

Information Commissioner's Office: views on legislation and update

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Public Security Team

14437
June 2011

Contents

- Further regulation – ICO view
- Current CCTV data protection issues
- Future developments

Further CCTV regulation

ICO view:

- Want effective CCTV regulation
- Want to see improved standards
- Not limited to data protection
- Don't want to see a lessening of data protection standards
- After period of uncertainty keen to get on with it



Protection of Freedoms Bill

Where does it leave data protection?

- Data Protection Act still applies to images of individuals
- DPA covers UK
- DPA covers all sectors, public and private space except for domestic use
- Welcome provision that Secretary of State has to consult ICO on code

Protection of Freedoms Bill

- Minister has confirmed that ICO remains responsible for data protection CCTV issues
- Agree clarity and co-ordination are essential
- Surveillance Camera Code applies to police and local authorities, at least initially
- Why not Whitehall departments, eg Transport or Home Office?
- What about private sector operators?

Protection of Freedoms Bill

Commissioners:

- Important to clarify roles of all commissioners
- If overlaps in responsibilities, there's a risk of different interpretations of law, contradictory advice
- Commissioners and codes will have to co-exist, important they have consistent approach
- Vital to ensure no confusion
- Committed to working closely with Surveillance Camera Commissioner

ICO response to consultation on Home Secretary's code

- Welcome drive to improve standards
- Think again about limiting scope to police and local authorities
- At very least want it to include other government agencies
- Could cause problems given partnership arrangements in town centres



CONSULTATION ON A CODE
OF PRACTICE RELATING TO
SURVEILLANCE CAMERAS

Surveillance Camera Code

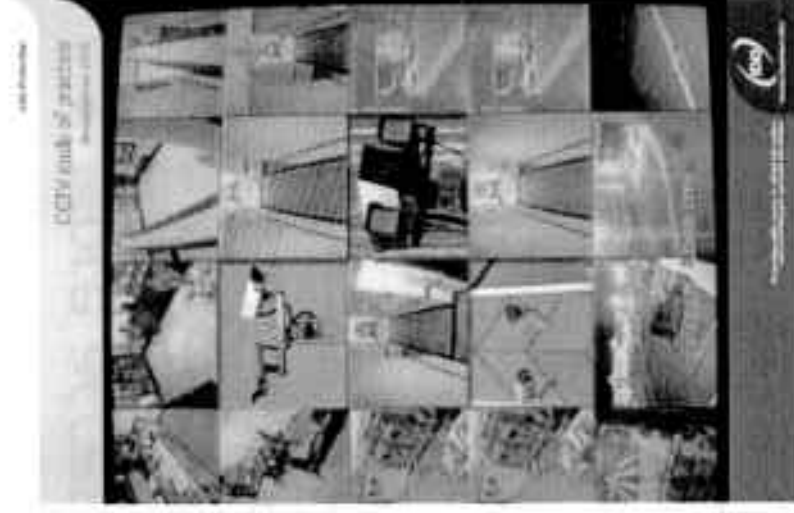
- Important to tackle problem of poor quality images, retrieval issues
- Helpful not to be limited to personal data
- Keen to work with Home Office and

Surveillance Camera Commissioner on the code to ensure it is consistent with data protection requirements

- Security standards e.g. encryption
- Keep up with technical developments

ICO's code of practice

- Data Protection Act still applies to images of individuals
- Covers UK, all sectors
- Helps CCTV operators comply with legal obligations
- Focus on data protection
- Cross references to surveillance camera code
- Education – intervene/enforce where risks high. Monetary penalties for serious breaches



Public attitudes

- Public trust and confidence – can't be taken for granted
- Less happy about being filmed for commercial purposes eg market research, income generation
- More access requests
- Expect proper control and fair use
- Privacy concerns about new proactive technologies

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Technological developments

- ANPR
- Facial recognition, other video analytics
- No longer just passive “general observation”
- Provides more information about people
- RIPA implications
- How good is the technology and the quality of underpinning databases?
- More care – possibility of wrong identification

ANPR

- Pleased it is covered by the Bill
- Would like to see organisations draw on expertise of CCTV operators
- Traffic and car park divisions/operators lack the knowledge of DPA, RIPA
- Lack of awareness that often ANPR is personal data
- Importance of safeguards – access controls, retention etc
- Accuracy of underlying databases – DVLA, hotlists

Transparency

- Devon and Cornwall FOI tribunal case
- ICO encourages transparency wherever possible
- But recognises there may be specific purposes where disclosing the exact location of a camera would be likely to prejudice the prevention and detection of crime

Letting people know

- People do not know who are operating what cameras, for what purpose
- Undermines public trust and confidence
- Want a national solution for overt roadside ANPR cameras
- Encouraged police to put ANPR signs on liveried police vehicles and use roadside variable matrix signs



Access to CCTV images

- Increase in queries
- Often part of a wider dispute/complaint
- Employment disputes
- Detention cells, custody suites
- Cars being damaged

Subject access requests

- People have right to view images of themselves and, unless they agree otherwise, be provided with a copy
- Must be provided within 40 days
- You may charge £10
- Request in writing. Need to provide details to find the image
- Third parties
- Disproportionate effort – only in most exceptional circumstances. Encourage viewing.

Disclosure/subject access

- Requests for footage of car being damaged so they or insurance company can take legal action
- Consider whether their request is genuine
- Any risk to the safety of other people involved?
- Judgements should be made by the organisation operating the system
- Have discretion to refuse any request unless there is an overriding legal obligation such as a court order or information access rights
- ANPR

What's new? Future developments

- Continue to use new powers and monetary penalties
- Continue to build up capacity to carry out audits
- Educate – review of ICO guidance
- Future EU data protection legislation, likely to include “Privacy by Design” concept
- Advising on new government initiatives eg crime mapping, collaboration, local initiatives, police restructure
- New cookies law
- Information rights consultation

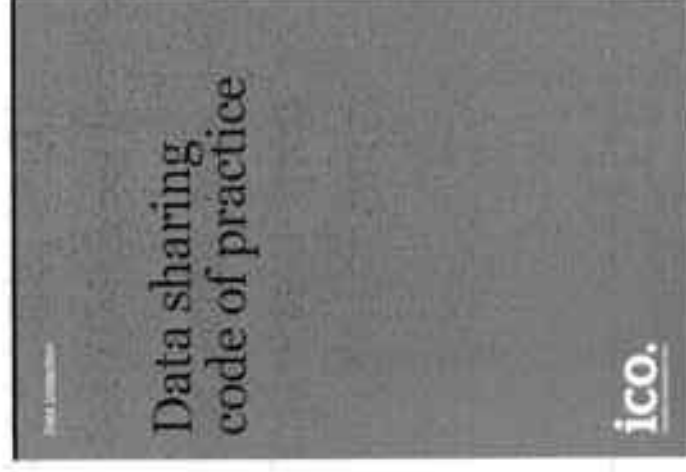
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Data sharing code of practice

- DPA is not a barrier where information sharing is justified, necessary and proportionate
- DPA provides a framework for sharing in a secure, lawful and reasonable way
- Limitations and safeguards are essential



We want your views...

We are consulting on our draft **information rights strategy**.

This strategy is being introduced in light of our commitment to integrate our data protection and freedom of information activities wherever we can.

It replaces our former, separate data protection and freedom of information strategies.

The strategy describes the role of the ICO and explains how we go about our work and set priorities.

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How to take part...

- Please visit the consultations page of the ICO website:

www.ico.gov.uk

Homepage > About the ICO > Consultations
> Current consultations

- Consultation closes 12 August

Keep in touch

Subscribe to our e-newsletter at www.ico.gov.uk
or find us on...

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a dark grey rectangular background.

facebook

The Twitter logo, featuring the word "twitter" in a light grey, lowercase, sans-serif font.

twitter

www.twitter.com/iconews

The YouTube logo, with the words "You Tube" in white, where "You" is smaller and "Tube" is larger, set against a dark grey rounded rectangle.

You Tube

The LinkedIn logo, featuring the word "Linked" in a standard font and "in" in a bold font, both in black, with a dark grey square containing a white "i" to the right.

Linked in

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Information Commissioner's Office

Connecting The Public Sector to 3rd Party Organisations - 16/6/2011 (1)

① Review where in legislative developments

Data Protection: Legislative developments and data security

David Evans, Senior Policy Officer



14th June 2011

② Look At What Actions taken of
will come in a form of PP - from MP's
revisions

③ Look At What we've used
one New MP's powers & why we've

④ Explain why we feel this approach of
using MP's will encourage transparency
Reducing friction

Coroners & Justice Act 2009

DP - legislative developments

- Data Protection
- ① - new audit powers
- ② - Monetary Penalty Notices

- ③ • PECR
- consent for cookies
- ④ - more information gathering powers
- more MPNs

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① PP Advice - ② 151 (7) ico can be written to

③ 151A - can have 'Contractual Assessment
Notice' on Govt's, Required to
include a contract of 100 on time

④ 155A-E in summer under 155C

① Drawing back - 155C May
② Service Provider

Coroners & Justice + Immigration Act 2008

FOI developments

- ① • FOI case law developments
- ② • Modified approach to publication schemes
- ③ • DCLG's Transparency Code of Practice
- ④ • Protection of Freedoms Bill

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① Constitution - a lot more all

② PS - very - for PS monitoring

③ by Take it from - Cfg. Conf

④ - Increase powers of PS - increase
Rights Home provisions of PSAS

↓
Bill

→ Not Just A New Law
- can have some effects on individuals

Be your best

1 interview
- Shopping etc

ensure this year

- know I have the
M.P.s. in place here

(2)

A salutary tale



A Breach of Confidence

A report by the Parliamentary Ombudsman on an investigation of a complaint about HM Revenue & Customs, the Child Support Agency and the Department for Work and Pensions

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- Recommendations!

Not About a Major Finding
Not Held a Must be (action)
Others involving ICC's - ICC's of (action)

RATHER

In brief

- Child Support Agency
- HM Revenues and Customs
- Department for Work and Pensions

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1 (action) / 1 (action)

1 (action) / 1 (action)
ORGANISATION

Then related to 2 other
ORGANISATIONS

What happened

- Complainant (Ms H) dealing with a number of govt agencies had address incorrectly changed
- Error duplicated
- When error pointed out it was not corrected
- No one took responsibility

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- Split team between

- Review written in error

- Some happen its because between

- ~~was a major conflict~~

'GAMES'

- NO ONE TOOK RESPONSIBILITY

Consequences for Ms M

- Ms M's personal data sent to former partner
- Unexpected decrease in child support
- Time and effort spent trying to establish what had gone on
- Stress

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- As by now shared all the time together
PD sent to former partner
- This caused some further stress
+ money went down

So like anyone in that position will
try to get to the bottom of it

Outcome

- Complaint to Parliamentary Ombudsman
- Detailed investigation
- Adverse outcome - maladministration
- Cost - actual and reputational

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- Retained investigation
- lots of administrative time & effort
- lot of time - permanent loss etc
- Ombudsman concluded it was all
HMP got the complete picture
- No one took responsibility
- No one took time off work to attend
meetings that she had to go
- Then Ombudsman at which point

More outcomes

When the report is a result of an investigation, it is important to consider the impact on the individual. The report should be clear, concise and easy to understand. It should also be written in a way that is respectful and fair. The report should be written in a way that is clear, concise and easy to understand. It should also be written in a way that is respectful and fair.

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More outcomes

In her response to a draft of this report, Ms A said that trying to sort this problem out had made her very distressed and had impacted on her family life. She felt she could not move on from her separation from Mr A as the address change provided a constant reminder of a very unfortunate episode in her life. Ms A said she was particularly concerned because she took a lot of trouble trying to separate her and Mr A's affairs when they split up so that her credit rating was not adversely affected by his debts. She is still concerned that there may be some link between her and Mr A's affairs within a government department, which may cause her problems again in the future.

After reading the draft report, Ms A commented that she was shocked, to say the least, that a specialist she had trusted appeared to have lied to her Member of Parliament, made excuses, and delayed the investigation until such time as an audit trail was no longer available. Ms A said that this left her in a situation where she would never know why the error had happened, she would never have peace of mind that it would not happen again and she would never trust a government agency again. Ms A said that she found all of this quite disturbing and was

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£21k damages awarded to Ms A
- small amount

But Great Damage To Her Reputation
Of The System

Is This How you treat customers by eg

TESCO or JC or Amazon - would you go
back? would they have a viable business?

Records:
 - 2. Truist (ISS) loan to Hodge
 - £65K - monthly to pay in 18 paid
 - due £24K " " " " " "

The ICO's powers

- ① Information gathering
- ② Undertakings
- ③ Enforcement
- ④ Prosecution
- ⑤ Monetary Penalties

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Before I get into Powers
 of MPAA - context setting
 with relevant Powers
 P-Warrant

① Info Notices & Search Warrants

② Ant Forensic - Warrant + Co-Cost

③ Before Not Punishment - Notice
 Compulsory Compliance

④ Offences of Non-Notification + 555 + 572 + Recovery of Costs

⑤ Since 1 April 2010

Monetary Penalties

- Administrative punishment
- Require payment of a Monetary Penalty which must not exceed £500,000
- ICO can serve a Monetary Penalty notice on a data controller
- ① Applies to all data controllers in the private, public and voluntary sectors

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① Won't Hold Back Because it's
 The Public Sector

- If The Matter is Serious we
 Will Act

Monetary Penalties

- Before the ICO can impose a Monetary Penalty it has to be satisfied under section 55A that:
- There has been a serious contravention of the data protection principles by the data controller
- The contravention was of a kind likely to cause substantial damage or substantial distress and either:
- The contravention was deliberate or

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Serious Breach of Principles

Like Risk of Harm or Reputational

- May be Recovered by HHS

or themselves - Also

Monetary Penalties

- The data controller knew or ought to have known that there was a risk that the contravention would occur, and that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent the contravention

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"Gross Stupidity"

3 out of 6 -

Policy of encryption laptops
+ practice - N/A!

Contravention was deliberate

- The contravention was deliberate or premeditated
- Data Controller was aware of and did not follow relevant advice published by the ICO and others
- Series of similar contraventions and no action taken by data controller to rectify cause of original contraventions

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4 out of 6 - Had policies
(like others)

Not put into effective
practice

Failed to take reasonable steps to prevent the contravention

- Inadequate procedures, policies, processes and practices in place
- No clear lines of accountability
- Failure to implement guidance or codes of practice published by ICO or others

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Hedges - same mistake twice

Chief Abuse Allegations
or Sensitive

- Inadequate

2 Surveys - 3 allegations

of Emails to various groups

eg 1 time to + 100

TAXI - Contact Numbers!

Monetary penalties - the future

MORE

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"This is not the way
I want to be
Punished My Partner
from making."

2011

Invitations - but Hottel
Lemon will be known
+ some mistakes were
be corrected
- might just be another Hottel

"And finally"

We want your views...

We are consulting on our draft information rights strategy.

This strategy is being introduced in light of our commitment to integrate our data protection and freedom of information activities wherever we can.

It replaces our former, separate data protection and freedom of information strategies.

The strategy describes the purpose for which the ICO exists and explains how we go about achieving this purpose.

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- Part of our approach
to taking up the role of
the ICO

have been prepared to
+ now want to make sure
Key Policies - Approaches
Angelo

How to take part...

Please visit the consultation page of the ICO website:

www.ico.gov.uk

Homepage » About us » Consultations » Current consultations

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What views

We will consider every
point made



Data Protection: Assessing Good Practice

Alvin West

Audit Team Manager

Information Commissioner's Office



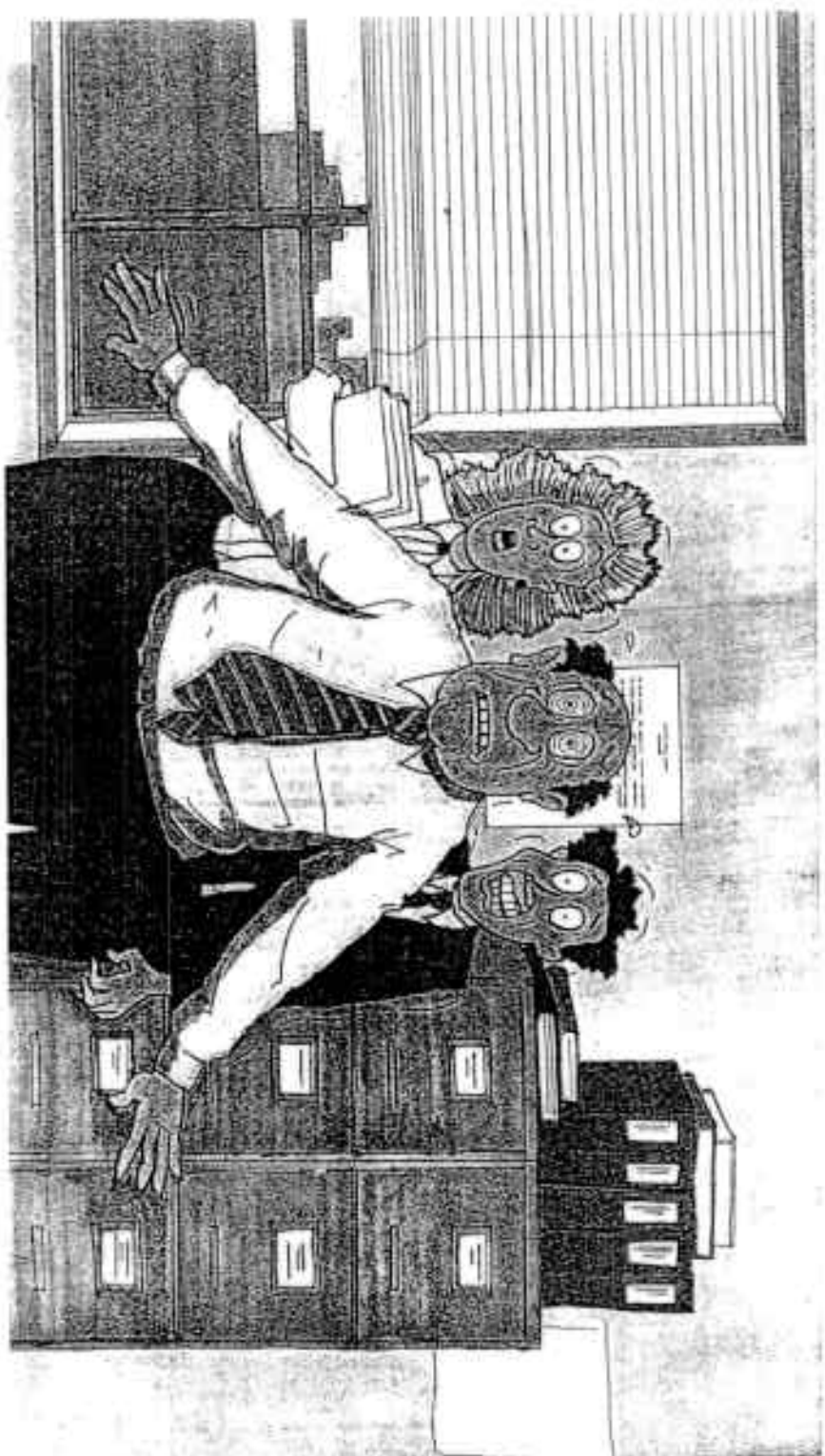
⁽¹⁴⁾
18th June 2011

What is good practice?

- What does the DPA say?
 - Good practice is defined as such practice for processing personal data as appears to be desirable. Includes, but is not limited to, compliance with the requirements of the act
- What does this mean in practice?
 - Efficient, effective, robust policies and procedures exist and are working in practice to ensure information is handled correctly and the organisation is aware of, and fulfilling, its obligations

Good Practice Audit

- Seen as being key to educating and assisting organisations to meet their obligations
- Use audit, assessment and practical advice and recommendations to improve the way organisations deal with information rights issues
- Assist the ICO to share knowledge and promote good data protection practice through publishing audit outcomes
- Allow organisations to show their commitment to, and recognition of, the importance of data protection
- Risk based approach



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How?

Assessment Notices

Consensual Audit

Short Audit

Undertakings

Self assessment questionnaires

Self Audit

Audits: consensual and compulsory

- So far, all of our audits have been consensual – i.e. scope and time agreed with the data controller or point of contact
- Consensual audits review the control framework for complying with the Data Protection Act, ICO codes of practice and guidance
- Now have powers to conduct a 'compulsory' audit following the issue of an Assessment Notice.

Assessment notices

- Under section 41A of the DPA the Commissioner may serve certain data controllers with a notice ('Assessment Notice') imposing specific requirements of the data controller
- Used in circumstances where there is a risk that individuals' data will be compromised but the organisation is unwilling, for whatever reason, to engage constructively with ICO
- The assessment notice is for the purpose of enabling the Commissioner to determine whether the data controller has complied or is complying with the principles

Our audit approach – overview

- Agree a scope of work with the organisation
- Carry out an off-site check of an organisation's documented policies and procedures
- Carry out an on-site review of the procedures in practice for processing personal data
- Provide a report with recommendations
- Write an executive summary that we can publish on our website, with the consent of the organisation
- Carry out a follow-up review – dependent upon the outcome of the original audit

Key scope areas

- Governance
- Training and awareness
- Records management
- Security
- Requests for personal data

What type of things
do you think we
would be looking for
in these areas?



Governance

Policies and procedures

- Making sure policies cover all aspects of DPA not just SARs and security
- Ensuring policies are dated and version controlled and available in one location
- Communication of policies

Governance structures

- Ensuring someone at a senior level has ownership of data protection matters and that role is clear to others in the organisation

Governance (contd)



Measures

- Management information including more than just performance against the 40 day deadline

Audits

- Role of internal audit, spot checks and routine monitoring of compliance

Returns

- Explicitly referring to information governance issues in publicly available documents
- Risk registers

Risk assessments

- Privacy impact assessments

Training & awareness

Induction

- Making sure permanent, temporary, contract and third party staff are aware of policies

Role based training

Refresher training

E learning

- Maintaining records to identify gaps

IT access

- Ease of access to information
- Access to personal data after data protection training



Records management

Owner

Inventory of personal data/audit of corporate information assets

Consistent application to manual and electronic records

Fair processing

Tracking of manual records/home working

Retention

Disposal

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Security



IT

Information Security Framework including Policy and Controls

Asset Management – fixed and mobile media including laptops, memory sticks, decommissioning etc

Incident Management

Training

Identity Access Management – joiners, leavers, movers, regular review
third party contractors

Network Access Controls – firewalls, anti-virus updates, encryption

Remote Working

Web application and Cloud computing



Security

Physical

Location of documents/servers – third party contractors

Security of buildings/cabinets etc.

Key control

Access control

Confidential Waste



Requests for personal data

Procedures

- Retrieval process from all 'likely' sources of personal data
- Responsibilities in job descriptions for processing SARs
- Reporting performance
- Complaints handling

Monitoring

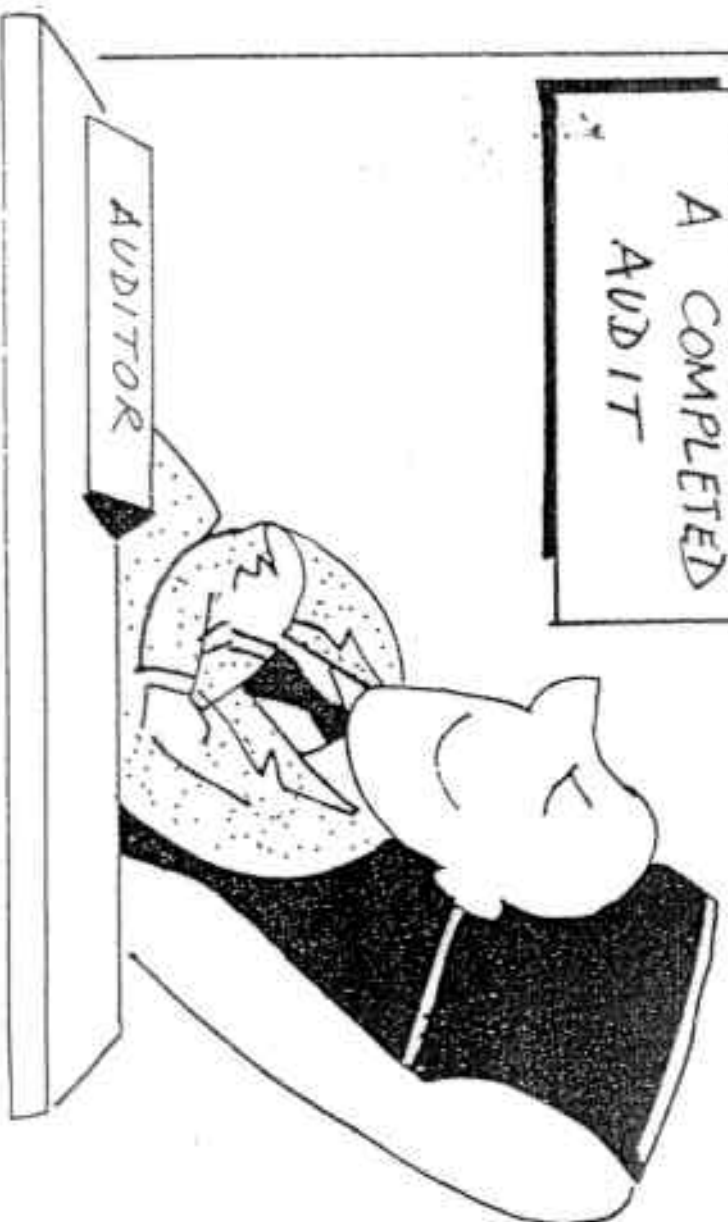
- SARs logs
- Application of Redactions and Exemptions
- Disclosures procedures

Data sharing

- Ownership
- Use of data sharing protocols/ updating
- Records of data sharing



HAPPINESS IS
A COMPLETED
AUDIT



ICO audit activity

- Growing number of audits
- Growing team
- More diversity of organisations audited
- Greater sharing of outcomes and good practice

Questions?

FOIA Vexatious Requests

Tony Dixon – Lead Policy Officer
Public Security Group – Strategic Liaison



14 June 2011

Hello, thank you for choosing this workshop on vexatious requests.

We will start by talking through the 5 criteria outlined in the ICO's guidance on vexatious requests drawing on some Tribunal examples. We will then discuss some case studies based on complaints we have received before going on to look at some more specific issues that have been raised in relation to section 14 recently. There should be some time left at the end for any questions and if we don't get enough time we can address those in writing following the event.

Vexatious Requests (s.14(1))

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

17 (5) "A public authority which ... is relying on a claim that section 14 applies must ... give the applicant a notice stating that fact."

except where the authority has given the applicant a s.14 notice in relation to a previous request and it would be unreasonable to expect the authority to serve a further notice (17(6))

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Firstly, it is worth reminding ourselves of the wording of section 14. It is important to recognise that s14 is not phrased as an exemption, it simply disapplies the public authorities duties outlined in s1(1) of the Act. So if the request is vexatious there is no duty to confirm or deny whether the requested information is held or to provide the information. Section 14 is in Part I not Part II of the Act and so relates to request itself rather than content of information. As section 14 is not phrased as an exemption there is no public interest test to consider.

Section 17(5) outlines the requirement that the public authority issue a refusal notice stating that section 14(1) applies except where the PA has given a refusal notice in relation to a previous request and it would be unreasonable to serve a further notice. We will look at section 17(6) in more detail later.

Context and History

Request not requester – but context is relevant

Gowers (EA/2007/0114) “it is not only the request itself that must be examined, but also its context and history.”

Betts (EA/2007/0109) “because it was a “continuation of a pattern of requests” it was obsessive” and “is also likely to cause disruption and annoyance.”

ICO will consider context/history and strength of **both** parties arguments in relation to the five factors

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Although the general rule that is that FOIA is applicant motive/blind this is not applicable when considering the application of s14(1) – a focus on the request and not the requester does not mean that knowledge of the applicant's identity/previous conduct can not be taken into account.

The Tribunal has been clear on this point as stated in Gowers (EA/2007/0114) “it is not only the request itself that must be examined, but also its context and history.”

Key Q is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause and is the applicant abusing their right of access.

The context and history should be taken into account in support of making a request vexatious but could also weigh against making a request vexatious if, for example, there is a good reason for the number of requests or the applicant's persistence.

Refusing a vexatious request often about drawing the line with an ongoing pattern of behaviour. As the Tribunal stated in Betts the request was vexatious “because it was a “continuation of a pattern of requests” it was obsessive” and “is also likely to cause disruption and annoyance.”

The 5 Factors – a balancing exercise

Vexatious has its ordinary meaning – likely to cause distress/irritation and vex the person to whom it is addressed – objective test – reasonable public authority (Gowers)

- Significant burden in expense **and** distraction
- Designed to disrupt or annoy
- Harassing or causing distress
- Obsessive or manifestly unreasonable
- No serious purpose or value to justify behaviour

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The Tribunal has often noted that it is not helpful to look at definitions of vexatious in other legal contexts as under the FOIA a finding of a request being vexatious has less serious consequences for the individual and so there is a lower threshold than (confirmed in the case of Hossack).

Vexatious therefore has its ordinary meaning – is the request likely to cause distress or irritation and vex the person to whom it is addressed. This is an objective test and so we assess its likely effect on a reasonable public authority (Gowers).

It is also important to recognise that it must be the request itself that causes distress/irritation NOT the likely effect of disclosing the requested information. Any potential embarrassment of disclosing information is not a relevant factor.

As you will be aware there are five factors outlined in the ICO's guidance – a public authority doesn't have to meet all 5 but should be able to make strong arguments under more than 1 of the factors. We accept there can be overlap between these factors but find it a useful approach which has been backed by the Tribunal in several cases.

The 5 factors don't need to be applied in any particular order so we will move on to look at each factor:

1. Significant burden / distraction

If just costs then section 12 is more appropriate:

Rigby (EA/2009/0103) – “It is the number of requests, combined with the nature of the requests, that brings section 14(1) into play.”

Divert / distract staff from normal work:

Welsh (EA/2007/0088) – “significant burden is not just a question of financial resources, but includes issues of distraction and diversion from other work.”

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Firstly, would complying with the request create a significant burden in terms of expense and distraction?

For this to be relevant it must be more than just cost or section 12 would be more relevant.

The Tribunal summarised this is Rigby stating that *“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.”*

This can relate to cases where:

- 1) There are frequent, overlapping or repeat requests;
- 2) each request generating new requests, complaints or correspondence;
- 3) requests contained in long and convoluted correspondence;
- 4) requests sent to multiple people distracting specific staff from their normal work.

It is not just locating/retrieving the information as is relevant for s.12 but it is the actual handling/administration of the request. Does this have

2. Designed to disrupt or annoy

Requesters intention – subjective and difficult to prove – context is important

FS50151851 – Department for Communities and Local Government – “I am insincere and my purpose is mischievous subversion.”

Betts (EA/2007/0109) – must be the process of complying that causes disruption/annoyance not the disclosure itself.

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2) The second factor is whether the request is designed to disrupt or annoy? In some cases there is a clear or admitted intention to “punish” or cause difficulty for the authority.

We find that this criteria causes some difficulty and can often be misapplied. This is a subjective test and so it is the requesters actual intention in making the request that is relevant here. This can be difficult to prove unless the requester has stated their intention in correspondence with the public authority or in some other way such as on a blog.

In the Department for Communities and Local Government case cited on the slides the requester had clearly stated that the intention behind the request was to – “I am insincere and my purpose is mischievous subversion.”

If the “effect” is disruption/annoyance then it is better to make these arguments under the next factor – whether the effect is to harass/distress the PA.

Complainants often also misapply this criteria arguing that the request can't have effect of disruption if that was not their intention which is clearly not the case.

3. Harassing or causing distress

Likely affect – objective test – reasonable person

Relevant factors – volume, frequency, language, behaviour

Gowers (EA/2007/0114) – “likely have been seen by any reasonable recipient, as hostile, provocative and often personal.”

Ahilathirunayagam (EA/2006/0070) - “information which the Appellant clearly already possessed”

“the request, viewed as a whole, appeared to us to be intended simply to reopen issues which had been disputed several times before”

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- 3) The question here is whether the request would be likely to harass or cause distress to a reasonable person.

There are a number of factors that are relevant here and are often present:

1. The request may include personal comments about individual staff members, complaints or intrusive questions about individuals.
2. It may be generally offensive in style and tone.
3. Requests may be frequent and overlapping making them difficult to manage.
4. Requests may relate to issues that have been addressed a number of times and are considered closed by the public authority as recognised in the Ahil case referred to on the slide.

Many of these factors were present in the case of Gowers where the Tribunal found that the request was “likely have been seen by any reasonable recipient, as hostile, provocative and often personal.”

4. Obsessive or manifestly unreasonable

Key factor – wider context/history important – unlikely one request will be obsessive in isolation

Independent evidence / underlying complaints – Welsh (EA/2007/0088) – “simply ignores the results of the 3 separate clinical investigations into his allegation.”

Rigby (EA/2009/0103) “on-going requests...beyond the reasonable pursuit of information, and indeed beyond persistence.”

Also – Ahilathirunayagam / Welsh – numerous routes of complaint pursued unsuccessfully

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4) The fourth factor to consider and one of the most important is whether the request can be seen as obsessive. In most cases there will be an element of obsessiveness. The complainant may have had good cause to make requests at first but the issue has been pursued for too long or FOIA may be being used where all other channels have been exhausted.

The complainant may show an obsession with their own point of view, not accepting closure on an issue or not accepting the outcome of independent investigations. This was the case in Welsh where the Tribunal stated that the complainant “simply ignores the results of the 3 separate clinical investigations into his allegation.”

The ICO recognises there is a fine line between obsession and persistence. The test is one of reasonableness – whether the reasonable person would describe the request as obsessive taking into account the context and history. As the Tribunal stated in Rigby the request will be obsessive if “on-going requests [are made]...beyond the reasonable pursuit of information, and indeed beyond persistence.”

For info:

Welsh – GP own complaints, the GMC, the PCT and Healthcare Commission.

4. Obsessive or manifestly unreasonable

Time span – Hossack (EA/2007/0024) – 4 year public campaign. Ahilathirunayagam (EA/2006/0070) – pursued issue for 12 years.

Information already possessed – Hossack BUT consider section 14(2) repeated requests if this is the main grounds

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Two other relevant factors under this criteria are the time span over which the correspondence / issue has persisted and whether the information is already in an individuals possession.

Although not conclusive a long time span over which an issue is pursued can indicate obsessive behaviour unless this is justified by the purpose of the request.

Both of these factors were relevant in Hossack where the Tribunal recognising the request was for information the requester already possessed and showed an endless wish to debate the original issue.

5. No serious purpose or value

Unlikely to be sufficient on its own – may add weight or make an otherwise vexatious request justified – close link to obsessive

Coggins (EA/2007/0130) – desire to uncover a fraud was a proper purpose with value which had the potential to outweigh vexatious arguments BUT in history/context requests had become obsessive and campaign no longer justifiable

Hossack (EA/2007/0024) – “...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.”

Serious purpose and a series of requests – drawing a line

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5) The final criteria is whether the request has a serious purpose or value. This factor alone will not be enough to deem a request vexatious – it can be seen as a supporting factor to other criteria and is closely linked to a request being obsessive or it can be seen as a factor balancing against making a request vexatious. This factor should be considered in all cases where the applicant has argued that there is a serious purpose/value which potentially prevents a request from being vexatious.

The question is often whether the purpose and value of the request outweighs the other vexatious factors the public authority has identified? For example, is there a serious purpose behind the request and has vexatious behaviour been caused in part by the public authority's failure to handle previous requests properly.

For this criteria to weigh in favour of deeming a request vexatious the burden of proof is on the public authority to demonstrate it has no value with robust arguments – it is not enough that value is not clear or established by requester.

In Coggins the Tribunal noted that there comes a point where you should let a matter drop and value can diminish over time. The desire to uncover a fraud was a proper purpose with value which had the potential to outweigh vexatious arguments BUT in history/context requests had become obsessive and campaign no longer justifiable.

In Hossack 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).

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.

Ahilathirunayagam (EA/2006/0070)

- Had already received much of the information
- Questions aimed at getting university to justify itself or admit fault, not obtaining information
- Making accusations in the form of questions
- Hurtful allegations against many individuals
- Believes answers false – will never be satisfied
- Obsessive – 12 years
- Using FOI to keep his complaint open
- Had already pursued all legal avenues

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Just to back up the case study examples the next two slides are examples of cases where the ICO found the request was vexatious and one where we didn't uphold s14.

One of the key points is the way in which FOI is being used – is it being used in accordance with its purpose (to obtain information) or as another 'weapon' in a complaint? In this case, the requester had already received much of the information, and the issues had been dealt with exhaustively. He saw FOIA as a way to force the university to continue in the correspondence, and therefore phrased the points he wanted to make as questions.

The request was harassing because it was used as a way of making numerous allegations, some of which were patently unreasonable (e.g. the Commission for Racial Equality is full of "hardcore racists"!). It is likely to be burdensome because he will never accept the answers given – he will simply claim they are lies and continue his correspondence.

It's clearly obsessive. Even if originally he had a point it has been dealt with exhaustively by the university, the courts, the CRE etc and he has sacked two sets of solicitors for giving him a "false" opinion that his case has no merits.

Not vexatious (FS50199130)

- over 70 pieces of correspondence
 - some overlapping or repeated
 - all on the subject of works at one building
- BUT
- this was because the authority had not been dealing properly with the requests
 - the requester owns a flat in the building and is on the Works Committee
 - the works are ongoing and there are unresolved issues around fire safety requirements
 - Previous behaviour reasonable

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This request concerned correspondence and documentation regarding the commissioning, production and issuing of a fire risk report at a certain property.

This was a finely balanced case but a good example of how something which might on the surface appear vexatious is actually justified persistence.

Was the request obsessive? Evidence suggested the issues were ongoing, there had been no independent evidence/adjudication on the issue – more information could improve understanding of the issues. Requester is on the committee so has a role to play.

Serious purpose/value? Legitimate purpose – expensive works using public money that the requester thinks are inappropriate. Council –

Section 17(6)

Disapplies s17(5) – requirement for refusal notice where:

- Relying on a claim s14 applies (to current request)
- Requester given s14(1) refusal notice for previous request
- Unreasonable in all the circumstances to expect the public authority to serve a further refusal notice

Importance of keeping a record procedure/reasons

FS50306071 – Upheld s14(1) but not s17(6) as requester not informed future request of a similar nature or on a similar topic may not be answered. Section 17(5) breach.

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Moving on to some more specific issues: section 17(6) is one of the most under-used sections of the Act. We consider it important that public authorities receive protection from vexatious applications under the Act and the ICO considers this to be the intention of including section 17(6).

This is applicable where the Public Authority is:

- Relying on a claim s14 applies (to a current request)
- Requester given s14(1) refusal notice for previous request
- Unreasonable in all the circumstances to expect the public authority to serve a further refusal notice

All of the above have to be met and you need to be able to justify decision to ICO. It is important to record these decisions as the ICO may receive timeliness complaints and not be aware that s17(6) has been applied.

If the requester is told in the s14 refusal notice that future requests on the same or similar theme would not be answered this can be a good way to draw a line under correspondence after the application of s14. As this didn't happen in the case referred to on the slides we did not uphold the application of 17(6) as being reasonable.

Section 17(6)

s17(6) upheld:

FS50274648 – ICO upheld s14(1) – in the refusal notice the requester was informed future requests may not be answered

FS50308738/FS50308744 – Same requester and requests on same subject matter – agreed it would be unreasonable to expect a further refusal notice

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In contrast to the previous cases s17(6) was upheld in these decisions as the requester was informed that future requests on the same theme would not be answered.

Section 16 and Section 14(1)

If ICO finds s14(1) not engaged may find breach of s16 in circumstances where other than erroneous reliance on s14(1) public authority would have been required to provide advice/assistance

If ICO finds s14(1) is engaged there will be no breach of s16 – s45 Code of Practice “An authority is not expected to provide assistance to applicants whose requests are vexatious”

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This slide is just to highlight the Commissioner's approach that just because requests may initially be considered vexatious, this does not necessarily prevent the offering of advice and assistance (for example, in the Billings Tribunal case, the public authority initially claimed s.14 but were swiftly able to provide the information under the terms of the revised request following dialogue as part of the Commissioner's investigation). The ICO's investigation found that section 12 may apply and the public authority could have responded citing s12 and providing advice and assistance to narrow down the request.

So, where a public authority argues that a request is vexatious but the Commissioner concludes that s.14 is not engaged, the Commissioner may find a breach of s.16(1) if the public authority failed to provide advice and assistance because of their erroneous reliance on s.14 in circumstances where they would otherwise be required to do so (see LTT87 for the 'triggers' to providing advice and assistance).

- **Advice and assistance to those proposing to make requests (paras 4 to 7)**
- **Clarifying the request (paras 8 to 11) (see also LTT88)**
- **Limits to advice and assistance (para 12)**
- **Advice and assistance and fees (paras 13 to 15)**

If there is no trigger to provide advice and assistance or if section 14 was correctly applied (i.e. you are not in any of the situations above) then there is no section 16 duty and therefore no breach

Acting in Concert

Burden of proof on the public authority on the balance of probabilities

Not determinative in itself – adds weight to evidence of burden/distraction

FS50288812 – insufficient evidence

FS50304283 – sufficient evidence of acting in concert

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We recently received a query from a Police Force in relation to s14 and requesters acting in concert. This will be unusual in that a public authority is relying on refusing requests in the wider context of a number of linked requests from different individuals which it believes are associated.

The most important thing to note here is that it is for the public authority to prove on the balance of probabilities that there is a co-ordinated and concerted effort to make co-ordinated requests. It is worth noting that this in itself does not make a request vexatious. There should also be strong arguments under more than one of the five factors identified in the ICO's guidance. If a link can be established this is likely to add weight to arguments that the requests, submitted in concert, constitute a burden and consequently distract the public authority from other activities and functions.

Arguments made by the public authority in the case where this was upheld concerned:

- The substantial increase in the number of requests within a short period (ICO accepted it was less likely to have allocated resources to FOIA beyond normal course of business which adds to burden/distraction)
- The similarity in the information requested and the timing/content of the requests suggests a link to an individuals underlying complaint
- The complainant has acknowledged involvement in a campaign

Possible alternatives to section 14(1)

Section s14(2) Identical or substantially similar and a reasonable period has not elapsed

Costs s12 – where this is the main consideration

S1(3) reasonably requires further information in order to identify and locate the information requested and has informed the applicant – not obliged to reply until further information received

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We often find that public authorities are fairly cautious in the application of s14(1), maybe overly so and this is not to encourage avoiding its use. However, in some borderline cases these sections are the mostly likely alternatives that may provide a useful alternative where appropriate. I won't go into these in any detail as its not the focus of this workshop but it is worth considering that we are happy to provide written or verbal advice on our helpline in relation to FOIA.

Section 14(2) - “Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed.” Same / overlapping information not just same topic or phraseology.

Good Practice Examples

Referring to ICO guidance/five criteria in refusal notices and in correspondence with the ICO

Providing evidence to back up the criteria

Being clear about the specific request or theme that is being deemed vexatious adds weight to the argument that it is the request not requester being deemed vexatious

Answering requests from the same requester on other issues/themes

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The last couple of slides are drawn from case officers experience of dealing with section 14 cases. We have found that s14 is often upheld where these good practice principles are followed:

- Referring to ICO guidance/five criteria in refusal notices and in correspondence with the ICO
- Providing evidence to back up the criteria
- Being clear about the specific request or theme that is being deemed vexatious adds weight to the argument that it is the request not requester being deemed vexatious
- Answering requests from the same requester on other issues/themes

Common Weaknesses

Hinting that a request/series of requests is vexatious without issuing a s14 refusal notice

Lack of reliance on section 17(6)

Lack of explanation in the refusal notice can cause offence - more likely to lead to a complaint

Poor refusals notices/procedural complaints due to PA having 'had enough' and not following normal FOI procedures

Lack of control of how to deal with multiple requests

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The ICO has found that public authorities have had more difficulties where:

- Hinting that a request/series of requests is vexatious without issuing a s14 refusal notice
- Lack of reliance or reluctance to rely on section s17(6)
- Lack of explanation in the refusal notice can cause offence - more likely to lead to a complaint
- Poor refusals notices/procedural complaints due to PA having 'had enough' and not following normal FOI procedures
- Lack of control of how to deal with multiple requests

Also - if there is a significant gap in correspondence before a theme is then taken back up then need to consider if s14(1) is still appropriate – it may not be fair / justified – just because correspondence dates back a number of years it doesn't necessarily mean its vexatious, for example, the information may have changed.

Sometimes we find an individual wants an apology for being 'labelled' vexatious as a result of misunderstanding rather than concern about the information. Its fair to say this isn't always the PA fault.

We have also found that PA's channelling requests to one individual can reduce the burden significantly and that PAs often put up with 'outrageous behaviour' for too long before considering s14

Finally.....

Subject access requests can not be vexatious

Requests for information on a public authority's publication scheme are capable of being vexatious (although generally s21 will apply) and could be breaches of s19 for failure to publish

Requests for environmental information must be considered under EIR – can be refused as “manifestly unreasonable” but subject to the public interest test

Future changes?

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Just to finish on some final thoughts:

- Subject access requests can not be vexatious
- Requests for information on a public authority's publication scheme are capable of being vexatious (although generally s21 will apply) and could be breaches of s19 for failure to publish
- Requests for environmental information must be considered under EIR – can be refused as “manifestly unreasonable” but subject to the public interest test

Future: We are currently reviewing the FOI complaints procedure – it has been agreed that we need to be tougher with public authorities around their obligations and adopt a Right First Time policy BUT that we should also make clear to public authorities our expectations of them. We are also doing a guidance review. Your chance to put across your views...

Publication scheme – can be vexatious if meets necessary threshold based on context/history (short guidance contradicts this) – no breach of s1 if s14 applied BUT possible breaches of s19 if fail to publish in accordance with scheme. Published guidance on this needs updating – part of review.

Inspection is a form of publication and s21 will still apply to info made available by notice board ie parish councils

We want your views...

We are consulting on our draft information rights strategy.

This strategy is being introduced in light of our commitment to integrate our data protection and freedom of information activities wherever we can.

It replaces our former, separate data protection and freedom of information strategies.

The strategy describes the purpose for which the ICO exists and explains how we go about achieving this purpose.

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How to take part...

Please visit the consultations page of the ICO website:

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Case Study 1

Background

The subject matter of the complainant's correspondence with the public authority related to the grounds for his late grandfather's medal claims for service in WW2. It began in 2004 with the complainant disputing the handling of his grandfather's medal claims with particular reference to the alleged amendment of the Medal Regulations, referred to by the public authority in the course of processing the claims, and affecting his grandfather's eligibility for the War Medal.

Chronology

Following further correspondence in relation to the same matter in 2007 and 2008 the complainant submitted the following request for information in August 2008:

"I have no alternative but to apply, under the FOI Act 2000, for copies of all documents and information concerning my claims to the [public authority] for my late grandfather's medals for full-time service in the Second World War."

September 2008: the public authority provided a response to the complainant in which it enclosed copies of all of the information held pertaining to the request.

December 2008-May 2009: There was a significant chain of correspondence relating to the same subject matter, which included further requests for information. The public authority answered the correspondence on each occasion, either providing further information or stating that information had been provided previously. On several occasions within this correspondence the public authority cited section 14(1) FOIA as grounds for refusing compliance with future requests concerning the same subject matter.

May 2009: the complainant requested an internal review on the grounds that not all information had been provided and also disputed the application of section 14(1) FOIA.

August 2009: the public authority's internal review reiterated that all information covered by the request had been provided. The public authority also stated that it was not unreasonable that further requests on this subject would be treated as vexatious.

In its correspondence with the ICO the public authority said:

"...it was not unreasonable that the [public authority] should take the view that any further replies to additional requests from him on this specific subject would not be constructive and should be treated as vexatious under section 14 of the Act, given that [the complainant]'s continued requests have become obsessive and manifestly unreasonable."

In later correspondence the public authority references its application of section 14(1) FOIA to the complainant's further requests and asks the ICO to address this in the decision notice so the matter can be brought to a conclusion.

Questions

1. Are there any problems here with reference to the application of section 14(1) FOIA?
2. Would you have taken a different approach?

Case Study 2

Background

The complainant had been corresponding with the public authority for 7 years in relation to both professional and personal matters. Much of this correspondence related to personal grievances.

Numerous requests under the DPA and FOIA had been made in this period, in addition to formal complaints and further informal correspondence which was sent to a number of different departments within the public authority.

Chronology

March 2010 - request: "I ask to be provided with the [public authority] guidance to the integrity testing of police staff."

April 2010 – the public authority issued a refusal notice citing section 14(1) FOIA.

Public Authority Arguments

1. "a truly vast amount of correspondence" has been exchanged between the applicant and the public authority.
2. "It is also clear that the complainant's pursuit of information in respect of the investigation is another aspect in the applicant's longer standing grievance".
3. The complainant "is prepared to exceed the level that would be considered as 'reasonable' in his pursuit of information."
4. "Furthermore, the applicant has accompanied these formal approaches by frequent and lengthy emails, often containing further questions on the basis of any response received."
5. "continually expanding the volume of correspondence exchanged with the applicant, of engaging more and more [public authority] staff in dealing with his requests and complaints, and of inevitably increasing the number of both that are received from the applicant."
6. Since 2004: "41 Freedom of information Act requests; 24 formal complainants to the [public authority]; and 3 subject access requests under the Data Protection Act."

7. The [public authority] believed there was clear indication that the applicant was continuing his focus on [named officer], specifically seeking further details in relation to any involvement of or approaches to [named officer] in respect of...previous request[s]."

The public authority provided a table of correspondence and clearly outlined the requests/subject areas that had been deemed vexatious.

Complainant's Arguments

1. "I am not vexatious; I have no desire to cause irritation or annoyance."
2. "My behaviour is intentionally open and frank in respect of my requests, it is the actions of the [public authority] that requires scrutiny. I am requesting information in response to disclosures by the [public authority], by a senior [public authority] Officer..."
3. "...the [public authority] are withholding information for no other reason than they do not wish to supply it, whether it be my subject access data or other information I have sought under FOIA [the Freedom of Information Act] I question the integrity and agenda of the [public authority]."
4. "...[it is] designed to enable me to receive information and make an informed decision. The use of integrity testing was apparently applied to [named officer]...the officer raised this and I wish to understand the process...I wish to understand the guidance to better appreciate the implications on a member of public associated with same; such as me."

Questions

1. Could this request be deemed vexatious in isolation?
2. Which of the five considerations outlined in the ICO's guidance on vexatious requests are met?
3. Does the complainant present any arguments that may balance against the request being vexatious?
4. Could the request have been refused as vexatious taking into account the context and history?