

FOI, practically speaking Part 3 — getting vexed

Paul Gibbons, FOI Man and Information Compliance Manager, SOAS, University of London, examines the clarity given to the law on vexatious requests and asks whether we will now see a ‘vexatious gold rush’

If you have ever watched *Monty Python and the Holy Grail*, you will recall King Arthur’s encounter with the Black Knight. The knight challenges him to combat. They battle. Arthur chops his arm off and, claiming victory, makes to leave. But the knight, in denial of all sense, will not accept defeat. No matter how many limbs Arthur lops off, the knight is insistent. Eventually Arthur walks off, whilst the knight, now literally without a leg to stand on, continues to shout after him.

But when you are providing a public service and legally obliged to respond to enquiries, you cannot just walk off. Or can you?

That is what section 14 of the Freedom of Information Act (‘FOIA’) provides for. FOI Officers rarely deal with medieval knights, but we are familiar with that kind of bloody-minded (if not bloody-bodied) determination. There are people who refuse to take no for an answer. There are others who are more like an attention-seeking child repeatedly prodding its older sibling, or a kitten jumping up and down on a weary old dog. The answers are not necessarily important — it is about provoking a response.

More recently, it is becoming clear that section 14 is FOIA’s answer to gluttony — it can be used to refuse requests where one request threatens to eat the public authority out of house and home.

What does the Act say?

Section 14 is not an exemption as such. What it does is remove the obligation of a public authority to comply with an FOI request where that request is vexatious. ‘Vexatious’ is not defined, so FOI Officers are dependent on the Information Commissioner’s (‘Commissioner’) guidance and the development of case law to help them work out whether or not they can use it in a specific case.

The problem

As readers will know, neither the Commissioner’s decisions, nor the First-Tier Tribunal (‘FTT’) decisions, can set legal precedent: they are, at

best, persuasive. Normally this is not a problem, as the Commissioner and different FTT panels have tended to be persuaded by previous interpretations of (for example) specific exemptions within the Act. So FOI Officers can read the latest decision by a FTT on, say, the exemption covering commercial interests, and it will build on previous decisions on the same subject. FOI Officers, therefore, have a reasonable chance of working out whether their proposed use of an exemption would be likely to stand up to appeal, and thus whether to bother using it at all.

This is not the case with the interpretation of ‘vexatious’. There are lots of published decisions available, but they have reached differing conclusions as to when a request can be considered vexatious. The Commissioner, perhaps because of this, has tended towards a cautious interpretation in his decisions. Which means, of course, that FOI Officers are somewhat reluctant to use section 14.

This is an issue that was examined by the Justice Select Committee in its post-legislative scrutiny of FOIA. During evidence-giving, the Commissioner backed a new provision for ‘frivolous requests’. The Ministry of Justice, probably quite rightly, has decided that there is no need for a new provision. FOI Officers just need to use the existing one more.

The Commissioner’s guidance

The Commissioner’s guidance proposes that public authorities ask five questions to determine if a request is vexatious:

- could the request fairly be seen as obsessive;
- is the request harassing or causing distress to staff;
- would complying with the request impose a significant burden in terms of expense and distraction;
- is the request designed to cause disruption or annoyance; and
- does the request lack any serious

(Continued on page 4)

[\(Continued from page 3\)](#)

purpose or value?

The guidance goes on to say that it will be necessary to say yes to more than one of those questions for a request to be safely categorised as vexatious.

The First-Tier Tribunals

Cases considering this issue reach Tribunals a lot. In the last year alone, there have been over 30 decisions at FTT stage considering whether or not a request is vexatious. At a recent seminar, James Cornwell of 11KBW chambers summarised their differing approaches as falling into three camps.

One approach is to follow the Commissioner's guidance. If two or more of his five questions can be answered in the affirmative, then the request must be vexatious. Some Tribunals have rejected this approach, arguing that, by following the Commissioner's guidance, they are effectively favouring one side's evidence over another (bearing in mind that the Commissioner is always one of the parties in cases brought to the Tribunal).

The second approach is to take a 'holistic' view by looking at the Oxford English Dictionary definition of vexatious. The third approach is to consider how proportionate the request is.

The difficulty is that these differing approaches will inevitably result in varying answers as to what circumstances are likely to make a request vexatious.

Two decisions from FTTs made within the last year gave FOI Officers some hope in navigating the issue.

In *Independent Police Complaints Commission v Information Commissioner* (EA/2011/022), the FTT was particularly critical of the Commissioner's handling of the case, arguing that "an approach which tests the request by simply checking how many of the five 'boxes' are 'ticked' is not appropriate". The FTT was encouraging of public authorities' use of section 14, stating (at paragraph 19) that:

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

This decision suggested that section 14 might apply purely because a request would

be expensive to comply with.

The other decision, in *Salford City Council v Information Commissioner and Tiekey Accounts* (EA/2012/0047), reinforced this view. In that case, the FTT ruled that section 14 applied because of the disproportionate effort that would be involved in redacting the requested material. This is particularly interesting to FOI Officers given the limitations of section 12 and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('fees regulations').

But the issue remained that the Commissioner and other FTTs were not bound by these decisions, and might take an entirely different view.

Clarity was needed.

Justice Wikeley to the rescue

And so it came to pass. For the first time, three cases involving section 14 were heard by the Upper Tribunal. The Upper Tribunal is an Appellate Court and its decisions therefore set precedent. So the Commissioner and future FTTs will have to follow its line (unless and until there is a successful appeal to a higher court, of course). The three cases were heard by Justice Wikeley, who gave his rulings in February 2013.

The lead case is *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), in which Wikeley (at paras 24-39) set out his view of how to identify vexatious requests, but the other decisions are also noteworthy. *Craven v Information Commissioner and DECC* [2012] UKUT 442 (AAC) looks at the relationship between FOI and the Environmental Information Regulations 2004 ('EIRs'), and between section 14 and section 12 (the acceptable limit). *Ainslie v Information Commissioner and Dorset CC* [2012] UKUT 441 shows that where a requester is able to demonstrate a serious purpose behind their request, authorities will struggle to justify their use of section 14.

So how does Wikeley advise us to interpret vexatious? The dictionary definition of "causing, tending or disposed to cause...annoyance, irritation, dissatisfaction or disappointment" will be a starting point. But the "question ultimately is this — is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?". In determining this, he suggests four broad issues or themes:

The burden — Consider the number of requests previously made; the breadth of the request; the pattern of requests (for example, are several made within days of each other?); and the duration (has this been going on for some time, and does this suggest it will continue in the future?).

Motive — It is not possible to be 'purpose-blind' in considering the

application of section 14. It will often be difficult to be sure what someone's motive is. In many cases, where it is known — for example, the requester is a journalist researching a story — it may be a reason *not* to use section 14.

Value or serious purpose — This is closely connected to considerations of motive. It might be that a series of requests starts out as having an obvious purpose (for example, finding out information relating to a legitimate complaint), but over time 'drifts' into vexatiousness as the requester draws in unconnected issues. Public authorities should never consider using section 14 purely because they cannot see a serious purpose or value behind a request; they should do so only if there are other reasons to think a request is vexatious.

Causing harassment and distress to staff — If a request (or series of requests) appears to target an individual obsessively, is aggressive or uses what Wikeley describes as 'intemperate language', it may be evidence that a request is vexatious.

Important caveats

In all his decisions, Wikeley stresses the important role of FOIA in holding public authorities to account. "This approach," he says, "should not be seen as giving licence to public authorities to use section 14 as a means of forestalling genuine attempts to hold them to account."

In *Ainslie*, Wikeley upheld the appeal because it was clear to him that there was a serious purpose behind Mr Ainslie's requests, and that the council had not replied adequately to his previous requests. Mr Ainslie's case is reinforced by a critical report of the council's actions, and the support of his local MP.

Wikeley also highlights the "danger... of not being able to see the vexatious wood for all the individual trees". Trying desperately to match a request to the Commissioner's five (or indeed, Wikeley's four) tests is misconceived. Wikeley advises the Commissioner to place more emphasis on a holistic approach in his guidance.

Burdensome and expensive requests

One obvious question is whether the approach taken by the FTTs in *IPCC* and *Salford* is supported by Wikeley. Can section 14 be used to plug the gaps in section 12 and the fees regulations?

In *Craven*, the Commissioner sought to persuade the judge that this should not be the case. His counsel argued that it would allow public authorities to "circumvent the constraints of section 12" through "overzealous use of section 14". Wikeley was sympathetic, but concluded that Parliament had not intended to define section 14 so narrowly. So, in theory, section 14 could well be used on the basis of the cost of compliance with a request. However, he does caution that where cost is the principal reason for wishing to refuse the request, public authorities should consider using section 12 first.

The EIRs and manifestly unreasonable requests

Craven is particularly interesting as the information requested potentially fell under both FOIA and the EIRs. The equivalent provision to section 14 in the EIRs is Regulation 12(4)(b), which provides an exception where "the request for information is manifestly unreasonable".

Wikeley concluded that "in practice, there is no material difference between the two tests under section 14(1) and Regulation 12(4)(b) EIRs". In other words, Regulation 12(4)(b) can be used for the kind of requests for environmental information that would be rejected as vexatious if they were made under FOI. The reasoning behind this is helpful. If an FOI Officer wants to refuse a request because of the burden that it might impose, it would clearly defeat the object if they had to read through all the material to establish which information was environmental, and which not. Justice Wikeley concludes that "public authorities, the Commissioner and tribunals are perfectly entitled, where appropriate, to address such requests on an 'either/or' basis". So FOI Officers do not need to separate out environmental information

before deciding whether to apply section 14 or Regulation 12(4)(b) EIRs. They should cite both in a Refusal Notice, where some information may be environmental.

Will we now see a vexatious gold rush?

So we finally have some clear case law on using the vexatious and manifestly unreasonable provisions in FOIA and the EIRs. The Commissioner is currently drafting revised guidance. The question is though: will this be enough to encourage more public authorities to use these provisions? And are the Commissioner and Tribunals ready for an influx of more complaints, as more enraged requesters take offence at their requests being called 'vexatious' and 'manifestly unreasonable?' We will have to wait and see.

Postscript: Just as this issue was going to press, the Information Commissioner launched his new guidance on handling vexatious requests. As expected, it has been heavily influenced by the judgments of Justice Wikeley.

The emphasis now is on requests which "cause a disproportionate or unjustified level of disruption, irritation or distress". Out have gone the Commissioner's notorious 5 questions. In their place come 13 "indicators" and a focus on the circumstances of the individual case.

The guidance appears to reflect a genuine shift in emphasis from the Commissioner towards encouraging authorities to use section 14 where justified, tempered by strong hints to use alternative routes where possible. But until we see decisions of both the Commissioner and the Tribunals backing the approaches spelt out in it, many in public authorities will remain nervous of using these provisions.

Paul Gibbons
FOI Man
paul@foiman.com
