

Breaking the camel's back: section 14 and burden

Paul Gibbons, aka FOIMan, examines some recent (2019) decisions of the Commissioner to see what they can tell public authorities about successfully applying section 14(1) to refuse resource intensive enquiries. Paul is Head of the Examination Board for the Practitioner Certificate in Freedom of Information (www.foiqualification.com)

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How much is too much? Hard-pressed public authorities struggling with years of reduced budgets and ever increasing volumes of requests under the Freedom of Information Act ('FOIA') want to know the answer to this question more than ever.

Practitioners will be well aware that there is an option at section 12 FOIA to refuse requests that exceed the appropriate limit (sometimes referred to as 'the cost limit') set out in separate fees regulations. However, there are constraints on the use of the appropriate limit, which mean that it can't always be used — even when a request would involve a lot of work. For example, the cost of activities such as reading through documents or carrying out redaction cannot be taken into account when estimating the cost of handling a request for the purposes of establishing whether that request will exceed the appropriate limit.

However, it has long been established that practitioners have another option where section 12 cannot be used. Several decisions, most notably the Upper Tribunal's ('UT's') decision in *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC), have made clear that a request might be deemed vexatious under section 14(1) FOIA partly or even solely on the basis of the burden that the request imposes on the public authority. This idea has been endorsed by the Information Commissioner's guidance on vexatious requests.

The problem is knowing where to draw the line. When will a request be so 'grossly oppressive' (a term used repeatedly by the regulator) that it becomes 'vexatious'?

The UT decision mentioned above provides a useful framework for establishing this, built on by the Commissioner's guidance since. However, practitioners still have to interpret this case law and guidance and apply it in specific cases. This is made more difficult by the fact that they will only rarely apply section 14(1).

One way to cast more light on the practical exercise of the vexatious provision in these circumstances is to look at how the regulator has interpreted it in specific cases.

In this article, we will look first at what the UT and Commissioner have said about the use of the vexatious provision to tackle burdensome requests. Then we will examine the decisions of the Commissioner in 2019 to see what more they can tell us about when we can successfully apply section 14(1) to refuse resource intensive enquiries.

The Upper Tribunal

Believe it or not, it is seven years since the UT ruled in *Information Commissioner v Devon County Council & Dransfield*. As readers will know, the judge in that case, Judge Wikeley, suggested four broad themes that can assist in identifying whether a request is vexatious:

- the burden imposed by the request;
- the motive of the requester;
- the value or serious purpose of the request; and
- any harassment or distress the request might cause to staff.

A request may be vexatious for a combination of the reasons outlined above, but 'in principle...there is no reason why excessive compliance costs alone should not be a reason for invoking section 14...whether it is a 'one-off' request or one made as part of a course of dealings' (*Craven v Information Commissioner and DECC* [2012] UKUT 442 (ACC) paragraph 31).

The UT in *Dransfield* identified that in considering the burden of a request, 'the number, breadth, pattern and duration of previous requests may be a telling factor' (paragraph 29). The history of the authority's dealings with the applicant can be taken into account (even though it is the request that can be deemed vexatious, not the applicant).

Effectively the UT identifies two types of burdensome requests:

- a request which is vexatious because it is the latest in a pattern of correspondence; and
- a single request which is vexatious because of the volume of information requested and/or its impact on the public authority.

The Court of Appeal reviewed both the UT decisions above and largely confirmed Judge Wikeley's approach (*Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454).

The Commissioner's guidance

The Commissioner's guidance seeks to define the term 'vexatious' in line with these decisions, and boils it down to a key question for public authorities: 'whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.' It accepts that this includes situations where collating information would impose a significant burden.

The Commissioner's main concern is that section 12 should remain the primary mechanism for refusing costly requests. This is resolved by setting a higher bar for the use of section 14(1), ensuring that it 'is therefore in a public authority's own interests to apply section 12 rather than section 14, in any case where a request would exceed the cost limit.'

Where an authority argues that a request is vexatious solely because of the burden that it imposes, the Commissioner expects to see evidence that:

- the request is for a substantial volume of information;
- there are real concerns that some of the material should be subject to exemptions; and
- the exempt material cannot be easily isolated from the rest of the information.

Unless a request is 'patently vexatious' (e.g. it contains threats or racist language) it will usually be necessary to go on and consider whether

the purpose or value of a request outweighs the impact it will have on the authority.

Recent decisions on burden

Let us now examine how the Commissioner has applied this approach in its decisions over the last year. There are 73 decisions relating to the use of section 14 listed on the Information Commissioner's Office ('ICO') decisions database for 2019. In this article, we are interested in those cases where the burden imposed by the request contributed to the determination of the case. By reading the decision notices, it is possible to eliminate the decisions that do not discuss burden to any great extent.

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This results in 43 relevant decisions. The good news for practitioners is that 70% of these (30) supported the public authority's refusal. Before even delving into the detail then, we can see some evidence that the Commissioner is supportive of the use of section 14 for dealing with the most disruptive FOI

requests.

A 'torrent of requests'?

Judge Wikeley clarified that it is appropriate to take the history of an authority's dealings with an applicant into account. Sometimes the reason a request will be vexatious is because it is the latest in a long string of correspondence: 'A torrent of individually benign requests may well cause disruption, so one further such request may also be vexatious in the FOIA sense' (*Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC)).

So what constitutes 'a torrent' of requests? Some situations are more clear cut than others. In one case, the Executive Office in Northern Ireland had at some stages been

receiving up to 90 pieces of correspondence a month from one person (FS50756692). In another, the University of Bath was entitled to refuse a request from an applicant that had submitted 42 requests in one year (FS50840106).

Typically in these cases, the volume of correspondence is part of a wider pattern of behaviour which helps make the case for the use of section 14(1). The General Medical Council ('GMC') successfully argued that a request was vexatious by pointing to 23 previous requests (containing 134 questions) made by the applicant over the course of ten years. This illustrates that, as the UT suggested, the duration of the period over which correspondence takes place can be a significant factor. A large proportion of the requests to the GMC were focussed on the applicant's grievance with a particular institution dating to a decade earlier. As the Commissioner observes: 'The complainant's focus seems to have shifted from acquiring information to keeping his personal grievance alive' (FS50776105 paragraph 32). The number of requests and the duration of the campaign demonstrate the impact of the request as part of that wider pattern of correspondence, but equally significant is the diminished value of the request.

Sometimes an applicant submits a large number of requests in a short period. Thanet District Council complained that an individual had submitted ten requests in a month, noting that this was in the context of a large volume of other correspondence. The Commissioner noted the 'considerable and ongoing burden' with a 'cumulative impact and effect' (FS50761287 paragraph 46). The regulator is not immune: decision FS50821377 upheld the ICO's own refusal of a request following the receipt of seven requests in short order. It was noted that the applicant had submitted 15 previous requests in the last two years, and that whilst records were not kept for earlier years, the ICO's staff recalled that there had been more before that.

A series of FOI requests can have particular impact on smaller authori-

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ties such as parish councils or GP practices, so it is not surprising to see that a significant proportion of the section 14(1) decisions relate to these. Garstang Medical Practice had received 26 emails from an applicant with a grievance over the course of two years with the effect of causing harassment to its staff (FS50814768). Horncliffe Parish Council had been subject to repeated questioning by a former councillor, including 30 items of correspondence between April 2018 and January 2019. The Commissioner upheld the use of section 14(1) to refuse the most recent request, even though it had identified a serious purpose underlying the enquiries. It was noted that given the applicant's background, they should have been aware of the likely impact of their correspondence on the council's resources, notably the parish clerk (FS50827209).

Whilst the Commissioner clearly has some sympathy for the position in which parish councils find themselves, she will still need to be convinced of the case for refusing a request as vexatious. Llanelidan Community Council argued that one of their former councillors was engaged in a 'vendetta' against the council, but failed to provide the Commissioner with sufficient evidence that this was the case (FS50798142). Authorities who fail to respond to the regulator's enquiries should not be surprised if a decision does not go their way.

A couple of cases involving government departments give us a better idea as to where the boundaries are likely to lie when arguing that a series of requests constitute a burden. The Ministry of Justice refused to answer a request, arguing that the applicant had previously submitted five requests containing 35 questions as well as (they claimed but could not produce) a significant volume of 'business as usual' enquiries (FS50837123). Notably, he was an employee of the department who had been adversely affected by pension scheme changes, and was now seeking to cast light on the way that the changes had been communicat-

ed. 400 other employees were affected by the changes and the applicant was providing them with assistance in challenging the department. Much of his correspondence was following up on previous responses, and the Commissioner did 'not consider it unreasonable for the complainant to have further questions relating to information he has not previously been party to' (paragraph 52). Whilst this was a 'finely balanced case', the Commissioner found in favour of the applicant. In another case, the Department for Health and Social Care ('DHSC') was told by the Commissioner that ten requests in a year is not 'particularly voluminous' (FS50798366).

The particular circumstances will always need to be taken into account, but these decisions suggest that where previous correspondence is being used to make the argument that a request is vexatious, lower volumes (say, less than ten) are likely to attract scepticism. This is particularly the case if the applicant is able to point to a serious purpose underlying their request.

Breadth of a single request

Even a single request can impose a disproportionate burden on a public authority. A request to the Financial Conduct Authority ('FCA') would have involved a trawl through over 6000 files. It did not help the applicant's case that they were seeking to reopen matters that had already been ruled upon (FS50827217). Three quarters of a million pounds was a lot for the Cabinet Office to spend on reviewing the security implications of releasing the files on the 'Spycatcher' dispute of the 1980s (FS50858261). The Metropolitan Police would have had to review 4.5 million lines of data (FS50854993), or NHS Improvement 2.8 million lines of data (FS50825104). The Ministry of Defence had already spent 120 hours reviewing correspondence on the misfire of a Trident missile (FS50836693).

Practitioners need to be careful not to overstate the amount of work that would be required, bearing in mind

that the Commissioner will ask for evidence and perhaps a sample of the material if it gets involved. Kendrick School refused a request for consultation responses, claiming that the process of reading through the 106 responses to redact personal data would take 50 hours. Having reviewed a sample, the Commissioner concluded that five hours was more realistic (FS50835713). Similarly the Ministry of Housing, Communities and Local Government (MHCLG)'s estimate of 292 hours (and even their reduced estimate of 55 hours) to review a ministerial diary was dismissed by the Commissioner (FS50828379).

In decision FS50846693, the Office of Gas and Electricity Markets, better known as Ofgem, had been asked for emails received by their Chief Executive and a Director during the last three days of February 2019. The Commissioner's comment on Ofgem's estimate of the time that it would take to review the emails is illuminating: '35 hours and 24 minutes of work is likely to be, at most, at the lower end of the scale of what may be considered grossly oppressive' (paragraph 36). Again, context will always affect the outcome in specific cases, but this decision gives us a rough idea where the ICO drew the line in 2019.

Impact of a request

In some of the decisions, the emphasis is less on the number of pages or emails that an authority might have to review, and more about how dealing with the request will impact other activities. The Department for Education ('DfE') received a request for minutes and other documentation relating to an academy trust which was under investigation. The Commissioner was persuaded that it would be necessary for civil servants to review significant volumes of material to identify anything which, if disclosed, would prejudice the investigation. The impact of this work would be to delay the investigation and the eventual report (FS50830860).

The Commissioner was swayed in this case by the fact that the department had committed to the publication of findings of the investigation and the fulfilment of the request would have acted to delay this transparency.

Two separate requests to government departments for their information asset registers ('IARs') illustrate that willingness to be transparent can make all the difference. On the one hand, a request to DfE for their register constituting 1300 lines of data or 32,000 cells of a spreadsheet was not deemed to be vexatious (FS50775813). On the other hand, the Foreign and Commonwealth Office ('FCO')'s refusal of the same request under section 14(1) was upheld by the Commissioner (FS50786762), even though its IAR consisted of only 300 lines at the time of the request. The difference was that the FCO's register was something of a work in progress at the time of the request, and between then and the time of the decision, a finalised and publication friendly version had been published on the FCO's website. The

FCO successfully argued that the work involved in redacting the out-of-date version held at the time of the request would have compromised their efforts to update the IAR and prepare the updated version for publication. The intention to publish the finished register slightly lessened the value of the request, tipping the scales in favour of the original refusal.

Relationship with section 12

A key question is whether the appropriate limits applied for the purposes of section 12 of FOIA provide any guide to the level of burden that should be tolerated under section 14(1). There are some clues in the ICO's

decisions.

In the MHCLG diary decision described above (FS50828379), the Commissioner commented that 'whilst the appropriate limit under section 12 is a point of reference, the Commissioner notes that this limit does not apply to section 14(1) and she considers that the phrase 'grossly oppressive' should not necessarily be taken as equivalent to the section 12 cost limit. Particularly where there is significant public interest in complying with the request, the bar may be much higher (paragraph 28).'

An argument from DfE (FS50775813) that a request was vexatious because it would take 25 hours to carry out review and redaction was rejected by the ICO. In the Commissioner's view, the fact that the estimate was so close to the appropriate limit for government departments (£600, or 24 hours of staff time), meant that 25 hours could not be described as an oppressive burden.

As indicated above, the Commissioner's guidance is clear that the ICO is keen to

ensure that any use of section 14(1) does not undermine the restrictions placed on the use of section 12. This is achieved by discouraging public authorities from using section 14(1) where section 12 can be used.

However, in the Ofgem decision referred to above (FS50846693), the Commissioner appears to go further. Ofgem had come up with an estimate which included the time it would take to retrieve the relevant emails from each individual's inbox for the three days requested. The Commissioner was sceptical of the retrieval time cited and added 'in any case, this activity would be covered by section 12 and should not be included in any estimates when refusing a request

under section 14(1)' (paragraph 34).

What the Commissioner seems to be saying here is that if an authority is making the case for a request to be refused under section 14(1) due to the burden that it imposes, it is not permitted to include the activities that can be included in an estimate for section 12: namely, establishing whether information is held, searching for it, retrieving it or extracting it. According to this decision, this is even the case where it would not be possible to refuse a request using section 12, as the estimate is less than the appropriate limit. This appears to contradict Judge Wikeley's ruling in the *Craven* case ('there is no reason why excessive compliance costs alone should not be a reason for invoking section 14') and indeed a First-Tier Tribunal ('FTT') case quoted in the Commissioner's own guidance:

'A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on section 12' *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222, paragraph 15).

In the Ofgem case, the Commissioner's position on the retrieval estimate probably hasn't made any difference to the outcome, but it will be interesting to see whether this tighter interpretation of the relationship between section 12 and section 14(1) is reflected in future decisions.

Conclusion

Whatever the value of FOIA as a democratic tool, its untrammelled use could undermine the ability of authorities to deliver public services. It is reassuring that the Commissioner has continued through 2019 to support public authorities' use of section 14(1) as a backstop to prevent the disruption of services where necessary. The decisions we have looked at demonstrate the following about using section 14(1) for burdensome

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requests:

- if arguing that a request is vexatious due, at least in part, to it being preceded by other correspondence, the larger the volume of correspondence the better;
- if the issue is with the amount of information requested, ensure that estimates are realistic;
- the impact on services should be articulated — explain the resource available and how it will be impacted by having to answer the request (and in particular how this will impact non the wider public);
- the time limits implied by the relevant appropriate limits (24 hours for central government and 18 for most other public bodies) are a guide — but only to the extent that an estimate of time for section 14(1) purposes will usually need to be well above these levels, particularly for larger public authorities;
- an argument that a request is vexatious will be strengthened if an authority can point to other factors such as harassment of staff; and
- conversely, if the request has a serious purpose or there is a public interest in disclosure, it will be much harder to argue that a request is vexatious, particularly where the impact is of a relatively limited nature.

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