Current lines to take

LTTs are in numerical order.

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FOI/EIR EIR **Section/Regulation** Reg 2 (1) **Issue** Any information on

Line to take:

In order to be consistent with the purpose stated in the first recital of Council Directive 2003/4/EC - from which the Regulations are derived - "any information...on" in Regulation 2 of the EIR should be interpreted widely.

Further Information:

Environmental information is defined in regulation 2 as :

"any information in written, visual, aural, electronic or any other material form **on** –

- the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- reports on the implementation of environmental legislation;
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

LTT80 on defining environmental information makes it clear that, for 2(1)(b) to (f), it is not necessary for the information itself to have a direct effect on the elements of the environment, , or to record or discuss such an effect . What is relevant instead is that the information should be **on** something falling within these sections.

In order to establish this connection consideration must be given to the meaning of **any information ...on** in the context of regulation 2.

This point was considered by the Tribunal in *Ofcom v the ICO and T-Mobile* where the applicant had requested information about the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information "*about either the state of the elements of the environment....or the factors.....that may affect those elements.*"

The Tribunal disagreed and commented (at paragraph 31) *that " The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information...on....radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and affect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime".* At further appeal (to the High Court and the Court of Appeal) Ofcom did not challenge the Tribunal 's finding that the names were environmental information.

The ICO agrees with the Tribunal's comments and would not accept the approach of separating out (as non environmental information) details such as names, which form an integral part of information falling under the

EIR.

The Commissioner's more general approach will be to interpret "any information... on..." fairly widely. The relevant Oxford English Dictionary definition of "on" is *"In reference to, with respect to, as to, concerning, about"*. The ICO view, in line with the purpose expressed in the first recital of the Directive, is that "any information ...on..." will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information (subject to the linking process set out in LTT80).

In addition, information may still be "on" a factor or measure which affects or is likely to affect the elements of the environment, even where the effect has not occurred in the specific case. For example, information relating to emissions testing where the result is that there are no emissions, or experiments which demonstrate that certain factors are unlikely to have an environmental impact, may still be environmental information. This is because information about the absence of a factor affecting the environment is still information "on" that factor (PARF in FS50301488). See also LTT83 (future likely effects) in relation to 2(1)(c).

The following examples from recent ICO case work should assist in the application of this judgement.*

Examples :

- Payments made under the Common Agricultural Policy – see Policy Advice Request Form for advice given.
- Information on tolling/road congestion charging and a proposal to build a new bridge – see Case Review Panel notes for details of discussion and decision. This decision was confirmed by the Tribunal in Mersey Tunnel Users Association (MTUA) v IC and Halton Borough Council (EA/2009/0001) – see below.

Comment on Kirkaldie

In *Kirkaldie v the ICO and Thanet District Council* the IT found that the EIR applied and said that "The Legal Advice.....related to the enforceability of the s106 Agreement, land usage and other planning matters. The Tribunal finds that for the purposes of Reg 2(c) EIR this agreement was an "environmental agreement under the Town and Country Planning Act 1990..."

This ICO view is that the argument articulated by the IT up to this point was sufficient to bring the information within the definition of environmental information. The information is "on" an environmental agreement, and the environmental agreement is a measure affecting or likely to affect the elements in 2(1)(a) and (b).

The Tribunal continued however that " Entering into and extending such an agreement is the sort of measure envisaged by the rule which is "likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements". "

The ICO view is that it is not necessary to say that "Entering into and extending such an agreement" is also a measure. Once it is established that the s106 Agreement is a "measure affecting or likely to affect the elements and factors referred to in (a) and (b)" then the legal advice is environmental information because it is "information on" this measure.

Planning decisions

In a similar way, when thinking about planning decisions it is not necessary to say that the decision (to approve or refuse planning permission) is itself a measure affecting or likely to affect the factors and elements in 2(1)(a) and (b). It will sufficient to establish whether the particular planning regulation under which the decision has been made is a measure; affecting or likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements . If it is then the decision, and the related planning application become environmental information because they are information on the implementation of the particular planning regulation in question. This mirrors the approach taken in the example of the Common Agricultural Policy payments given above.

This shouldn't be taken to mean that all information contained within planning files will inevitably be

environmental information. It will be necessary to identify what measure the information is on (i.e. the particular planning regulation being applied) and ensure that this is a measure; affecting or likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements .

An alternative approach would be to consider if the planning application is a measure (a plan) likely to affect the elements of the environment.

MTUA v IC and Halton Borough Council (EA/2009/0001)

This case concerned information relating to the proposed tolling of two bridges (one existing and one new) as part of the Mersey Gateway project. The public authority, applying the "remoteness" test used by DEFRA, argued that information on tolling was not sufficiently closely connected to the "measure" (in this case the Mersey Gateway project) to be environmental information. However, the Tribunal agreed with the Commissioner's reasoning that "tolling is an integral part to the Project and its viability" (para. 69). It was not therefore necessary to demonstrate – as had also been argued – that tolling itself was a measure affecting the environment.

*It should be noted that the ICO line on this subject has developed and changed over time and that there is some inconsistency in the Decision Notices issued to date. The examples provided have been chosen as they reflect the ICO's current position.

PREVIOUS / NEXT

Source	**Details**
	Ofcom/ Health Protection Scotland
	Kirkaldie / Thanet District Council
IT, policy team, European Parliament	Council Directive 2003/4/EC
	Mersey Tunnel Users Association / Halton Borough Council

Related Lines to Take

LTT80, LTT 83, LTT84

Related Documents

EA/2006/0078 (Ofcom), EA2006/001 (Kirkaldie), EA/2009/0001 (MTUA) 2003/4/EC, PARF on case FS50301488

Contact		LA / KP	
Date	18/10/2010	**Policy Reference**	**LTT82**

s1(3),

FOI/EIR FOI **Section/Regulation** s8 **Issue** "Duty" to read a request objectively

s16

Line to take:

Whilst a public authority has a duty to read a request objectively, this does not mean that it is not permitted to seek clarification under s1(3) FOIA, or Regulation 9 EIR, in circumstances where it thinks that an applicant may in fact be looking for something other than what has been asked for.

If when making a request an applicant draws the public authority's attention to their contemporaneous dealings with the pa, and it is clear that the request should be considered in this context, then if this renders the request ambiguous or unclear the duty to provide advice and assistance will be triggered.

Further Information:

Berend v the ICO & London Borough of Richmond upon Thames:

In the case of *Berend v the ICO & London Borough of Richmond upon Thames (LBRT)* the Tribunal found that, "the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request" and "there was no requirement for LBRT to seek a second meaning or ask for clarification"

In support of its position, the Tribunal referred to the definition of a request provided at s8(1)(c), and found that contained, "no caveat or imputation of subjectivity."

Section 8(1)(c) provides that:

"In this Act any reference to a request for information is a reference to a request which –

(c) describes the information requested."

Whilst the ICO accepts that a public authority is only ***required*** to read a request objectively, our view is that this does not mean that it is ***not permitted*** to seek clarification under s1(3) in circumstances where, because of a public authority's prior knowledge of an applicant's interests, it thinks that they may in fact be looking for something other than, or in addition to, what has been asked for.

We are of the view that a public authority, if it is aware that an applicant may require information other than that which is requested, may claim under s 1(3) that it reasonably requires further information to identify the information requested.

If a public authority claims that it needs further information to identify the information requested under s1(3) then the duty to provide advice and assistance under s16 is triggered. The public authority ***may*** seek clarification where it has prior knowledge and reasonably requires further information to determine what is actually being requested, even if the request as worded is objectively clear.

However if a public authority in this situation reads the request objectively and responds to the request as phrased without exercising its right to require further information under s1(3) then no duties under s16 arise. It is **not** the case that a public authority ***must*** look for other possible readings of a seemingly clear request or check previous correspondence.

Section 8

The ICO does not agree that reference to s8 is relevant. Section 1(1) provides the right to have information communicated etc. to any person making a "request for information." Section 8 defines a "request for information". Section 1(1), however, has effect subject to the provisions of the rest of the section, subsection (3) of which removes the obligation to comply where a public authority reasonable requires further information in order to identify and locate the information requested.

This means that, contrary to the Tribunal's conclusions, a request for information may "describe the

information requested" yet still be one for which a public authority requires further information to identify it.

Boddy v the ICO and North Norfolk District Council :

A similar situation arose in relation to advice and assistance under the EIR in the Tribunal case of *Boddy v the iCO and North Norfolk District Council.*

Here the IT stated that the "correct approach to the law is that a request for information ought to be "taken at face value", i.e. it should be read objectively" (para 25), and " "we do not see that there can be any legal obligation on the Council to "second guess" what was a clear request" (para 26). This is in line with the IT's comments above in relation to s16 FOIA in the *Berend* case.

However the IT in *Boddy* added a qualification to this approach saying that "if an applicant had been in discussions or correspondence with the public authority about a particular matter.....then we would expect the public authority to take into account the contemporaneous dealings with the applicant to clarify the information that was being requested." (para 25).

The ICO line remains as detailed above, that if a request is clear but a public authority suspects, from its prior knowledge of the applicant that they may require different or additional information to that specified in the request, then the pa is **permitted** but **not required** to seek clarification of the request. We would not expect the public authority to check for previous correspondence when an otherwise clear request is received.

However, if when making a request the applicant draws the public authority's attention to the contemporaneous dealings and makes it clear that the request should be considered in this context, then if this renders the request ambiguous or unclear the duty to provide advice and assistance will be triggered. This will apply equally to FOIA and EIR.

N.b. This LTT should be read in conjunction with LTT 89- More than one objective interpretation of a request, where the particular circumstances of the *Berend* case are considered in more detail.

PREVIOUS / NEXT

Source	**Details**
	Berend / LBRT (12 July 2007)
IT, agreed by GS	Boddy / North Norfolk District Council (23 June 2008)

Related Lines to Take

LTT87, LTT89, LTT91,

Related Documents

EA/2006/0049 & 50 (Berend), EA/2007/0074 (Boddy)

Contact		LA	
Date	28/07/08	**Policy Reference**	**LTT90**

FOI/EIR	FOI / EIR	Section/Regulation	s2 / Reg 12(1)	Issue	Timing at which exemptions and public interest test are to be applied

Line to take:

Consideration of the exemptions and public interest test is to be based on the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17 FOIA.

Although, matters which were relevant at the time of the request but which only later came to light may also be taken into account.

However, if circumstances change post-request to the extent that disclosure would now be undesirable, then the Commissioner can recognise this by indicating that no steps are required in order for the public authority to comply with the Act.

Further Information:

The Tribunal has considered the time at which to apply the exemptions and the public interest test in a number of cases and has come to a number of conclusions. The Commissioner has previously followed decisions of the Tribunal which stated that the ICO should make its decision by reference to the time the request was internally reviewed.

However the Commissioner will now follow the clear indication provided by the Tribunal in the case of the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Friends of the Earth, in which it was said that "*the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA*" (para 110).

The Tribunal went onto say that it was not Parliament's intention to allow events that took place after the request to be considered as part of the public interest test despite arguments that this could lead to artificial conclusions, particularly where a new and later request could be made with a different outcome.

The Tribunal in the case of the Department for Communities and Local Government and the Information Commissioner also supported this approach by referring to the wording of s.50. At paragraph 14, they said – *"the reference to whether the request 'has been dealt with' seems to us plain in that it refers back to the time of the request and decision to disclose (or not to disclose). This also makes sense as there needs to be a degree of certainty for any public authority and for any subsequent appeal…".*

Therefore, the Commissioner will consider the circumstances at the time of request or at least by the time for compliance with sections 10 & 17 although, as the Tribunal in DBERR pointed out, if it is the case that matters which were relevant at the time of the request only came to light after the date of the request, these too can be considered.

However, if the Commissioner decides that the requested information should be disclosed on the basis of the circumstances at the time of the request but that later events would now make it undesirable to disclose, then the Commissioner can indicate in the 'steps required' section of the decision notice that no steps are in fact required in relation to this aspect of the investigation in order for the public authority to have complied with the Act. See LTT183.

The Commissioner is aware of the different view expressed in the more recent case of Campaign Against the Arms Trade (CAAT) v Information Commissioner and Ministry of Defence (EA/2007/0040), where the Tribunal recommends that the authority should consider its response at the time of the conclusion of the internal review. However, the Commissioner maintains the line above and accordingly, the status of this (and other similar) Tribunal decisions is red, and **should not** be followed.

Source	Details
	DBERR / Friends of the Earth (29 April 2008)

	Office of Government Commerce / House of Commons (11 April 2008) (High Court decision)
IT	Dept for Communities & Local Government (22 July 2008)
	Campaign Against Arms Trade / MoD (26 August 2006)

Related Lines to Take

LTT183

Related Documents

EA/2007/0072 (DBERR), EA/2007/0069 (DCLG), EA/2007/0040 (CAAT)

Contact		HD / GF	
Date	19/11/2010	**Policy Reference**	**LTT92**

FOI/EIR	EIR	Section/Regulation	Reg 12(4)(d)	Issue	Drafts of documents are unfinished documents, even where final versions are complete

Line to take:

Drafts are unfinished documents; they remain unfinished even upon completion of a final version. Therefore, requests for drafts will engage the exception regulation 12(4)(d) (although the public interest test required by regulation 12(1)(b) still needs to be considered).

In considering the public interest test, the Commissioner's position is that once a final version of a document has been completed, it is likely that the public interest in maintaining the exception will diminish (although not disappear entirely).

Further Information:

Regulation 12(4) provides:

> "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
>
> > (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data".

The Commissioner's position that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version, is guided by the Tribunal's decision in DfT v ICO (EA/2008/0052) (also known as '*the Eddington decision*'). The Tribunal disagreed with the position originally taken by the Commissioner in the related decision notice (FER0156849). In this case, the applicant had requested a draft of a report prepared by an independent advisor to government, Sir Rod Eddington. At the time the request was made, the final version of the report had been published.

The decision notice had originally stated that:

> *"...the draft report cannot be regarded as 'material in the course of completion' as the final version of the study had already been published prior to the request being made, and as such the material contained in the draft report would now be considered to be completed. Furthermore, the Commissioner does not believe that the request relates to incomplete data for the same reasons."*

However, the Tribunal disagreed, accepting the appellant's arguments (paragraphs 67-79) that '*the Draft Report clearly constituted an unfinished document at the time of the request and still remains so following the publication of a final version*' (paragraph 67).

The Tribunal disputed the Commissioner's original position, stating that if no draft of any document could ever fall within the exception at regulation 12(4)(d), '*this would be an unfortunate conclusion as it would mean that such drafts could not be subjected to the public interest balancing exercise*' (paragraph 80). The Tribunal stated that '*The fact that the Draft Report itself related to another document does not change that position. Its status does not change simply because a final version exists*' (paragraph 81) and concluded that '*the Draft Report is, by its very name and giving the words their logical meaning, an unfinished document*'.

The Tribunal also accepted the appellant's argument that the Commissioner erred in his reliance on regulation 14(4) in his decision notice as providing further reason for why the Draft Report could not fall within the exception at 12(4)(d). Caseworkers should note that regulation 14(4) is only relevant where another public authority is preparing the information (paragraph 73). The Commissioner will follow the decision of the Tribunal.

Public interest test

Once ascertained that a regulation 12(4)(d) is engaged, caseworkers will need to give consideration to the public interest test.

LTT129 considers safe space arguments in relation to policy formulation. The Commissioner considers there

is similarly a public interest in protecting safe space (thinking space) and drafting space inherent in regulation 12(4)(d).. Applying the same principles as are accepted in relation to policy development, there is a public interest in enabling officials to get on with the job in hand without having to defend a preliminary position, or comment externally on what are only drafts and may not reflect fully formulated or agreed positions.

The Commissioner considers that once a final version of a document is completed, the need for the protection of safe space in which to think and draft no longer exists.

Once the final version of a document is published, the Commissioner's view is that generally, any prejudicial effect related to the sensitivity of the information included in a draft will be likely to reduce. This will, however, differ from case to case - a judgment will have to be made based on the content of the information and the extent to which the draft contains information or reveals position not covered in the final published version. How recent the publication of the final version of the document is and how recently the draft was produced will be others factors that will need to be taken into consideration – the more time that has passed, the more the public interest in maintaining the exception is likely to have diminished.

In considering the public interest test in the DfT case, the Tribunal gave little credence to the appellant's point that outside experts would be deterred from making their services available to the government if draft documents were to be disclosed under FOIA, pointing out that the type of person who would carry out such policy development would have the ability to carry out the task with the pre-requisite thoroughness and robustness (paragraph 115) and would not be deterred by a fear of disclosure (paragraph 125). The Commissioner agrees with this position, but it should be noted that these points are associated with 'chilling effect' arguments, rather than the concept of 'safe space', which the Tribunal had considered them under.

There is also a public interest argument inherent in 12(4)(d) in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete, so as to avoid public resources being expended in explaining or justifying draft documents or interim positions. Balanced against this of course, would be the strong counter argument that there is a public interest in exposing draft positions so that the public is given a fully informed picture of the policy making process, promoting transparency and accountability in relation to the activities of public authorities. Generally, unless a public authority can provide specific reasons why a particular un-adopted position shouldn't be exposed after publication of the final draft, we would give more weight to the counter argument.

PREVIOUS / NEXT

Source	**Details**
Tribunal decision	DfT / ICO (5 May 2009)
Related Lines to Take	
LTT129	
Related Documents	
EA/2008/0052 (DfT)	
Contact	LB / GF
Date	28/09/2010
Policy Reference	**LTT110**

FOI/EIR	FOI EIR	Section/Regulation	s.1 Reg 5	Issue	Information held (on balance of probabilities) test

Line to take:

The normal standard of proof to apply in determining whether a public authority does hold any requested information is the civil standard of the balance of probabilities.

In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.

Further Information:

In the case of Linda Bromley & others and the Environment Agency (EA), the applicants framed their request widely by asking for any files in connection with a flood bank near their homes. They said the files should go back to at least 1963. The EA disclosed some information but the applicants felt the search had been poorly and incompetently conducted and that further relevant documents were in existence but had not been discovered. The Commissioner concluded that the information was not held. The Tribunal said:

"...we must consider whether the IC's decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..." (para 10) because *"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records..."* (para 13).

The Tribunal also indicated that in considering where the balance lies - *"...we may only consider, in light of the evidence placed before us, whether the scope, quality, thoroughness and results of those searches entitles us to conclude that the Environment Agency does not hold further information falling within the scope of the original request...."* (para 12).

The Tribunal in the later case of Fowler and Brighton & Hove City Council suggested that such evidence may include *"...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place...."* (para 24).

Therefore the Commissioner will look at both:

- the scope, quality, thoroughness and results of the searches and
- other explanations offered as to why the information is not held.

(i) The search

The Tribunal in Bromley said it would "resist" the applicant's arguments that issues such as the seniority of the individuals who conducted the searches or the adequacy of the FOIA training should be taken into account. Instead, they indicated that the application of the balance of probabilities test requires the consideration of a number of factors including:

- *"...the quality of the public authority's initial analysis of the request,*
- *the scope of the search that it decided to make on the basis of that analysis and*
- *the rigour and efficiency with which the search was then conducted..."* (para 13).

This approach led the Tribunal to conclude that all of the documents or categories of documents the complainants requested were not held, for example:

- the complainants requested any documents relating to planning decisions from the 1960s. The EA searched the paper files and also microfiche records provided by its predecessors (Severn Trent River

Board, Severn Trent Water Authority and the National Rivers Authority). Based on the public authority's evidence, the Tribunal said that they felt that the EA had carried out *"...an appropriately rigorous and focused search..."* (para 15) and that the importance of these documents (to the complainants at least) was not enough to persuade the Tribunal that the documents were held.

- the complainants requested any documents from the Severn Trent Regional Flood Defence Committee in relation to their flood bank. The EA indicated that the Committee only considered high level matters, not individual flood defences, but nonetheless carried out a search of the papers for the committee meetings for the relevant period but found no relevant material. At paragraph 30, the Tribunal said that the public authority had fulfilled its obligations under the EIRs.

In the case of Christopher Ames and the Cabinet Office the applicant wanted to know which official(s) had amended the executive summary of the dossier on "Iraq's Weapons of Mass Destruction" between 10 and 16 September. The Tribunal heard evidence from the Cabinet Office that they had searched both hard and soft copy records as follows:-

"...the hard copy information searched included all printed emails, written drafting comments and meeting notes dated between 11 and 16 September inclusive. The hard copy of the draft dossier dated 16 September was also read....

Electronic information searched also included saved emails, drafting comments between 11 September and 16 September 2002 inclusive and the soft copy of the draft dossier dated 16 September. Electronic searches included searches of the metadata held upon the draft of the dossier produced on 16 September i.e. the draft produced immediately after the time frame of Mr Ames' request. Soft copy searches were assisted by the staff of LogicaCMG, who are contracted to support the relevant IT system...." (para 12).

The Tribunal said the search of the metadata was the most obvious and important search. Searching the written drafting comments, emails and meeting notes was also appropriate. This search strategy allowed the Tribunal to firmly conclude that on the balance of probabilities, the Cabinet Office did not hold any information within the scope of the request and that *"...the Tribunal regards the scope of this search to be reasonable on the face of it and is not aware of any other material that ought to have been searched...."* (para 15).

The Tribunal also said at paragraph 10 that in "*...considering the probabilities and in particular the quality of any search carried out it may on occasion be relevant to bear in mind the Tribunal's comments in relation to deleted data in the case of Harper v Information Commissioner (EA/2005/0001 15.11.05) and the contents of the Code of Practice issued by the Lord Chancellor under s.46 of the Act...*".

See LTT2 for the further details of the ICO's interpretation of the Harper decision although, in short, the ICO's view is that information which has been properly and intentionally deleted from a recycle can but not yet overwritten is not held.

The Commissioner acknowledges that his decision as to what would represent an appropriate search or search strategy will have to depend on the circumstances of each case but he would expect to see evidence of either a reasonable and logical search strategy or a thorough search of both paper and electronic records although if the public authority is arguing that it would exceed the appropriate limit to confirm whether or not it holds the requested information, see LTT31.

The scope and thoroughness of the search required may be determined in part by any other evidence that information is likely to be held. For example, the Tribunal in the case of Mersey Tunnel Users Association (MTUA) v IC and Halton Borough Council (EA/2009/0001) found that "[i]t is clear from the paucity of the documents disclosed as well as their content that the existence of further information was more likely than not" (para 85). Therefore it was "unreasonable" for the Commissioner to have accepted the authority's assurances that thorough searches had been conducted. The Tribunal in this case cited a previous Tribunal decision (Babar v IC and British Council (EA/2006/0092)) which found that the likelihood of information being held will be relevant to the level of search required.

An unexpectedly small quantity of information should also flag up the possibility that the authority is applying too narrow an interpretation of the request, as was the situation in the MTUA case.

(Also see LTT76 which states that information which has been identified, selected, downloaded and saved or printed by a public authority from a third party's online database will be held by that public authority. In most

cases public authorities will not hold any of the remainder of the information held in such a database).

(ii) Other explanations as to why the information is not held

a) No business need to hold the information / documents were never created

The Tribunal in Bromley said that as the EA did not own or take responsibility for a number of features to which some of the requested information related, the Tribunal accepted that the public authority would not hold information on those features. The Tribunal felt supported in making this finding given that the applicants could not provide any evidence to the contrary (paras 16, 20 and 27).

The Tribunal in Bromley also said that their role was not to comment on the EA's administration so that whilst the applicants may have thought that notes should have been made on site visits (para 18), that telephone calls should have been noted and recorded (para 23) and that documents justifying or explaining why previously held views had been superseded (para 25), the Tribunal said its role was *"...not to assess the quality of the EA's administration but to determine the straightforward issue..."* of whether the information was held (para 18). Also at paragraph 28 they said *"...we do not feel qualified, in any event, to tell a complex national organisation discharging statutory responsibilities how it should operate record-keeping systems in support of its functions..."* In response to this point, the Commissioner would say that whilst it may not be the Tribunal's role to comment on a public authority's system of record keeping, it is does fall within the Commissioner's remit via the s.46 records management code.

The Tribunal in Ames said "....w*hile we are not very impressed by the quality of the record keeping revealed by the search....we do not think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one in spite of the evidence put forward by the Cabinet Office..."* (para 15).

The Commissioner's approach is that a poor records management system does not necessarily mean that the information must inevitably be held. Instead, the Commissioner is looking for a rigorous and well focused search which takes into account the limitations imposed by a historically inadequate filing system.

b) Likelihood that information has been destroyed

(i) Sensitivity / importance of the subject to which the information relates

The Commissioner is concerned with an objective level of sensitivity or seriousness which would warrant retention of the information rather than considering whether the information is of subjective importance. For example, the complainants in the Bromley case were convinced that not all the information they requested could have been destroyed. The Tribunal said: *"...the appellants' conviction on this issue and the understandable importance of the informal flood defence from their point of view is not enough to persuade us that the documents must still exist, particularly in the absence of any evidence presented to us which might have undermined what we were told by the EA..."* (para 15).

However, in the case of Francis and South Essex Partnership Foundation NHS Trust, the applicant asked for a number of documents relating to the psychiatric care of her son up to his death and also details surrounding his death. The NHS Trust had already provided the applicant with a large number of relevant documents but said that further information could not be found. At paragraph 20, the Tribunal said:

"...we find it unlikely that the records have been either destroyed or removed from the Trust altogether. Given the sensitivity of some of the records, apparent from the Chief Executive's personal involvement in obtaining information back in early 2000, it seems to us very unlikely that the Trust has not kept a record somewhere. More likely, on a balance of probability, is that the records are still held by the Trust, but cannot now be located in the time required by the Act to be spent searching for them..."

At paragraph 48, the Tribunal concluded that on the balance of probabilities, the Trust did hold further information but that no further searches were required as the Trust had already exceeded the costs limit as set out in s.12.

However in the case of Ames, the Tribunal said that the Iraq dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...."*. However, it said that the evidence of the Cabinet Office was such that the Tribunal could

nonetheless conclude that they did not "*....think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...*" (para 15).

Therefore, where the subject matter is objectively important, the Commissioner will consider the circumstances of the case and any arguments put forward by the complainant to consider whether it is so inherently likely that the information is held to allow him to conclude that it is despite the evidence of the public authority to the contrary. The Commissioner notes that in applying this test, the Tribunal in Francis concluded that the material information was held whilst the Tribunal in Ames found that the requested information was not.

(ii) Age of the information & destruction schedules

The Tribunal in Bromley said at para 15 that they found it was "*...entirely plausible that documents that would be approximately forty years old would have been destroyed at some point...*" particularly given the number of reorganisations prior to the creation of the Environment Agency.

The Tribunal in Fowler suggested that they may be persuaded that the information is not held where there is evidence of destruction. If a public authority raises such an argument, the Commissioner would look to see evidence of destruction such as a retention policy or a disposal schedule.

For guidance, the Commissioner will look to the s.46 records management code which may be used either to support a challenge to the public authority's assertion that the information is not held or may be referenced in the other matters section to promote better record keeping.

Late discovery of relevant documents

In the Bromley case, as a result of the applicant's persistence in corresponding with the EA on this matter, further information came to light which was relevant to their request after the EA's initial response that they had disclosed all documents they had. Also when, preparing for the appeal before the Tribunal, the EA unearthed a number of other documents which it said did not fall within the scope of the original request but which were disclosed to the applicants as a matter of good will. These late discoveries led the applicants to believe that the other information they requested was held by the public authority.

The Tribunal said "*...it is fair to say that one or two mistakes and mishaps that occurred within the Environment Agency during the course of the matter did not help in convincing the Appellants that the various searches were conducted with appropriate rigour and competence...*" (para 4).

The Tribunal also said that "*...other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light....*" (para 13).

However, the Tribunal went onto say that they were particularly impressed by the care taken by the public authority in revisiting the search in preparation for the appeal and concluded that they had no difficulty in deciding that the EA held no further information relevant to the request. Further, they said "*....there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information.....*" (para 13).

The Tribunal in the MTUA / Halton case distinguished the circumstances of that case from those of Bromley. In MTUA, the information in question "related to a contained project ... [and] would have been kept at no more than a few readily identifiable locations" (para 84). Therefore the small amount of relevant information located, as well as the late discovery of further information, should in the Tribunal's view have alerted the Commissioner to the likelihood that searches had been inadequate.

The Commissioner would say that as the test to be applied is not whether the public authority can categorically state that the information is not held, he accepts that occasionally information may come to light after a public authority has indicted that they do not hold it. In such cases, the Commissioner will consider whether this late discovery of relevant information affects his assessment of the public authority's scope, quality, thoroughness and results of the initial search. Further, such a discovery may affect the

persuasiveness of other arguments raised by the public authority to explain why the information is not held, for example, where a public authority has argued that the information has been destroyed according to their destruction schedule but is discovered after the date of disposal. The Commissioner will also consider the information itself to consider whether this reveals anything about the existence of other information.

(See note on LTT116 for the effect that the late discovery of information would have on an assessment of whether an estimate was reasonable).

PREVIOUS / NEXT

Source	Details
IT	Linda Bromley & Others / Environment Agency (31 August 2007) Fowler / Brighton & Hove City Council (6 November 2007) Christopher Ames / Cabinet Office (24 April 2008) B Francis / South Essex Partnership Foundation NHS Trust (21 July 2008) Mersey Tunnel Users Association / Halton Borough Council (23 June 2009)

Related Lines to Take

LTT2, LTT31, LTT76, LTT88, LTT89, LTT116,

Related Documents

EA/2006/0072 (Bromley), EA/2006/0071 (Fowler), EA/2007/0110 (Ames), EA/2007/0091 (Francis), EA/2009/0001 (MTUA), FOI Procedures Manual, s.46 Records Management Code

Contact		HD / KP	
Date	27/08/2010	**Policy Reference**	**LTT121**

FOI/EIR	FOI / EIR	Section/Regulation	s14 s12 (4)(b)	Issue	Vexatious requests

Line to take:

The Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious:

1) whether compliance would create a significant burden in terms of expense **and** distraction

2) whether the request is designed to cause disruption or annoyance

3) whether the request has the effect of harassing the public authority or its staff

4) whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

5) whether the request has any serious purpose or value

Further Information:

Section 14 of the Act states as follows:-

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

The term is not defined further in the Act although the phrasing states that it is the request and not the requestor which must be vexatious. If a particular applicant has previously requested information , then this should be taken into consideration as the Tribunal comments in Gowers v the London Borough of Camden at paragraph 29 *"...it is not only the request itself that must be examined, but also its context and history"* and this approach was maintained by the Tribunal in Rigby v ICO and Blackpool, Fylde and Wyre Hospitals NHS Trust (EA/2009/0103) which said "*it is entirely appropriate and indeed necessary when considering whether a request is vexatious, to view that request in context*" (paragraph 40). In the case of Welsh v the Information Commissioner, the Tribunal said *"...it is possible for a request to be valid if made by one person, but vexatious if made by another, valid if made to one person, vexatious if made to another..."* (paragraph 21).

The Commissioner's Approach

The Commissioner will consider the context and history of a request to assess whether the request would fall into some or all of the following categories. It is not a requirement for all categories to be relevant to a request; however, where the request falls under only one or two categories or where the arguments sit within a number of categories but are relatively weak, this will affect the weight to be given to the public authority's claim that s.14 is engaged:

1) whether compliance would create a significant burden in terms of expense **and** distraction

2) whether the request is designed to cause disruption or annoyance

3) whether the request has the effect of harassing the public authority or its staff

4) whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

5) whether the request has any serious purpose or value

The Commissioner acknowledges that these distinctions are a little artificial and that a request may, for example, be both obsessive and create a significant burden or it may have the effect of harassing the public authority but have a significantly serious purpose which prevents it from being vexatious. This idea was

succinctly dealt with by the Tribunal in Coggins when it said *"...a decision as to whether a request was vexatious within the meaning of s.14 was a complex matter requiring the weighing in the balance of many different factors. The Tribunal was of the view that the determination whether a request was vexatious or not might not lend itself to an overly structured approach..."*. However, whilst the Commissioner accepts that the analysis of section 14 will normally cover a combination of these issues, not all the factors have to be present. The decision notice should identify which factors have been considered and how they have been weighted.

1. Significant burden in terms of expense and distraction

In line with the Commissioner's external guidance (Vexatious and repeated requests AG22), determining whether a request has a significant burden involves more than just the cost of compliance. A public authority should also consider whether responding would divert or distract its staff from their usual work.

Where the public authority's only concerns relate to the costs of complying with the request, then it should cite s.12; to engage s.14, the Commissioner expects the public authority to show that complying with the request would cause a significant burden both in terms of costs **and** also diverting staff away from their core functions. As the Tribunal in the Rigby case asserted: "Although it is clear that the Appellant made a considerable number of requests, if that alone was in issue, the Trust may have been able to rely on section 12, though not necessarily on section 14. It is the number of requests, combined with the nature of the requests, that brings section 14(1) into play."

The Commissioner's approach is supported by the Tribunal in Welsh who said that whether a request represents a significant burden is *"...not just a question of financial resources but also includes issues of diversion and distraction from other work..."* (paragraph 27). The Tribunal in Gowers also said *"...that in considering whether a request is vexatious, the number of previous requests and the demands they place on the public authority's time and resources may be a relevant factor* (para 70).

In the case of Coggins, the Tribunal found that a "*significant administrative burden*" (paragraph 28) was caused by the complainant's correspondence with the public authority which started in March 2005 and continued until the public authority cited s.14 in May 2007. The complainant's contact with the public authority ran to 20 FOIA requests, 73 letters and 17 postcards. The Tribunal said this contact was *"...long, detailed and overlapping in the sense that he wrote on the same matters to a number of different officers, repeating requests before a response to the preceding one was received....the Tribunal was of the view that dealing with this correspondence would have been a significant distraction from its core functions..."* (para 28).

The Tribunal in Betts also suggested that even if it would not create a significant burden to respond to the material request, it may still be reasonable for a public authority to conclude that compliance would result in a significant burden if in answering that request, it was *"...extremely likely to lead to further correspondence, further requests and in all likelihood, complaints against individual officers..."* (para 34). The Commissioner would however point out that this sort of approach would have to be supported by a history of the public authority responding to requests which the complainant utilises to generate further requests before a public authority could use this argument in support of claiming s.14.

2. Is the request designed to cause disruption or annoyance?

Case FS50151851 provides an example of a request which the Commissioner found was designed to cause disruption or annoyance. Here, the Commissioner found the request to be vexatious when considering the volume and disparate nature of the correspondence coupled with the complainant actually writing: "I am insincere and my purpose is mischievous subversion" and "my own motivation is no more than to be disruptive and annoying".

However the Tribunal in Betts did point out that the distress or annoyance must be caused by the process of complying with the request and not by the possible consequences of disclosure. At paragraph 28 they said - *"...distress, annoyance, irritation or worry arising from the possible consequences of disclosure cannot turn an otherwise proper request into a vexatious one; indeed that would defeat the purpose of FOIA..."*

3. Does the request have the effect of harassing the public authority or its staff?

In the case of Gowers, the complainant made allegations about the public authority's lack of independence

and incompetence and subsequently made a number of FOI requests of which 10 were considered by the Tribunal. Alongside the requests, the complainant also corresponded with the Council in which he made personal attacks upon the head of the Council's Central Complaints Unit (CCU) and made enquiries into the identity of the wife of the CCU's head. The Tribunal said:

"...what we do find is that the Appellant often expressed his dissatisfaction with the CCU in a way that would likely have been seen by any reasonable recipient as hostile, provocative and often personal...and amounting to a determined and relentless campaign to obtain any information which he could then use to discredit them....we find that taken in their context, the requests are likely to have been very upsetting to the CCU's staff and that they...are likely to have felt deliberately targeted and victimised...." (paras 53 & 54).

In the case of Ahilathirunayagam, the complainant had been in correspondence with the London Metropolitan University since 1992 as a result of him not being awarded a law degree. The complainant exhausted the University's appeal procedure, complained to the Commissioner (Data Protection Registrar as he was then), instructed two firms of solicitors to correspond with the University, and unsuccessfully issued County Court proceedings. He also complained to his MP and to the Lord Chancellor's Department. In February 2005, the complainant made an FOI request for information on the same issue. The University cited s.14.

The Tribunal found the request to be vexatious by taking into account the following matters:

"...(ii) The fact that several of the questions purported to seek information which the Appellant clearly already possessed and the detailed content of which had previously been debated with the University

(iii) The tendentious language adopted in several of the questions demonstrating that the Appellant's purpose was to argue and even harangue the University and certain of its employees and not really to obtain information that he did not already possess

(iv) The background history between the Appellant and the University...and the fact that the request, viewed as a whole, appeared to us to be intended simply to reopen issues which had been disputed several times before..." (para 32)

This case demonstrates the connected and overlapping nature of the various categories, as this request could also be seen as obsessive.

4. Can the request otherwise fairly be characterised as obsessive or manifestly unreasonable?

The Commissioner accepts that at times there is a thin line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue. As the Tribunal in the Rigby case put forward, *"ongoing requests, after the underlying complaint has been investigated [by independent regulators], [go] beyond the reasonable pursuit of information, and indeed beyond persistence"*. Further, the more independent evidence available, the more likely the request can be characterised as obsessive although a request may still be obsessive even without the presence of independent evidence.

For example, in the case of Welsh, the complainant attended his GP with a swollen lip. A month later, he saw a different doctor who diagnosed skin cancer. Mr Welsh believed the first doctor should have recognised the skin cancer and subsequently made a number of complaints although these were not upheld by the practice's own internal investigation, the GMC, the Primary Care Trust or the Healthcare Commission. Nonetheless, the complainant addressed a 4 page letter to the GP's practice, headed 'FOIA 2000 & DPA 1998 & European Court of Human Rights" which contained one FOI request to know whether the first doctor had received training on face cancer recognition. The GP cited s.14. The Tribunal said:

"...Mr Welsh simply ignores the results of 3 separate clinical investigations into his allegation. He advances no medical evidence of his own to challenge their findings.....that unwillingness to accept or engage with contrary evidence is an indicator of someone obsessed with his particular viewpoint, to the exclusion of any other...it is the persistence of Mr Welsh's complaints, in the teeth of the findings of independent and external investigations, that makes this request, against that background and context, vexatious...." (paras 24 &25).

In the case of Coggins, the applicant was employed by Age Concern and in this capacity was helping an elderly woman with her care arrangements. The applicant believed that a fraud had been committed by

Norfolk County Council in charging the woman for care she may not have received. The Council investigated and concluded that the care had been provided but had not been recorded and disciplined the relevant carer. The applicant also complained to the Commission for Social Care Inspection who did not uphold his complaint. Even the police said there was no evidence of dishonesty. The Tribunal said that the "*...number of FOIA requests, the amount of correspondence and haranguing tone of that correspondence indicated that the Appellant was behaving in an obsessive manner...*" (Paragraph 28).

5. Does the request have any serious purpose or value?

This factor should be given consideration in all cases where the applicant has argued that their request does have a serious purpose or value.

To weigh as a factor in favour of a request being vexatious, the public authority would need to demonstrate that the request has no serious purpose or value at all. However, it would be rare that a lack of serious purpose on its own could turn a valid request into a vexatious one.

Where a request does have a serious purpose or value it may be more helpful to view serious purpose or value as a potential preventer of a request being vexatious. In other words, if it *does* have serious purpose and value, then this would be an argument to weigh *against* the other vexatious arguments. In order to prevent an otherwise vexatious request from being vexatious, the serious purpose or value of a request would have to be sufficient to overcome the weight of any other factors present.

The Tribunal in Young indicated that its findings on harassing and burdensome turned on whether there was any serious purpose or value to the request (paragraphs 8 and 9). They went as far as to say that purpose or value was 'the most important consideration in this case' (paragraph 11). While the Commissioner is of the view that this factor should be given consideration in all relevant cases, he does not necessarily agree that it is the most important factor; care should be taken to avoid hanging a section 14 decision solely on the purpose or value of the request .

The Tribunal in Coggins said at paragraph 20 - "*...the Tribunal could imagine circumstances in which a request might be said to create a significant burden and indeed have the effect of harassing the public authority and yet, given its serious and proper purpose ought not to be deemed vexatious...*". Thus in this case, despite the request having the potential to cause a significant burden and be obsessive, the Tribunal considered whether the request had a serious purpose which may mean that despite the other findings it ought not be deemed vexatious.

The Tribunal said that the complainant was driven by a genuine desire to uncover a fraud which was not unreasonable particularly given that he had discovered that some of the visits had not been recorded by the carer. The Tribunal felt that this agenda "*...amounted to a serious and proper purpose...*" (para 22). However the Tribunal also said that "*...there came a point when the Appellant should have let the matter drop...there had been three independent enquiries...in the Tribunal's view it [the complainant] was not justified in the circumstances to persist with his campaign....*" (para 25).

The Tribunal did not clarify whether at the time of the request the complainant no longer had a serious purpose or whether the obsessive and harassing nature of the request outweighed the serious purpose. However on either interpretation, the Commissioner considers this case a good example of how the Commissioner's approach as outlined here can be applied.

In the case of Hossack, the DWP inadvertently revealed to the complainant's wife that he was in receipt of benefits in breach of the Data Protection Act. The DWP initially suggested they were unable to identify the employee who committed the breach although they later were able to identify the individual. The DWP went onto accept responsibility for the breach, apologised and paid compensation but Mr Hossack twice complained to the Parliamentary Commissioner for Administration whose recommendations the DWP accepted and acted upon. However Mr Hossack continued to believe that the DWP's initial misleading reply justified his campaign to prove a cover-up at the DWP. He accused the DWP staff of fraud and corruption and he publicised his allegations by setting up his own website and towing a trailer with posters detailing his allegations around the town.

The Tribunal said "*....whatever cause or justification Mr Hossack may have had for his campaign initially, cannot begin to justify pursuing it to the lengths he has now gone to. To continue the campaign beyond the Ombudsman's second report....is completely unjustified and disproportionate*" (para 26) and "*...seen in*

context, we have no hesitation in declaring Mr Hossack's request, vexatious" (para 27).

In Betts, the complainant's car was damaged in 2004 by what he argued was an inadequately maintained Council road. He stated that the Council were responsible and as such should refund the £99.87 charge for the car repair. The Council stated that they had taken all reasonable care to ensure the road was not dangerous to traffic. By a number of letters and emails, the complainant sought inspection records, policies and assessments and the Council provided this information under the FOIA but when in January 2007 the complainant made a further request for information on health and safety policies and procedures, the Council claimed s.14. The majority Tribunal found s.14 was engaged and commented:

"...the Appellant's refusal to let the matter drop and the dogged persistence with which he pursued his requests, despite disclosure by the Council and explanations as to its practices, indicated that the latter part of the request was part of an obsession. The Tribunal accepted that in early 2005 the Appellant could not be criticised for seeking the information that he did. Two years on however and the public interest in openness had been outweighed by the drain on resources and diversion from necessary public functions that were a result of his repeated requests..." (para 38).

Again, this case shows the links between the various categories as the request in Betts seems to be obsessive, to create a significant burden and lacking a serious purpose.

Serious purpose & series of requests

There will be cases where public authorities deal with a number of requests but decide that, for example, the seventh or twentieth request is vexatious albeit that it would have been a simple matter to comply with that request in isolation. In these circumstances, the Commissioner would look at the pattern of previous requests to consider whether the latest request goes to support either the presence or absence of a serious purpose.

For example, a complainant may have to submit requests in a successive fashion as it may only be by reading the contents of document A, that he/she is able to direct a subsequent request for document B and so on. For example, the Tribunal in Coggins said: "....*one could imagine a requester seeking to uncover bias in a series of decisions covering many years and involving extensive detail, each of fairly minor importance in themselves but representing a major issue when taken together. This might indeed be experienced as harassing but given the issue behind the requests, a warranted course of action ..."* (para 20).

However where a series of requests have been made, this may go to demonstrate the absence of any serious purpose, for example, where a complainant uses different phraseology in a number of requests but is essentially asking for the same or substantially similar information as has already been provided.

Subject Access Requests (SARs)

Requests for an applicant's own personal data should be considered as Subject Access Requests and dealt with under the Data Protection Act rather than under FOIA. Similarly, complaints to the ICO about how SARs have been dealt with by public authorities should be treated as Requests for Assessment under the DPA rather than section 50 FOI complaints. Therefore, our approach where a public authority has deemed a SAR to be vexatious under FOIA will be to refer the SAR itself for an Assessment under the DPA rather than considering whether it is vexatious under s14 FOIA.

However, as set out above, when considering whether an FOI request is vexatious the overall context in which the FOI request is made can be taken into account. This may therefore include taking into account any SARs, that are distinct from the FOI request but pursue the same underlying issue or obsession, as part of the overall context. The Commissioner considers that this approach is no different than taking into account any other non FOI request correspondence as evidence of burden or pattern of behaviour

Conclusion

There is no definition of a vexatious request for FOIA purposes and the Tribunal has therefore concluded that Parliament intended it to have its ordinary meaning i.e. likely to cause distress or irritation, literally to vex a person to whom it is directed. The Tribunal has however commented that it is not helpful to look for a definition within other legal contexts because:

- *"...the consequences of finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in these other contexts, and therefore the threshold for a request to be found vexatious need not be set too high..."* (paragraph 11, Hossack)

- *"...the concept of vexatious litigants from other legal contexts is not an appropriate analogy to use because what s.14(1) does make clear is that it is concerned with whether the request is vexatious, not whether the applicant is vexatious..."* (paragraph 25, Gowers)

Further, the Tribunal in Gowers said that the test is an objective one, i.e. the threshold is whether a reasonable public authority would find the request vexatious. (Paragraph 27).

Therefore in determining whether a request is vexatious or not, the Commissioner will consider the context and history of the request to reach a reasoned conclusion based on the strength or weakness of both parties' arguments in relation to some or all of the above five factors as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious.

Vexatious requests for environmental information

For further information on the Commissioner's approach to the above issues under the EIR please refer to LTT182

PREVIOUS / NEXT

Source	Details
	Vaithilingam Ahilathirunayagam / London Metropolitan University (20 June 2007)
	Hossack / DWP (18 December 2007)
	Welsh (16 April 2008)
IT	Gowers / London Borough of Camden (13 May 2008)
DN	Coggins (13 May 2008)
	Betts (19 May 2008)
	Rigby / Blackpool Flyde & Wyre Hospital NHS trust (10 June 2010)

Related Lines to Take

LTT65, LTT182

Related Documents

EA/2006/0070 (Ahilathirunayagam), EA/2007/0024 (Hossack), EA/2007/0088 (Welsh), EA/2007/0114 (Gowers), EA/2007/0130 (Coggins), EA/2007/0109 (Betts), EA/2009/0103 (Rigby)

Contact		HD / GF/ LA	
Date	13/09/2010	**Policy Reference**	**LTT123**

FOI/EIR	FOI / EIR	Section/Regulation	s.21(1), 21(2)(a) & (b) Reg 6(1)(b)	Issue	Reasonably accessible information

Line to take:

The phrase 'reasonably accessible' under s21 refers to whether the applicant can reasonably obtain all the information to which s21 has been applied. It does not refer to whether the applicant can access a reasonable proportion of the information to which the exemption has been applied.

Further Information:

Section 21 of the FOIA states as follows:

"21. – (1) Information which is reasonably accessible to the applicant otherwise than under s.1 is exempt information".

In the case of Colin P England v London Borough of Bexley, the complainant asked for the addresses of empty properties in Bexley, the reasons why the properties were empty and other information about the properties' ownership. The Land Registry holds details of land ownership for registered but not unregistered land and around 30% of land is unregistered. Thus whilst it would be reasonable to expect the complainant to approach the Land Registry, he would not be able to obtain all the information he had requested in this way.

The issue before the Tribunal was whether the fact that 70% of the information requested was available meant that the information requested was reasonably accessible or whether **all** the information had to be reasonably accessible.

One dissenting member of the Tribunal agreed with the decision notice in finding that the requested information was reasonably accessible to the complainant because *"...in section 21 the word 'reasonably' qualifies the 'accessible'..."* (para 113).

However, the majority decision of the Tribunal found that:

"...in the majority's view, 'reasonably accessible' applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere..." (para 113).

The Commissioner now considers that the approach taken by the majority is the correct one. Thus, s.21 can only be claimed where all the information to which s21 has been applied is reasonably available to the complainant and any investigation will consider how reasonable it would be for the complainant to access all the information to which the exemption has been applied.

Environmental Information Regulations

The Commissioner considers that the above approach may be useful only insofar as specifically interpreting the *"...already publicly available..."* element of Regulation 6(1)(b) but this should not be read across to other aspects of Regulation 6 (see LTT119).

PREVIOUS / NEXT

Source

IT

Details

Colin P England / London Borough of Bexley (10 May 2007)

Related Lines to Take

LTT25, LTT26, LTT119

Related Documents

EA/2006/0060 & 0066 (England),

Contact		HD	
Date	27/09/2010	**Policy Reference**	**LTT143**