

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2022

Public Authority: The Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note

This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the Commissioner, as the public authority, dealing with the request, and the term 'Commissioner' denotes the Commissioner, as regulator, dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested information about the ICO's processes. The ICO considers the request to be a vexatious request under section 14(1) of FOIA and has refused to respond to it under section 17(6).
2. The Commissioner's decision is as follows:
 - The complainant's request is vexatious and the ICO is entitled to rely on section 17(6) as it would have been unreasonable in the circumstances to have expected the ICO to issue a refusal notice.
3. The Commissioner does not require the ICO to take any corrective steps.

Request and response

4. On 22 June 2021 the complainant wrote to the ICO through the WhatDoTheyKnow website and requested information in the following terms:

"I refer to my 22/06/2021 conversation with your CRIT.

I ask to be provided, since the commencement of the FoIA (2000) the number of:

1. Summons issued for this offence
2. The number of prosecutions utilising s77.

I believe '2' to be 3 and am seeking the names of the parties involved and any judgement/reports you possess about same to include feedback about the action taken, internal reviews etc.

I ask to be provided, for the past 5 years:

3. The number of s77 allegations you have recorded and dates of these
4. The authorities involved and number of allegations against each
5. The outcome of each allegation
6. The number of live/active i.e. ongoing, s77 investigations

Ideally, I would like the above information in excel format.

Additionally:

7. Any internal reviews of the section and the difficulties associated with progressing/prosecuting and
8. Any representations to others to have the section amended. For example, I have noted <https://publications.parliament.uk/pa/bi...>

5. The complainant did not receive a response to the request and wrote to the ICO on 22 July 2021.
6. On 26 July 2021 the ICO advised the complainant that their request was refused under section 17(6) of FOIA as per its section 14 response of 19 November 2020.
7. The ICO provided an internal review on 27 July 2021. It upheld its position and directed the complainant to the Commissioner.

Scope of the case

8. The complainant had first contacted the Commissioner on 22 July 2021 to complain that they had not received a response to their request. Having then received the ICO's response the complainant remained dissatisfied.
9. The Commissioner wrote to the complainant on 4 February 2022. He noted that in EA/2021/0168, the First-tier Tribunal (Information Rights) ('the FTT') had recently dismissed an appeal the complainant had brought about the Commissioner's decision in a separate but somewhat similar case in which he had found that the ICO was entitled to rely on section 14(1). The FTT had referred to the "generally obsessive nature" of that request. The Commissioner advised the complainant that there was a similar obsessive nature to the request in the current case, which is concerned with another of the ICO's processes.
10. The Commissioner also noted that, since April 2020, he had found against the complainant in two further cases which involved the ICO's reliance on section 14(1) of FOIA, and he had dismissed as frivolous/vexations two separate complaints he had received from the complainant, under section 50(2)(c) of FOIA.
11. In light of the above factors, the Commissioner advised the complainant that he was likely to find against them in this case and suggested they withdraw their complaint. The complainant refused.
12. The Commissioner's investigation has focussed on whether the request is vexatious under section 14(1) of FOIA and whether the ICO is entitled to rely on section 17(6).

Reasons for decision

Section 14(1) – vexatious request

13. Under section 14(1) of the FOIA a public authority is not obliged to comply with a request if the request is vexatious.
14. Considering what makes a request a vexatious request in **Information Commissioner vs Devon County Council & Dransfield** [2012], the Upper Tribunal discussed four broad themes:
 - 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).

15. However, the Upper Tribunal emphasised that:

“All the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA”

16. In his published guidance on section 14(1)¹ the Commissioner notes that these themes provide a useful structure to start analysing whether a request is vexatious. However, he advises that a public authority should keep in mind that it needs to adopt a holistic approach. The authority may identify other factors which are relevant to its circumstances, and it should make sure it considers those as well.
17. In its submission the Commissioner the ICO has said that it has considered the context and history of the complainant's contact with it prior to this request, in determining the request to be vexatious.
18. The ICO says that the complainant has a long history of making information requests to the ICO, via both the WhatDoTheyKnow website and from their personal email. Many of these have related to the same or similar topics and have been refused as vexatious under section 14(1) of the FOIA, or article 12(5)(b) of the UK GDPR as manifestly unfounded under data protection legislation.
19. According to the ICO, the vast majority of the matters the complainant has brought to it relate to their interest in Highways England, now known as National Highways (NH). They have also made a criminal allegation about NH to the ICO under section 77 of FOIA. The information request of 22 June 2021 related to section 77 allegations made to the ICO.
20. From May 2020 to the date of this request the complainant has made 24 information requests, 17 of which related to NH. The ICO says it refused 15 requests under section 14(1) FOIA or article 12(5)(b) of the UK GDPR. The section 14 responses included an advisory that the ICO may rely on section 17(6) and not provide a response to any related future requests.
21. In addition to these information requests, says the ICO, the complainant had brought a large number of complaints to the Commissioner. At the time of the request, the Commissioner had received 60 complaints, 42

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

of which were about NH. This is based on the two year retention schedule for the Commissioner's FOIA casework. The Commissioner understands the ICO to be referring here to cases it has subsequently had an involvement with, through the complainant.

22. The ICO confirmed that each information request is, of course, assessed on its own merits. It says it has given the above additional information to provide context to the considerations it made in relation to the application of section 14. The ICO says that responding to this level of correspondence has a detrimental impact on the ICO being able to provide a quality level of service to other individuals.
23. Following one of these previous section 14 refusals, the ICO says that a complaint was made to the Commissioner (IC-72969-D6J4), who determined that the ICO's application of the exemption was appropriate in that case. That request related to NH and its compliance with FOIA. The ICO says this is relevant here. This is because it considers that the continued requests for information in this area of interest despite these refusals, as well as their complaint against the application of section 14 not being upheld, are intended to cause annoyance to the ICO and detrimentally impact the limited resources of the ICO's Information Access Team.
24. In these previous responses, the ICO says, it has provided an explanation of its position in response to the information requests it considers to be vexatious. It appears to the ICO that no effort has been made on the complainant's part to engage with this and they have continued to make further related requests of limited value. The ICO considers these requests to be designed to cause a disproportionate and unjustified level of disruption to the team.
25. The ICO has explained that in terms of the information request received on 22 June 2021, this request was similar to one it had previously refused under section 14 in correspondence dated 19 November 2020. That request was received on 5 September 2020 and is as follows:

"I wish to be provided all related information; that received from Highways England and any internal emails, associated considerations, advice etc. I trust this will be sent in the usual course of business, in the alternative, I must present this as a SAR and FoIA request... How many s77 allegations has the ICO received since 01/01/2015?"
26. The ICO has noted that that it responded to eight separate information requests within the same letter of 19 November 2020 in order to minimise the administrative burden on the team.
27. In the ICO's view, as well as being repeated, the request of 22 June 2021 effectively expanded the scope of the 5 September 2020 request to make it more burdensome to the ICO - from the number of section 77

allegations since 2015 to further related information, eg dates, authorities involved, outcome, ongoing investigations, internal reviews etc. It also included a request for the names of parties involved. The ICO says it had previously advised the complainant that it would not provide the personal data of individuals involved in section 77 cases.

28. Given the above context and history and based on the evidence of its contact with the complainant to date, the ICO considers it is apparent that providing the information is extremely unlikely to resolve anything to their satisfaction. Responding to their requests generates more correspondence, complaints and further requests. It does not result in any resolution and usually ends up in a cycle of futile correspondence. The ICO considers that there does not appear to be any prospect of an end to this pattern of correspondence.
29. The complainant has, in the ICO's view, continued to display a level of intransigence and unreasonable persistence in relation to these matters. The ICO says these requests serve no serious purpose in terms of their wider public interest and are simply an attempt to re-open the complainant's grievances and matters it considers to be closed. The resources needed to deal with the complainant's ongoing correspondence, complaints and requests is disproportionate and causes the ICO an unjustified level of disruption. This is to the detriment of other people and other matters that require the ICO's attention.

The Commissioner's conclusion

30. The Commissioner has taken account of the history, circumstances and position that the ICO gives in its submission; the Commissioner's decisions in previous, similar cases in which the ICO had relied on section 14(1) and his own reliance on section 50(2)(c) of FOIA; and the FTT's comments in EA/2021/0168.
31. The Commissioner is satisfied that the current request simply continues the pattern of meritless requests that the complainant has chosen to submit to the ICO, for reasons obvious only to the complainant. As such the Commissioner's decision is that the complainant's request to the ICO can be categorised as a vexatious request under section 14(1) of FOIA.

Section 17 – refusal of request

32. Under section 17(5) of FOIA a public authority that is relying on a claim that section 14 applies must give the applicant a notice stating that fact.
33. However, 17(6) removes that obligation if a) the authority is relying on a claim that section 14 applies, b) it has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim and c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in

34. In relation to the first of the criteria, the ICO has relied on a position that the request is vexatious and, as explained above, was justified in doing so. The second of the criteria has also been met as the ICO had informed the complainant in November 2020 that their request for similar information was vexatious.
35. Finally, the Commissioner has considered whether the third of the criteria was met ie whether it would have been unreasonable in the circumstances to have issued a fresh refusal notice. The Commissioner finds that, in the circumstances, it would have been unreasonable. Simply refusing the complainant's previous requests as vexatious had clearly not brought matters to a close and therefore the ICO was entitled to draw a further line in the sand.
36. Continuing to issue further refusal notices would, in the Commissioner's view, only serve to prolong the pointless correspondence further. The Commissioner is therefore satisfied that the ICO was entitled to rely on section 17(6) not issue a refusal notice.

Other matters

37. The complainant obviously has the right to appeal this decision to the FTT if they consider that the Commissioner has incorrectly applied the law.
38. However, in the absence of a successful appeal, the Commissioner wishes to place the complainant on notice that he is likely to rely again on section 50(2)(c) of FOIA to refuse to issue decisions in respect of any further complaints the complainant submits about the ICO which relate to this matter. Whilst any further complaints will be assessed on their own merits, it would undermine the purpose of section 17(6) of the FOIA if the ICO were constantly to be asked to re-justify its use of the exemption.

Right of appeal

39. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.

41. 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

Cressida Woodall
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