FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 8th March 2006

Name of Public Authority: Birmingham City Council
Address of Public Authority: The Council House
Birmingham
B1 1BB

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint which states that the following information was requested from Birmingham City Council under section 1 of the Freedom of Information Act 2000 (the "Act"):

27 requests made on the 26th and 27th March and 11 requests made on the 18th and 19th April attached to this Decision Notice as Appendix 1.

It is alleged that:
Birmingham City Council has applied the exemption under section 14 of the Act incorrectly.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner's decision is as follows;

The Commissioner is satisfied that in all but two of the requests Birmingham City Council complied with the Act in applying section 14(1) lawfully. Section 14(1) (1)states:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

There are two requests that do not fit within the established pattern of requests and could have been considered separately. They are:

"I seek Information under the FOI Act regarding the informal communications made between BCC and the ICO with regard to information sought to the workings of the Local Access Forum.

I seek disclosure of Local Authority policy regarding applications for information within the FOIA with reference to any consideration given to vexatious applications."

The Commissioner is of the opinion that these two requests, as they do not conform to the pattern of the established thematic requests, should have been answered by the council. By failing to respond to these two requests the Council has wrongly applied section 14 of the Act.

Action Required

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

Birmingham City Council shall, within 30 days of the date of this Decision Notice, respond to the two information requests identified above in accordance with section 1(1) of the Act.

Failure to comply

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the “Tribunal”). Information about the appeals process can be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 8th day of March 2006

Signed: …………………………………………………

Richard Thomas
Information Commissioner

Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Statement of Reasons

Section 14(1) of the Act states:

"Section (1) (1) does not oblige a public authority to comply with a request for information if the request is vexatious."

Background

The complainant has advised that on 26th and 29th March 2005 he made 27 requests for information in accordance with section 1 of the Act. The requests are listed in Appendix 1 to this Decision Notice.

On 15th April 2005 the Public Authority advised the complainant that in the light of the fact that he had made 49 logged requests over the preceding 4 months, of which 22 had previously been complied with, it was refusing 25 of the latest 27 requests on the ground that they were vexatious.

One request was refused on the grounds that the information was not held and one on the grounds that the information was available elsewhere and therefore exempt under section 21 of the Act. No complaint was made about the handling of these two requests and therefore the Commissioner does not consider the response to those requests in this decision.

The Public Authority further informed the complainant that it had made its decision after giving consideration to the number and size of requests made and after consideration of the fact that it believed that the number and nature of the requests were designed to cause considerable inconvenience, harassment and/or expense to the Public Authority. The complainant was advised of his right to request an Internal Review of that decision.

On 18th and 19th April the complainant submitted a further 11 requests for information but was notified on the 5th May 2005 that his second sets of requests were also being refused under section 14 of the Act.

The complaint requested an Internal Review of the application of the section 14 exclusion which was held by the Chief Executive of the Council. She informed the complainant on 23rd June 2005 that after consideration of the details of the requests made under the Act, a submission prepared by the Public Authority's Freedom of Information Unit, copies of published guidance by the Information Commissioner's Office and the submission by the complainant, that the decision to apply the section 14 exclusion was upheld.

The decision was based largely on the fact that the number, nature and frequency of the requests were considered to be demonstrably obsessive and manifestly unreasonable. In addition, consideration was given to the cumulative effect of the requests on the Public Authority. The decision was supported by the fact that after informing the complainant that the requests made in March were considered to be vexatious, instead of modifying his behaviour the complainant promptly submitted a further 11 requests.

The Public Authority, whilst stating that it did not form a part of the decision to consider the requests as vexatious, considered the fact that the complainant had been treated as vexatious in another context by the Public Authority in 2004. The Public Authority concluded that it was reasonable in such circumstances to consider that the nature and number of requests made by the complainant represented a continuation of a previously demonstrated pattern of behaviour.

The Complainant then appealed to the Commissioner for consideration of the section 14 exclusion which he considered had been incorrectly applied by the Council.

In his submission to the Commissioner, the complainant argued that as an activist and as a member of the Local Access Forum (LAF)[1] he had a particular interest in the areas of rights of way, footpaths and other related areas. He suggested that his role on the LAF and his personal and political interests meant that he had a duty to perform an overview and scrutiny of the Public Authority in theses areas. This necessarily meant that he would need to make extensive use of the Act. He also questioned the number of requests cited by the Council.

Investigation of the Case

Number of Requests

The Commissioner sought clarification from the Public Authority regarding the number and nature of requests. The Public Authority informed the Commissioner that it only logs information requests where the time involved in complying with the request would exceed an hour or where the FOI Officer would need to refer a request to a different department. Prior to the decision to treat the complainant's request as vexatious the Public Authority demonstrated that the complainant had made a substantial number of un-logged requests, visited the Public Authority's offices to view documents on

[1] See Countryside and Rights of way Act 2000. Part V Miscellaneous and Supplementary sec.94 Local Access Forums.

several occasions and made over 70 logged requests.

The complainant questioned the number of logged requests and the Commissioner provided a copy of the log of requests to him. He did not subsequently contest them.

Enhanced Access/Political interest

The complainant argued that the Public Authority had adopted a policy of obstruction, as it (the public Authority) "was not wishing to hand information (over) which is not in its political interest to those able and interested in using it." Further, he argued that he often found himself in opposition politically to the Public Authority and that he is much more engaged than most because of his interests and membership of the Local Access Forum (LAF) which he believes confers a duty of overview and scrutiny. Consequently he cited his membership of the LAF as justification for his "extensive use of the FOIA Act". The Commissioner informed him that membership of the LAF or any other such group does not confer an enhanced right of access under the Act. In any event, the complainant had been requested on 19th April 2005 by the chair of the LAF to refrain from using his membership of the group to obtain information. He was advised that unless specifically authorised he must not ask for information using his status as a member of the group.

Costs

The Commissioner asked what consideration, if any, was given by the Public Authority to the issuing a Refusal Notice on the grounds of cost. The Public Authority stated that it does not normally refuse a request on the grounds of cost, unless the effort and work required to comply with a request would result in a detrimental effect on its core functions. In respect of the contested requests, it argued whilst they all related to allotments and rights of way issues, it was felt that they were on such a wide and disparate area of topics, that it would be unreasonable or unfair to consider aggregating the costs. Each individual request would cost, in accordance with the fees regulations, between £100 to £400 to process and respond to, if aggregated the costs would have exceeded £3,500.00.[2]

Advice

The Commissioner considered the advice and guidance offered to the complainant regarding his rights of accessibility under the Act. The Public Authority believed that it had offered advice and guidance to the complainant and had advised the complainant of its consideration of the application of the section 14 exclusion. He nevertheless chose not to modify his behaviour and continued to submit numerous requests within short time periods.

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[2] Statutory Instrument 2004 No. 3244. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004.

The complainant demonstrated a keen knowledge of the Act; some of his correspondence including letters to the Council contained over 20 pages of complex legal arguments, including legal references. It is apparent that the complainant's knowledge of legislation regarding access to information is highly developed and he was one of the first people to make requests under the Act to the Public Authority.

Determination

The Commissioner is aware that that many public authorities and individuals would welcome guidance about the interpretation of the term "vexatious" in section 14 of the Act and has therefore incorporated such guidance in this decision.

The Commissioner's approach was to evaluate whether the requests, as argued by the Public Authority, imposed a significant burden on the Public Authority and had the effect of harassing the public authority and/or could fairly be characterised as obsessive or manifestly unreasonable.

In making this decision he has drawn upon **Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests** (See Annex A) and has also considered jurisprudence from other legislative environments. (See Annex B).

However, it is important to note that the Awareness Guidance Notes are not an addendum to the Act and are intended to introduce some of the key concepts and suggest approaches to be taken in the consideration of the application of the exemption.

In line with Awareness Guidance No 22, The Commissioner's general approach was to consider whether the Council had clearly demonstrated that the requests;

- would impose a significant burden on the council;
- have the effect of harassing the Public Authority
- could otherwise fairly be characterised as obsessive or manifestly unreasonable.

Significant burden

The Commissioner considers that although it may not have been the explicit intention of the complainant to cause inconvenience or expense, the main effect of the requests was a disproportionate inconvenience and expense to the Public Authority. Whilst it is clear that the Public Authority was correct not to exclude the request on the grounds of costs, he considers that it is appropriate for the Public Authority to consider the aggregated effect of dealing with the requests. By estimating the potential costs of complying with the requests along with the time taken and the frequency and number of requests, the Commissioner accepts that the effect of complying with the requests clearly demonstrates that a significant burden would be placed on the Public Authority. The Commissioner consider that a Public Authority does not have to comply with a request(s) if, as in this case, it can clearly demonstrate that dealing with the request(s) would divert a substantial amount of the Public Authorities resources.

Harassment

The department to which the requests had been made had expressed concerns about the level of attention and resources required to satisfy the complainant's previous request. The Commissioner considered the succession of requests both logged and un-logged. Whilst they were not strictly identical or substantially similar, the cumulative effect was to harass the public authority.

Obsessive.

The Public Authority's decision to treat the complainant's two sets of 25 and 11 requests respectively as vexatious was partly based on the grounds that they believed that the requests were obsessive and manifestly unreasonable. The Public Authority concluded that the requests although not "repeated" in the sense that they were not requests for the same information, taken together formed a pattern of obsessive thematic requests relating as they did to rights of way, footpaths and other similar areas.

The thematic nature of all but two of the contested requests reflected the nature of other requests previously received by the Public Authority prior to the introduction of the Act. Thus representing a continuation of a previously demonstrated pattern of behaviour which had led the Public Authority to treat the complainant as vexatious in another context in 2004.

In his consideration of this aspect of the Public Authority's submission, the Commissioner was mindful of the fact that section 14 applies to requests received by a Public Authority, not to the person who has submitted the request. A request cannot be judged vexatious purely on the basis that the person who submitted that request had previously submitted one or more vexatious, though unrelated, requests. The same applies where that requester has been judged vexatious by that public authority in areas unconnected to FOI, such as with regard to complaints to the organisation or any other

previous conduct.

However, it is the Commissioner's view that it is reasonable for the Public Authority to have concluded that all but the two of these particular requests represented a continuation of behaviour which it has judged to be vexatious in another context. In this case it was the combined factors of the thematic nature of the requests, the number and frequency of the requests and the fact that the LAF itself had asked the complainant to refrain from using his status as a member of the group to obtain information as he had bought himself into 'confrontation' with the Public Authority.

The Commissioner recognises that two of the requests relate to FOI issues, namely;

"I seek Information under the FOI Act regarding the informal communications made between BCC and the ICO with regard to information sought to the workings of the Local Access Forum.

I seek disclosure of Local Authority policy regarding applications for information within the FOIA with reference to any consideration given to vexatious applications,"

and is satisfied that these would not fall within the thematic nature of the other requests. The Commissioner therefore considers that the Public Authority should have dealt with those two requests in accordance with the requirements of the Act.

Whilst it is apparent that an individual with a particular interest maybe likely to submit themed information requests, an interest in an issue, membership of an interest group or a political party does not confer an enhanced right of access to an individual.

The Commissioner in coming to his decision in this case has also considered jurisprudence from other legislative environments, which are attached as Annex B. The Commissioner is aware that legislative differences may affect the substance of decisions in other legislative environments. Such jurisprudence does not determine the decision made in this case but assists in the wider consideration of the case.

Conclusion

In this case the Commissioner has considered the nature of the requests, the grounds of refusal, the conduct of the Internal Review and the background as outlined above. The Commissioner considers the application of the section 14 exclusion appropriate and therefore does not uphold the complaint, with the exception of the two requests specified above.

Appendix 1

Logged Freedom of Information Requests made by the complainant:

March

- I seek disclosure of the proposed purpose of the site at Station Road, Stechford C/01297/05/BCC. C/01298/05/BCC. Disclosure of current use of site and any information about change of use of land.
- I apply for information by ward and with specified usage, relating to capital receipts held by the City generated by settlements from Section 106 of The Town and Country Planning Act 1990.
- I seek disclosure of any consideration made by the local Authority of the obligations and duties within the Countryside Rights of Way Act 2000.
- I seek access to the national land use database for the areas of land which are on that database which are contained within the local Authority area of Birmingham. I would also seek information of sites which appear on this database which are just outside the boundaries of Birmingham Local Authority but which are adjacent to river corridors of areas of existing green space. I would also seek information on the availability of land which is included on the national land use database within the areas adjacent to the following major regeneration corridors. The Chester Road, Dudley Road with East Side, Selly Oak. The Londbridge/Minworth link road area. In addition I week access to levels of consideration of unused office and commercial space within these areas.
- I seek disclosure of any interpretation made by BCC Corporate, with regard to the duty to promote well being. I seek information with regard to this obligation in relation to promoting walking and enhancing routes way from the highway, both permissive and designated rights of way.
- I seek information on beneficial health effects by access to available green space, recreational and leisure amenities. Disclosure of any assessment of other factors such as housing standards, diet, exercise which the city considers will promote health. Disclosure of areas where assessments have been made. Disclosure of the methodology used in assessing public health in general.
- *I seek disclosure of Local Authority policy regarding applications for information within the Freedom of Information Act with reference to any consideration given to vexatious applications*.
- I request disclosure of any information held by the local Authority relating to pedestrian journeys to and from local post offices.
- I apply for access to all information held by the Local Authority relating to assessments of pedestrian journeys made within the parks network and upon routes designated as rights of way. I apply for access to be given to Local Authority information held relating to walking journeys made to and from schools in Birmingham. In addition I apply for information relating to Local Authority air quality monitoring undertaken in relation to pollution adjacent to Birmingham schools.

- I request information relating to the current budget for the forthcoming assessment of Birmingham's Right of Way network undertaken in accordance with the Countryside Rights of Way Act 2000. I request information regarding where geographically this assessment will be made.
- I request information regarding any assessment of pedestrian journeys undertaken to local shopping facilities. In addition I request any information held or sought by the Local Authority regarding assessments of pedestrian journeys to major retail outlets.
- I seek information held by the Local Authority regarding any assessment of levels of pedestrian journeys made to doctor's surgeries.
- I seek information held by the Local Authority regarding assessments of any pedestrian journeys undertaken between home and work and work and home.
- I seek information held by the Local Authority regarding pedestrian journeys to and from Birmingham International Airport.
- I seek disclosure under Freedom of Information Act of a copy of The Definitive Map for rights of way in the Birmingham Local Authority.
- I request disclosure of information held by the Local Authority regarding pedestrian journeys undertaken by council employees.
- I seek disclosure of information held relating to any current considerations of proposed improvements to be made of existing rights of way within Birmingham.
- I seek disclosure of any consideration or plans to improve the existing rights of within the City Centre.
- I seek disclosure of any information sought regarding to the levels of car ownership within the wards of Birmingham.
- I seek disclosure of the number of applications made by members of the public to improve and close existing rights of way by ward.
- I seek disclosure of any consideration made by the Local Authority of the obligations and duties contained with the Countryside Rights of Way Act 2000.
- I seek information sought relating to walking contained within the pilot accessibility planning project undertaken.
- I seek disclosure of any information within the Local Authority regarding assessments of walking journeys which contributes to the proposed regeneration of the Chester Road area.
- I seek disclosure of information held by the Local Authority with regard to pedestrian journey assessments made with regard to the proposed regeneration of the Dudley Road corridor.
- I seek information and disclosure of assessments with regard to walking levels within the proposed East Side regeneration proposals.
- I seek disclosure of information held by the Local Authority with regard to assessments of walking journeys made with regard to the regeneration of the Selly Oak area.
- I seek disclosure of information held by the Local Authority with regard to assessments made of the nature of pedestrian journeys made with the proposed Longbridge/Minworth link road area.

- I seek disclosure of information held by the Local Authority and Local Education Authority regarding the figures for turnover of pupils within the school year, if such a calculation is used to assess the viability of the school provision.

April

- I seek any further information held by the Local Authority which forms the basis of assessment of social deprivation.
- *I seek information under the Freedom of Information Act regarding the informal communications made between Birmingham City Council and the Information Commissioner, regard to information sought in regard to the workings of the Birmingham Local Access Forum*.
- I seek copies of any information relating to discussions with Calthorpe estates regarding future land use at the site of the Archery Tennis Club off West borne road Edgbaston.
- I seek clarification of the existence of a vehicle route from Farquhar Road Edgbaston which adjoins the access road from Westborne road.
- Does the City also have any information regarding the use of other portions of land within this site, and does the City hold any information regarding the lease hold arrangements for this land or that of Archery Tennis Club.
- Is the City aware of any long term land use changes discussed with Calthorpe estates regarding these sizable portions of open space with limited, permissive public access, and as yet no record of rights of way. Edgbaston Park, Edgbaston Golf Course, Edgbaston pool.
- I seek disclosure of information relating to the sale and envisaged purchaser of this land under the Freedom of Information Act.
- I seek details of the proposed uses for which this land has been considered.
- I seek disclosure of information relating to disposals of land adjacent to possible rights of way at; Wood lane, Woodgate Valley, Seals Green, Kings Norton.
- I seek details that proposed usage for which this land has been considered.
- I seek disclosure of information relating to the sale and envisaged purchaser of this land.

Information Commissioner

Annex A

Freedom of Information Act Awareness Guidance No 22

Vexatious and Repeated Requests

The Freedom of Information Act will come fully into force in January 2005. The Act creates a right of access to official information and places a duty on public authorities to publish information in accordance with "publication schemes".

The **Awareness Guidance** series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some its challenges. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation. Awareness Guidance No 22 takes the form of Frequently Asked Questions on a range of issues surrounding Vexatious and Repeated requests under the Act. An Annex also gives some advice about the equivalent provision in the Environmental Information Regulations.

Introduction

1. What is the purpose of the provisions relating to vexatious and repeated requests for information?

The Freedom of Information Act (and the parallel Environmental Information Regulations) gives new rights of access to official information, known as the **right to know**. The Act makes clear that, subject to certain safeguards, there is a public interest in allowing access to such information and, in particular, in the release of information as to the reasons for decisions made by public authorities.

However, while placing a general duty on public authorities to give access to official information the Act also provides an exception to that duty for requests which are vexatious or repetitious. (In the case of the Environmental Information Regulations, the equivalent provision is for requests which are repeated or manifestly unreasonable.) These provisions are necessary to prevent abuse of the **right to know**.

2. What is the Information Commissioner's general approach?

The Commissioner is confident that most members of the public will exercise their new rights sensibly and responsibly. However, he recognises that there is a risk that some individuals - and perhaps some organisations - may seek to abuse these new rights with requests which are manifestly unreasonable and which would impose substantial burdens on the financial and human resources of public authorities. Such cases may well arise in connection with a grievance or complaint which an individual is pursuing against the authority.

The Commissioner considers that the exception in the Act for vexatious and repeated requests is important, especially as no fee will be charged for most requests. His approach will be influenced by the desirability of keeping compliance costs to a minimum and to avoiding damage to the credibility or reputation of the Freedom of Information framework.

At the same time, the Commissioner emphasises that authorities should not conclude that a request is vexatious or repeated unless there are sound grounds for such a decision. An authority may well need to defend its decision.

While giving maximum support to individuals genuinely seeking to exercise the new **right to know,** the Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and:

- clearly does not have any serious purpose or value;
- is designed to cause disruption or annoyance;
- has the effect of harassing the public authority; or
- can otherwise fairly be characterised as obsessive or manifestly unreasonable.

Although the Act states that a Request can only be refused by a public authority where it is vexatious or repeated (section14), public authorities will be aware that the Commissioner has slightly different grounds (section 50(2)) for refusing to deal with a complaint. In addition to removing the duty to consider complaints which are vexatious, the Commissioner is under no duty to consider complaints which are "frivolous". A complaint about a request that has been refused because it was vexatious will need good evidence in support. Otherwise the complaint itself may well be considered as vexatious and/or frivolous. The Commissioner would also be likely to reject any complaint as frivolous where the public authority had clearly shown that the Commissioner, the Tribunal or the courts had ruled in the authority's favour in other similar cases.

A) Vexatious Requests

1. What does the Act say?

Section 14(1) of the Act states that the general right of access to information "does not oblige a public authority to comply with a request for information if the request is vexatious." An important point to note here is that it is the request rather than the requester which must be vexatious.

Section 50(2)(c) of the Act states that the Information Commissioner is not obliged to deal with complaints if the application appears to him to be frivolous or vexatious. His approach will be consistent with what is set out in this paper.

2. What is a vexatious request?

There is no definition of "vexatious" in the Act. Dictionary definitions refer to "causing annoyance or worry".

In the different context of litigation, the term has been considered by the courts in cases where public authorities and others have sought to have particular individuals declared "vexatious litigants." The case of the Attorney General v Barker (2000), for instance, suggests that it may be reasonable to treat as vexatious a request which is **designed** to subject a public authority to inconvenience, harassment or expense.

But – although a request cannot be treated as vexatious simply because it causes inconvenience or expense - the Commissioner considers that a wider approach is necessary in the context of FOI requests made, without charge and with the minimum of formality, to public authorities. **Effect** will need to be considered as well as intention. Even though it may not have been the explicit intention of the applicant to cause inconvenience or expense, if a reasonable person would conclude that the main effect of the request would be disproportionate inconvenience or expense, then it will be appropriate to treat the request as being vexatious.

3. How is it possible to identify a single request as vexatious?

There are a number of ways in which it may be possible to identify individual requests as being vexatious. The following list is not designed to be exhaustive, but rather to illustrate a general approach:

- **The applicant makes clear his or her intention:** If an applicant explicitly states that it is his or her intention to cause a public authority the maximum inconvenience through a request, it will almost certainly make that request vexatious.

- **The authority has independent knowledge of the intention of the applicant:** Similarly, if an applicant (or an organisation to which the applicant belongs, such as a campaign group) has previously indicated an intention to cause a public authority the maximum inconvenience through making requests, it will usually be possible to regard that request as being vexatious.

- **The request clearly does not have any serious purpose or value.** Although the Act does not require the person making a request to disclose any reason or motivation, there may be cases which are so lacking in serious purpose or value that they can only be fairly treated as "vexatious". Such cases are especially likely to arise where there has been a series of requests. Before reaching such a conclusion, however, a public authority should be careful to consider any explanation which the applicant gives as to the value in disclosing the information which may be made in the course of an appeal against refusal (see below).

- **The effect of redaction would be to render information worthless:** If much of the information requested falls within an exemption(s) and requires extensive redaction and the remaining information would be meaningless or no real use to the applicant, the application may be reasonably considered to be vexatious. This will depend on what has been requested and whether the applicant is (or becomes) aware of the likely result. Again, in such cases it will be important to give proper consideration to any explanation which the applicant gives as to the value in disclosing the information, for example in the course of an appeal against the refusal.

- **The request is for information which is clearly exempt:** Requests may be received for information which the applicant clearly understands to be exempt even after the application of the public interest test. It may be reasonable to consider these requests as vexatious.

- **The request can fairly be characterised as obsessive or manifestly unreasonable.** It will usually be easier to recognise such cases than define them. They will be exceptional – public authorities must not be judgemental without good cause. An apparently tedious request, which in fact relates to a genuine concern, must not be dismissed. But a public authority is not obliged to comply with a request which a reasonable person would describe as obsessive or manifestly unreasonable. It will

- Obviously be easier to identify such requests when there has been frequent prior contact with requester or the request otherwise forms part of a pattern, for instance when the same individual submits successive requests for information. Although such requests may not be “repeated” in the sense that they are requests for the same information (see Section B below), taken together they may form evidence of a pattern of obsessive requests so that an authority may reasonably regard the most recent as vexatious.

4. To what extent can a public authority take into account any knowledge it has of the applicant?

As stated, section 14 applies to requests received by a public authority, not to the person who has submitted the request. So a request cannot be judged vexatious purely on the basis that the person who submitted that request had previously submitted one or more vexatious, though unrelated, requests. The same applies where that requester has been judged vexatious by that public authority in areas unconnected to FOI, such as with regard to complaints to the organisation or any other previous conduct.

A public authority may have taken the decision not to correspond with a person in respect of their complaints to the organisation, but they cannot simply adopt this stance with regard to that person’s requests for information.

A useful test which a public authority could apply in determining whether to comply with a request for information in such circumstances is to judge whether the information would be supplied if it were requested by another person, unknown to the authority. If this would be the case, the information must be provided as the public authority cannot discriminate between different requesters.

While caution is needed before taking into account general information which a public authority may have about a particular applicant, as made clear in the answer to Question 3 (above) it will be reasonable to take into account any information volunteered by the applicant in connection with a particular request.

Although it may be wrong to judge a request to be vexatious simply because the same applicant has previously submitted such a request or because the authority has judged other behaviour of the applicant to be vexatious, equally it may be reasonable for the authority to conclude that a particular request represents a continuation of behaviour which it has judged to be vexatious in another context and therefore to refuse the request as being vexatious,

5. Can a public authority take account of abusive or threatening language?

An FOI request which either contains abusive or offensive language or is written in a threatening tone will not automatically render the request vexatious. Although unpleasant, it would not necessarily forfeit the applicant's rights under FOI if the request is nevertheless clearly requesting information. The use of threatening, offensive or abusive language or behaviour may however be strongly indicative of a vexatious request.

In drawing inferences from the way in which a request is framed or pursued, public authorities should, of course, be aware of their general obligations as service providers, together with any specific obligations under the Disability Discrimination Act, when dealing with users of mental health services.

6. Can a public authority take account of the length of requests?

There may be cases where a public authority receives lengthy written correspondence containing a mixture of information requests and other content, such as complaints about non-FOI related issues. Even if a public authority has deemed the correspondence to be vexatious in respect of the other issues, this categorisation cannot be automatically applied to the request for information. In other words, all information requests must be interpreted in line with the provisions of the FOI Act. In some cases, however, such a communication may be so rambling or impenetrable as to make vexatious any request which it may contain.

7. Are requests submitted under obvious pseudonyms automatically vexatious?

The Act requires applicants to make requests for information in writing and to state his or her name and an address for correspondence. Technically, therefore a request submitted using a pseudonym is not a proper request and could be refused on that ground. However, the Act does not allow public authorities to enquire into the circumstances of the applicant or to ask for information in order to verify identities. Unless the public authority **knows** that the applicant has used a pseudonym, therefore, it will be difficult to refuse a request on that ground.

A better starting point is the assumption built into the Act that public authorities must generally discount the identity and circumstances of the applicant and must regard any release of information as if it were a release to the world at large. This approach recognises that although applicants cannot,

gain any advantage by using a pseudonym, they may have reasons for not wishing to draw attention to themselves by using the names under which they are normally known.

Although a public authority may not designate a request as vexatious simply because the applicant uses an obvious pseudonym, it may be prompted by the use of the pseudonym to consider whether information is exempt or whether, for other reasons, the request is vexatious. It should not, however, base any decisions as to disclosure upon the name supplied by the applicant, (unless of course the applicant is making a subject access request - a request for information about him/herself under section 7 of the Data Protection Act 1998).

B) Repeated requests

1. What does the Act say?

Section 14(2) of the Act states that: "where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request."

2. What is a "reasonable interval"?

The term "a reasonable interval" is not defined in the Act and in the first instance this is for the public authority to determine, depending on the type of information sought and any advice provided to the applicant by the public authority in response to their previous request. Much will also depend on the nature of the public authority's business. For example, if it regularly updates records, it might be reasonable for an applicant to make requests for information more often.

If the applicant disputes the public authority's definition of a "reasonable interval" in respect of their application, they may complain to the Information Commissioner.

3. Can a request be classified as repeated simply on the basis of the content of the request?

No. Importantly, the request must be put into context. Many requests for information may appear to fit the criteria in section 14(2) due to

identical/substantially similar content, but are not in fact repeated requests. This is because in certain cases information that the public authority would disclose if complying with the application might not be the same as the information previously released.

Often, the information that will be released in complying with a request will be of greater significance than the description of the information found in the request. The following are examples of this:

- **The information held in relation to a request has changed since the request was last made:** Public authorities should be aware that information about a situation that is likely to change often might reasonably be sought more frequently than information about a situation that is static.

  For example, two requests received from the same applicant, a month apart, requesting a public authority's most recent monthly performance statistics would not be considered to be a repeated request. This is because the information held by the public authority in relation to the request has changed since the previous request. Therefore, the fact that the content of the two requests are identical is of no consequence. Even if there were no new monthly statistics, the request would still merit a response (by informing the applicant of this fact under the duty to deny), unless in the response to the first request the applicant was informed of when these figures are due to change.

- **An FOI request simply asks if any of the information held by a public authority has changed since it was previously requested:** These requests are designed to elicit different information and it is reasonable for public authorities to expect to receive them. If the information has changed, the request must be complied with. If it has not, this should still be classified as a new request for information as it is asking a specific question that has not previously been submitted to the public authority, even though the information to which it refers has previously been requested. This obligation would also apply if the content of the application is the same as the first request but the applicant genuinely thinks that the information held has changed since then. This might be repetitious in nature, but it would still constitute a valid request.

  Any number of such requests should be complied with, unless of course the public authority informs the applicant when the information is due to change and the applicant then sends another request before that time. In this case, the subsequent request would be judged as repeated.

4. Can requests be both repeated and vexatious?

Yes. In the answer to question 3 in Section A, we looked at ways of identifying single vexatious requests. This may often be a difficult judgement to make. Such a judgement may become easier however, if there is a succession of requests, whether or not strictly "identical or substantially similar," the effect of which is to harass the public authority. This is consistent with the case of the Attorney General v Barker (2000) referred to earlier, which suggests that it may be reasonable to treat as vexatious a request which is designed to subject a public authority to inconvenience, **harassment** and expense.

5. Are there certain kinds of repeated requests to which a public authority should consider responding as a matter of best practice?

Even though a request may be repeated, there will be cases where a positive response should be considered. The following are examples:

- In the request, the applicant states that he or she lost the information but still requires it;
- The applicant states that he or she disposed of the information but has subsequently discovered that it was still required;
- The applicant reasonably requires another copy of the information previously sent to them, for instance because they have been obliged to supply the original to another body;
- Cases where some of the information requested is new, but the rest has previously been supplied to the applicant. In such "hybrid" cases, it might be easier to comply with the request but only supply the information which has changed and classify the remainder of the request as repeated.

6. Can an authority refuse identical requests submitted by different applicants on the ground that they are repetitious?

No. Section 14 makes clear that the provision relating to repeated requests only applies to requests submitted by the same applicant.

If a public authority has reason to believe that the requests have been submitted as part of a campaign designed primarily to cause it inconvenience, it may be able to refuse them because they are vexatious.

If, however, it believes that the requests have in fact been submitted by the same applicant, it may refuse them either because they are vexatious or repeated.

If identical but non-vexatious requests are received a sensible solution may be to publish the information in question, for instance, by way of a disclosure log under a publication scheme.

C) Practical Considerations

1. Who should make the decision as to whether a request is vexatious?

In most cases the process of identifying a genuinely vexatious request will be straightforward as long as the public authority understands what is meant by a vexatious application. However, even where a staff member dealing with an FOI application is confident that it meets the vexatious criteria, it may be wise to refer the decision for approval to a more senior level within the authority, given that such a judgement may be controversial.

2. What approach should be adopted where it is uncertain that a request is vexatious?

In certain cases it may be difficult to determine whether a request is vexatious or simply difficult to answer. Here, it might be easiest for a public authority to deal with the request as best it can by adopting one of the following alternatives:

- Contact the applicant and ask him or her to clarify the request. (See also Awareness Guidance 23 which explains the duty to provide Advice and Assistance under the Act.)
- Comply with the request and reduce the chances of a more time consuming grievance developing between the applicant and the public authority. Essentially this is a matter of judgement for the authority.
- Refuse a request but spell out the reasons and perhaps indicate the information which might lead to a different conclusion on appeal.

3. How can a public authority make it easier to deal with complaints about refusal?

Some public authorities may receive large volumes of vexatious or repeated requests as a result of the nature of their business. It may be helpful for them to identify the likely issues which may arise in their circumstances and draw up publicly available criteria for categorising these requests. This will help show that vexatious applications will be dealt with fairly, against an objective method of assessment.

4. What should a public authority do when refusing a request?

After receiving a request that is subsequently deemed to be vexatious or repeated, the public authority should notify the applicant accordingly and inform them why this is the case. It need not, however, provide a notice of refusal in the case of repeated requests if a similar notice has been given previously. It is wise for a public authority to retain records of the case in order to assist should the applicant appeal against the decision or in order to identify identical requests in the future.

Records should consist of details of the request and the applicant, information as to why the application was judged to be vexatious or repeated, and the way in which the public authority came to its decision. There may also be an operational need to keep this information as a public authority might want to know how many requests for information have been deemed as vexatious.

5. What are the key elements of an internal complaints procedure?

Reliance on section 14 is likely to be relatively controversial and may easily lead to further complaint. This is in itself a strong reason why public authorities should adopt an internal complaints procedure in respect of FOI complaints. It will give a public authority a chance to reconsider a case and provide assurance to the applicant that they have been fairly treated under the provisions of the Act. Except in exceptional cases, such a complaints procedure will have to be exhausted by the applicant before he or she is able to refer a case to the Information Commissioner.

The applicant should be advised about the complaints procedure when informing him or her of the outcome of a request. The Access Code of Practice under Section 45 of the Act recommends that complaints handling is conducted by someone not involved in the initial decision.

The existence of a robust internal complaints procedure may allow front line decision makers to make more confident decisions about refusals of requests which appear at first sight to be for information of little value but entailing significant costs for the authority in its retrieval or redaction.

Annex B

Other Jurisdictions

The Commissioner in coming to his decision in this case considered jurisprudence from other legislative environments. In New Zealand, an information request may be refused if it is frivolous or vexatious. Guidance issued by the New Zealand Commissioner on vexatious complainants argues that in order for a request to be vexatious, the claim must be such that no reasonable person could properly treat it as bona fide (that is, having been made in good faith).[3] In Ireland and Scotland the Commissioners have issued decisions in which the term vexatious is clarified further by looking at the effect of a given request.[4] Both argue that it will sometimes be necessary to consider the effect of dealing with the request on a public authority. Requests made by the same person in or around the same time as part of a series of requests dealing with the same topic may sometimes be treated as frivolous or vexatious.[5] In such cases, it may clearly be inefficient from an administrative point of view, and of no benefit to the requester, to deal with the requests singly. Of itself, the fact that a requester has submitted a 'large' number of requests does not necessarily indicate that any of these requests is frivolous or vexatious.

It is clear that in other jurisdictions an information request does not have to be dealt with if dealing with that request would divert a substantial and unreasonable portion of the body's resources away from its other operations or its functions.[6] The Western Australian Information Commissioner when making a decision on the effect of a potentially vexatious request considered, amongst other things, the number of documents involved, the resources available to the Department to deal with the application and the limited number of staff with the necessary knowledge to make an informed judgement about the granting of access to the information.

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[3] www.ombudsmen.govt.nz/guideB2 Section 17(h) LGOIMA, Norman v Matthews [1916 - 1917] All ER 696. Other relevant cases are Re Vernazza [1960] 1 All ER 183 and Riches v DPP [1973] 2 All ER 935. Many of the authorities are collected in A-G v Hill (1993) 7 PRNZ 20. Young v Holloway [1895] P87.

[4] Office of the Information Commissioner for Ireland. Case number 99151 (02.02.2000). Scottish Information Commissioner's Decision numbers 063/2005 Macroberts and Caledonian MacBrayne Limited (29/11/05) and Decision 062/2005 Macroberts and the Scottish Executive (29/11/ 2005).

[5] Office of the Irish Information Commissioner. Case Nos. 020375, 020376, 020647, 020648, 020649, 020651, 020652.

4 Decision DOI 22000 Western Australian Information Commissioner (MR.12 2000).

The Commissioner is aware that legislative differences may affect the substance of decisions in other legislative environments. Such jurisprudence do not determine the decisions but assist in the wider consideration of what constitutes a vexatious request.