

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2019

Public Authority: Information Commissioner's Office (ICO)

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. She is therefore under a duty as regulator to make a formal determination of a complaint made against her 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 ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested particular correspondence and evidence of particular decisions. He is dissatisfied because the ICO has categorised his three part request as vexatious and has refused to comply with it.
2. The Commissioner's decision is as follows:
 - The complainant's request can be categorised as vexatious under section 14(1) of the FOIA and, as such, the ICO is not obliged to comply with it.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 14 March 2019 the complainant wrote to the ICO and requested information in the following terms:

"...1. Information amounting to the text of correspondence between the ICO and Barnet Enfield and Haringey Mental Health NHS Trust (MHT) [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case EA/ 2015/0120; and correspondence submitting such forms to the ICO; and any ICO response to MHT.

2. Information evidencing any internal ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT (believed to have occurred on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to the pleading by the ICO on 29.09.15 that such opinions of the MHT chief executive were reasonable.

3. Not replicated.

4. Not replicated.

5. Not replicated.

6. Not replicated.

*7. Information as to any decision made within the ICO and/or by its representatives in the period 30.11 15 to 09.12.15 to concede that the guidance would be revised; and/or to present such a concession by pleading on 09.12.15 that the Commissioner intends to revise. [The words in italics above are from [Redacted] e-mail of 16.05.16 to Information Tribunal Decisions at 18:05 *provided* by order of the Tribunal on 29 May 2018 at 12:10.]"*

5. The ICO issued a refusal notice on 15 April 2019. It noted that the three parts of the above request are near identical to a previous request the complainant had submitted it and which the ICO had considered under its reference IRQ0750441/RCC0768856.
6. The ICO went on to say that, with regard to part 2 of the request, it had already confirmed to the complaint that it does not hold the information requested. The ICO advised the complainant that this current request is therefore a repeat request for information the complainant has been told

the ICO does not hold and, as such, could be considered a vexatious request.

7. The ICO then turned to parts 1 and 7, which had also formed part of the earlier request. It said that in its previous response it had confirmed that information it holds falling within the scope of both parts was exempt information under section 42(1)(legal professional privilege). That response had been considered by the Commissioner under reference FS50777962 with the Commissioner upholding the ICO's application of section 42(1). The ICO had noted that the complainant had subsequently appealed the Commissioner's decision. It appeared to the ICO that the complainant was attempting, through parallel routes, to keep live a topic that had already been considered several times.
8. With regard to part 1 of the previous and current request, the ICO noted that during the above complaint – FS50777962 – the complainant had claimed that MHT had provided the documents in scope and thus legal professional privilege (LPP) had fallen away.
9. The ICO confirmed that it had received no confirmation or evidence of disclosure from MHT and that it had asked the complainant to provide copies. It said that, instead, the complainant had provided a list of email dates and a description of emails supposedly provided by MHT. The ICO said it considered that this in itself was neither proof of disclosure nor a reliable confirmation of what information MHT had disclosed and what information had been redacted.
10. In the ICO's view, this created a situation in which there were two possibilities:
 - MHT had not disclosed the information to the complainant and he was attempting to subvert MHT's appropriately applied exemption of the information under section 42; or
 - MHT had indeed disclosed the information to the complainant and he wished for the ICO to provide access to information to which he already had access.
11. The ICO confirmed that in either scenario, section 14 would apply.
12. With regard to part 7 of the request, the ICO noted that the request had come only two weeks after the Upper Tribunal refused to allow an appeal to the Court of Appeal of GIA.1680.2018. This was itself an appeal of EA/2017/0232 which had resulted from a complaint under FS50676914 about request IRQ0663492 and the ICO's review RCC0669497. The ICO noted that the request considered under FS50676914 was substantially similar to part 7 of the current request; that is, it was for internal ICO discussion over the changing of section 36

guidance resulting from the appeal EA/2015/0120, mentioned in the complainant's request.

13. The ICO advised that, moreover, the complainant had made a similar request on 3 November 2018 under IRQ0799567 for information relating to changes to section 36 guidance. The ICO said it had provided him with some information but information previously withheld under section 42(1) was still subject to LPP. This decision was upheld at internal review RCC0806024. The ICO noted that the complainant had referred this response to the Commissioner on 28 January 2019 and that this complaint was, at that point, under assessment. The ICO advised the complainant that, again, a situation existed in which the complainant had opened parallel routes to the consideration of, substantially, the same information.
14. The ICO confirmed that in its response IRQ0799567 it had advised the complainant that continued requests for information on "*these matters or for information we have already considered for disclosure and withheld*" would be considered in line with its guidance on vexatious requests under section 14. It appeared to the ICO that part 7 of the current request was in a similar vein to that which prompted the above warning.
15. The ICO summarised its refusal by noting that the complainant's request is part of a long-running and obsessive campaign focussed on information pertaining to EA/2015/0120. It considered that further responses to requests in a similar vein would not benefit the complainant, the ICO or the public at large but would be a disproportionate burden on the ICO's limited resources. The ICO told the complainant that his unwillingness to accept the independent determination of the First-tier Tribunal (Information Rights)(FTT) and his repeated requests on the same topic, or for the same information, indicated a level of unreasonable persistence and obsessiveness with these matters.
16. The ICO confirmed that it was relying on section 14(1) with regard to the requests and would not, in reliance on section 17(6) of the FOIA, provide any further acknowledgements or refusal notices in response to any similarly themed requests in the future.
17. The ICO provided an internal review on 9 May 2019. It maintained its reliance on section 14(1).

Scope of the case

18. The complainant contacted the Commissioner on 15 May 2019 to complain about the way his request for information had been handled.
19. Having communicated with the complaint about the scope of his request, the Commissioner's investigation has focussed on the ICO's reliance on section 14 of the FOIA to refuse to comply with the three parts of the complainant's request.

Reasons for decision

Section 14 – vexatious and repeat requests

20. Under section 14(1) of the FOIA a public authority is not obliged to comply with a request if the request is vexatious.
21. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
 - Abusive or aggressive language
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
22. 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.
23. The Commissioner's guidance goes on to suggest 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.

24. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
25. Under section 14(2) of the FOIA a public authority does not have to comply with a request which is identical, or substantially similar to a previous request submitted by the same individual, unless a reasonable period has elapsed between those requests.
26. The Commissioner has considered the ICO's response to parts 1 and 7 of the request first. With regard to part 1 of the request, in its submission to her the ICO referred the Commissioner to its refusal of this part. The ICO said that in either of these scenarios referred to at paragraph 10 of this notice it is satisfied that it correctly applied the section 14 exemption. It noted that the complainant had continued to ask for the same information after his internal review request, despite being informed that the ICO would not consider repeated requests any further.
27. In order to be quite clear about the situation, the Commissioner subsequently discussed with the ICO its position with regard to part 1 of the request. It was noted that, during the course of the Commissioner's investigation of FS50777962, the ICO advised her that on 22 August 2018 MHT had contacted the ICO regarding an information request it had received from the complainant. MHT had provided the ICO with unredacted versions of the information it had released to the complainant.
28. On 17 December 2018, during that same investigation, the complainant advised the Commissioner that, on 22 August 2018, he had alerted the ICO to the fact that he had "just" received "redacted hard copies of some material of July to August 2015" from MHT.
29. As has been detailed, FS50777962 concerned the ICO's application of section 42 to particular information the complainant had requested (and has requested again in the current case). In FS50777962 the complainant had argued that the ICO could not rely on section 42 as the LPP had fallen away because MHT had released the information to him. In her resulting decision of 14 March 2019, the Commissioner had pointed out that she had to focus on the situation as it was at the time of the complainant's request and that at that time – 29 May 2018 – the complainant had not received any information from MHT; the LPP had therefore not fallen away and the Commissioner decided that section 42 was engaged in that case.
30. With regard to the current case, however, in its refusal of the request of 14 March 2019 the ICO had advised the complainant that, during the course of FS50777962, it confirmed to him that it had received no confirmation or evidence "of disclosure" (ie of what information MHT had

disclosed) and had asked the complainant to send to it the information he had received from MHT. This was so that the ICO could review the released information and consider if, indeed, the information the ICO held no longer engaged section 42. The complainant had declined to send the ICO the information he said MHT had disclosed to him. In its refusal, the ICO went on to note that the complainant had only provided it with a list of email dates and descriptions of emails "supposedly provided by MHT". As has been noted, to the ICO this was neither proof of disclosure nor a reliable confirmation of what was disclosed and what was redacted.

31. At the point the complainant submitted his current request for information, on 14 March 2019, it appears that the complainant had still not provided the ICO with copies of that same information which he said he had received from MHT. This has led, in part, to part 1 of his current request being categorised as vexatious.
32. This is because, as the ICO has explained, there are two possibilities in this situation. Either MHT had not, in fact, disclosed the information in question to the complainant and through the current request he is attempting to subvert MHT's application of section 42 to the information. The Commissioner agrees with the ICO that this would mean the current request is vexatious as the complainant appears to be trying to 'trick' the ICO into providing him with the information in question by advising the ICO that he has already received the information from MHT, when he has not.
33. Alternatively, MHT did disclose the information to the complainant, in which case he is asking the ICO to provide access to information to which he already has access. That would render part 1 of the request frivolous.
34. As the ICO noted in its refusal, the complainant appealed FS50777962 to the FTT. In its decision of 11 October 2019 – EA/2019/0121 – the FTT dismissed the complainant's appeal. During the course of the appeal, the complainant provided the FTT with copies of the information he had received from MHT. However, as with FS50777962, the Commissioner must consider the situation as it was at the time of the request – 14 March 2019. The ICO may have reviewed the material from MHT during the appeal to the FTT, which was heard on 6 September 2019, but the complainant had not provided the ICO with that same material at the time of the 14 March 2019 request, or by the time of the ICO's review of its refusal.
35. The Commissioner will now turn to part 2 of the request. She considers that the ICO's position with regard to this part is not quite clear as it refers to this part being both a repeat request and a vexatious request.

36. As has been discussed the complainant had first submitted part 2 of the current request to the ICO on 29 May 2018 and the ICO had informed him that it does not hold this information. Despite having been told that the ICO does not hold this information, the complainant submitted the current identical request for this information, on 14 March 2019.
37. In her published guidance on section 14(2) a public authority may only apply section 14(2) where it has either:
 - previously provided the same requester with the information in response to an earlier FOIA request; or
 - previously confirmed the information is not held in response to an earlier FOIA request from the same requester.
38. If neither of these conditions applies then the public authority must deal with the request in the normal manner.
39. In this case part 2 of the request of 14 March 2019 is identical to part 2 of the request of 29 May 2018. In its response to the 29 May 2018 request the ICO had confirmed it does not hold this information and the complainant did not dispute this ie this matter was not considered in the associated decision FS50777962.
40. The second condition at paragraph 37 has therefore been met; the ICO had previously confirmed that it does not hold the requested information in response to an earlier FOIA request from the complainant.
41. A period of ten months had elapsed between the two requests. However, the complainant has not provided the Commissioner with any arguments to support a position that, although the ICO did not hold this information at the time of his request in May 2018, it could or did hold it at the time of the current request.
42. Given the nature of the information requested in part 2, and the wider circumstances of this case, the Commissioner can see no reason why the ICO would now hold this information. There is therefore a good case for arguing that part 2 of the request is a repeat request under section 14(2) of the FOIA.
43. However, because of the wider context behind this request, and as she has with parts 1 and 7, the Commissioner has decided that part 2 can be categorised as a vexatious request under section 14(1).
44. With regard to part 1 of the request, because of the explanation the ICO gave in its refusal of the request (and in its internal review), which has been detailed in this notice, the Commissioner is satisfied that this part can be categorised as vexatious.

45. With regard to part 7, the ICO had advised the complainant during its handling of a separate request that if he was to request the same or similar information again, that request would be considered in line with its guidance on vexatious requests under section 14. The Commissioner agrees that part 7 of the current request is similar to the separate request and again concerns the same overall matter. The Commissioner is satisfied that part 7 can therefore be categorised as vexatious – the complainant appears to be attempting to open parallel routes to the consideration of, substantially, the same information.
46. With regard to all three parts of the request, in its submission to her the ICO told the Commissioner that the detrimental impact of dealing with these requests (by which the Commissioner understands the ICO to mean the three parts of this one request) - in terms of the time taken to respond to the initial request and the review, and to provide its submission to the Commissioner – is significant. By way of a wider context, it stated that at a time where its service has a 54% increase in requests for information it is not possible to respond to all of the requests (generally) that it considers to be vexatious without a significant impact on other requesters and its compliance rates.
47. The ICO has concluded its submission to the Commissioner by confirming that the complainant has been advised on numerous occasions that any continued requests for information on the above matters, or for information it has already considered for disclosure and withheld, will be considered in line with its guidance on vexatious requests under section 14(1). The ICO says that, in total and at the time of this request, it was processing information relating to 12 items of casework brought by the complainant concerning MHT and/or the ICO's published section 36 guidance.
48. The Commissioner is satisfied that all three parts of the complainant's request are part of a long-running and obsessive campaign associated with the FTT's decision in EA/2015/0120 and the ICO's guidance on section 36 of the FOIA. At the time of the request, EA/2015/0120 had been the subject of a number of requests, complaints to the Commissioner and appeals - to both the FTT the Upper Tribunal. The matter associated with EA/2015/0120 had therefore been fully considered, but the complainant has been unwilling to accept the resulting findings. With regard to the current case, the complainant had already been advised that the ICO either does not hold the requested information or that it engages the section 42(1) exemption.
49. In addition, from paragraph 35 of the Commissioner's decision in FS50777962 the complainant will have been aware that the section 42(1) exemption would almost certainly remain engaged while the matter on which the legal advice in question had been sought is 'live'.

He would also have known that he had related requests, complaints and at least one appeal ongoing at 14 March 2019 – ie that the matter that is his concern - was still 'live'. The section 42 exemption would therefore have remained engaged to certain information he had requested and the ICO would still not hold the remaining information. There would therefore seem to have been little point in submitting the request to the ICO again, on same day as the Commissioner's decision in FS50777962.

50. The Commissioner therefore considers that the request was of little purpose or value to the complainant. And it certainly has no wider public value. In addition to the reasons given above, therefore, even though the burden of complying with the request may not have been substantial, the Commissioner finds that the request did not warrant the ICO diverting any of its resources into providing a response to it, to any extent. The Commissioner is satisfied that the complainant's request is vexatious and the ICO can rely on section 14(1) of the FOIA to refuse to comply with it.

Right of appeal

51. 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

52. 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.
53. 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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