by repeat requesters whose enquiries represent an undue and disproportionate burden on public resources.
31. Within that context, the university contends that it must be relevant to consider the underlying motive for the request. Quoting from the Dransfield decision, the university provides the following from an FTT judgment to support its view:

"Abuse of the right to information under s.1 of FOIA is the most dangerous enemy of the continuing exercise of that right for legitimate purposes. It damages FOIA and the vital rights that it enacted in the public perception. In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill-intentioned requests and should not feel bound to do so only where a sufficient number of tests on a checklist are satisfied."<sup>2</sup>

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<sup>2</sup> Independent Police Complaints Commission v Information Commissioner (EA/2011/0222) (at paragraph 19).

32. The university also argued that the complainant would have been aware of an Upper Tribunal decision<sup>3</sup> before they made a request for the confidential annex in this case. The Commissioner notes that the university has provided its reasons for making this assertion but he is not able to go into detail about what those reasons are in this decision notice.
33. The Commissioner notes that the refusal to appeal is dated 8 March 2021. The judgment the university refers to refused leave to appeal the FTT's case management direction of 18 June 2020 that had refused to disclose the confidential annex to the applicant in that case. The applicant had stated that they needed the annex to be able to appeal the Commissioner's decision notice and in order to obtain fairness in the proceedings. FTT Judge MacMillan refused, stating that disclosure, would "defeat the purpose of the appeal". This was one of two case management directions that was then appealed to the Upper Tribunal.
34. Judge Jones in GIA/1120/2020 refused permission to appeal on the grounds that,  

"... the case management decision of 18 June 2020 to refuse to disclose the confidential annexe to the Applicant was not arguably plain wrong in law and there is no other reason to grant permission to appeal..." [147]

### **The Commissioner's view**

35. Judge Jones in GIA/1120/2020 said that the reasons for withholding the confidential annex were not made clear to the applicant either by the ICO or the FTT and were "arguably insufficient"[91]. An annex could include the requested information or similar (in which case it may be subject to the same exemption/s) or it may not but it may contain information that could be lawfully disclosed. This could potentially be disclosed to the applicant in a redacted annex. Nonetheless, having seen the confidential annex he was satisfied that it should not be disclosed to the applicant at that stage.
36. It is important to bear in mind that the judge was referring to the applicant in that appeal and in that specific context and not to a requester asking to see a confidential annex that formed part of a third party's decision notice, as is the case here. The Commissioner's view is

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<sup>3</sup> GIA/1120/2020

that there is even less reason for a requester to see a confidential annex that has not been provided to the individual who made the original request to the public authority.

37. The Commissioner's guidance states that a useful starting point in assessing whether a request is vexatious or not is the value or purpose of the request and the impact handling the request would have on the public authority:

'When considering this issue the Upper Tribunal in [Dransfield](#) asked itself, "Does the request have a value or serious purpose in terms of there being an objective public interest in the information sought?" (paragraph 38). The public interest can encompass a wide range of values and principles relating to what is in the best interests of society, including, but not limited to:

- holding public authorities to account for their performance;
- understanding their decisions;
- transparency; and
- ensuring justice.<sup>4</sup>

38. In its analysis, the guidance acknowledges that most requests will have some value and serve a number of interests – the personal circumstances of the requester, for example, challenging a decision that directly affects them. Requests can serve the private interests of the requester or overlap with the wider public interest. Other requests serve the wider public interest and have no direct bearing on the requester. The Dransfield decision makes it clear that there has to be a public interest in disclosure. In other words, "the requester's private interests in the information carry little weight unless they coincide with a wider public interest".

39. Therefore, a public authority needs to establish the value and purpose from these criteria, the -

- nature of the information requested;
- context of the request; or

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<sup>4</sup> [How do we assess value or serious purpose? | ICO](#)

- history of the requester's engagement with [the public authority].
40. In this instance, the Commissioner does not dispute that there is a serious purpose behind the complainant's request. The requester in FS50772671 is not the complainant, therefore the only conclusion that can be reached is that the complainant believes that confidential annexes should be disclosed as part of the section 50 process. How this can be reconciled with a need for confidentiality in certain circumstances is unclear. Clearly though the complainant considers the disclosure of the confidential annex to be in the public interest.
41. However, despite the fact that the Commissioner does not dispute that there is a serious purpose behind this request or that the complainant believes his request to be in the wider public interest, there are two matters that support the university's view that this is a vexatious request. The complainant was not the requester/appellant in FS50772571 or EA/2020/0021 and the confidential annex has not been disclosed even to the requester/appellant. The university has explained that a redacted document summarising the university and the ICO's discussion and agreement on various points in relation to the confidential annex has been disclosed. The case has now been heard at appeal but this was a recent decision which had not been made when the request was made for the confidential annex. Therefore to disclose the confidential annex at the time of the request which was prior to the appeal hearing, undermines due process in the case of an appeal to the FTT.
42. The Commissioner is confident that the complainant is aware for reasons he cannot disclose here, that the matter of disclosing a confidential annex has been dismissed by the Upper Tribunal, as set out in paragraphs 32-34 of this decision. The Commissioner accepts that this decision cannot necessarily be extended to all such requests. He considers that a confidential annex by its very nature is meant to be restricted, unless a court decides otherwise. The Commissioner is also aware that the complainant has themselves requested confidential annexes from other public authorities and been refused.
43. If the test of a vexatious request is the wider public interest then the Commissioner considers the public interest to lie in the formal legal processes that exist which can include confidential matters being withheld from the public for a reason. The university has relied on what it considers to be the self-evident nature of the vexatiousness in requesting a confidential annex that had not been provided to the requester in FS50772671 at the time of the request.



44. Generally speaking a request is applicant blind but section 14 does allow some consideration of context and background. In this case, the Commissioner agrees with the university that the complainant is aware of GIA/1120/2020. The complainant would have been aware of it before making the request that is the subject of this decision notice but made it regardless.
45. Although a great many of the usual criteria for agreeing that a request is vexatious are absent, such as burden or harassment or distress to the public authority, the Commissioner nonetheless has taken the decision that the reason behind the complainant making the request whilst cognisant of GIA/1120/2020 represents a refusal to relinquish their own view in the face of contrary legal opinion.
46. Section 14 is about the nature of the request, rather than the damage in releasing the requested information. Leaving aside the damage in releasing information that has been placed in a confidential annex because it cannot be part of the decision notice that is in the public domain, the nature of the request is vexatious because it is testing an issue that has already been tested. The complainant is fully aware of the appeals process and that their request, should the information be disclosed, could make the appeal process of which they are not even the appellant at least partly redundant. When viewed in this light, there is a futile element to the request which makes it vexatious.
47. As the Commissioner has concluded that this is a vexatious request, he has not gone on to consider either the university's citing of section 32(1)(b) or section 40(2).

**Right of appeal**

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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 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 Information 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** .....

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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