Vexatious requests — still no easy answers

In this article, Emily Carter, Partner at Kingsley Napley LLP, considers the implications of the recent Dransfield decision on section 14 (vexatious requests) cases

Refusing to respond to a request on the basis that it is vexatious is one of the thornier areas of the Freedom of Information Act 2000 ('FOIA') for authorities. Such refusals will almost inevitably be followed by further correspondence, complaints, internal reviews and litigation.

The Court of Appeal has recently provided its judgment in *Dransfield v ICO & Devon County Council [*2015] EWCA Civ 454 (and a joint decision in *Craven v ICO & Department for Energy and Climate* which relates to a refusal under the Environmental Information Regulations 2004). The effect of the judgment is that the Upper Tribunal's earlier guidance concerning vexatious requests remains intact (see 'The vexed question of vexatiousness, repeated requests and unreasonable ones', in Volume 10, Issue 5 of Freedom of Information, pages 3-5, which discussed the guidance).

Although the Court of Appeal has helpfully confirmed the validity of existing principles, no hard edged rules emerge. Dealing with vexatious requests will continue to involve wise judgment and careful consideration of all the circumstances of the request.

Section 14 FOIA and existing guidance

Section 14 FOIA does not operate as an exemption to the Act, but rather (as described by the Upper Tribunal in *Dransfield* [paras: 10-11]) is a legislative 'get out of jail free card' for the 'purpose of protecting the resources of the authority from being squandered on disproportionate use of FOIA.'

Section 14 provides an exception to the usual rule that FOIA is blind to the identity of the requestor, or their motive. Despite this, it is accepted that the term 'vexatious' applies to the request and not the requestor.

A definition of 'vexatious' has been hard to come by. The Upper Tribunal in *Dransfield* approved [26] the statement in the Information Commissioner's guidance that 'the key question is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause'. The Upper Tribunal also set down four broad, non-exhaustive, issues [28] which should be borne in mind when considering whether a request is vexatious:

- the burden on the authority;
- the motive of the requestors;
- the value or seriousness of the request; and
- any harassment or distress caused to the staff.

Regulation 12(4)(b) of the Environmental Information Regulations 2004 ('EIRs') contains a similar provision to section 14 FOIA. Although it is an exemption and subject to the public interest test, the Regulation is otherwise similar to the FOIA provision and, if a request is 'manifestly unreasonable', it may be refused.

Mr Dransfield's request

The pattern of Mr Dransfield's requests is no doubt familiar to many authorities across the country.

Concerned about public safety, Mr Dransfield made a request to Devon County Council for drawings of a pedestrian bridge in Exeter, as well as a lightening protection system for that bridge. In the five year period leading up to the request, Mr Dransfield had also made ten FOIA requests involving lengthy correspondence about the 'Lafarge Concrete Scandal,' another pedestrian bridge and lightening protection system.

Prior to the relevant request, the tone of Mr Dransfield's correspondence on occasion had been 'extreme' and 'abusive' and he had made allegations of malfeasance and criminal behaviour. The Council had refused to correspond with Mr Dransfield by email given the volume of emails received. Despite the latest request being 'precise and politely worded,' the Council refused it under section 14(1) FOIA on the grounds that it was vexatious

Considering his case, the First-tier Tribunal separated the latest request from the previous ten requests and, on the basis it was 'simple and entirely benign', decided it was not vexatious. It ruled that for section 14 to apply, there needed to be some 'underlying grievance' rather than simply 'similarity of subject matter'.

Upon appeal by the Information Commissioner, the Upper Tribunal rejected this approach on the basis that it was too restrictive, and provided the useful guidance set out above.

Despite the emphasis in the Upper Tribunal's judgment upon justification for the request, Mr Dransfield's motive to uncover (what he considered were) important health and safety issues was outweighed by the disproportionate burden upon the authority, and the likelihood of a 'future barrage of correspondence.'

Permission to appeal to the Court of Appeal was only given to Mr Dransfield on one narrow point: whether, contrary to the decision of the Upper Tribunal, past requests were relevant only if they 'taint or infect' the request which is said to be vexatious.

Mr Dransfield did not challenge the guidance issued by the Upper Tribunal.

Arden LJ agreed with the instinct of the First-tier Tribunal that there should be some limit on the ability of the court to look at past dealings. Further, she specifically warned of the danger of tarring all requests with the same brush, and refusing a request for information which ought to be disclosed under the statutory regime.

She affirmed that the authority must consider all relevant information before it in good faith making a decision [70]. She reiterated that, in keeping with the constitutional principles underpinning FOIA, the threshold for refusing a request on the basis it is vexatious was a high one [68].

Arden LJ emphasised that assessing whether there was an objective justification for the request provided a more useful starting point than the requestor's motives for the request:

'The starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public' [68].

"It is unlikely that the Information Commissioner's already lengthy guidance on both vexatious requests under FOIA and manifestly unreasonable requests under the EIRs will need to be re-written following the Court of Appeal's judgment."

She therefore suggested that there may be some circumstances in which a request should be responded to so long as it is objectively justified, even though improperly motivated. However, at the end of the day, a 'rounded approach is required', and the First-tier Tribunal was wrong to try and draw bright lines between earlier requests and the request in question [69]. She therefore dismissed Mr Dransfield's appeal.

Arden LJ provided additional clarification which may be useful to authorities in the future. Although she was not able to second guess the Upper Tribunal's assessment of the evidence that the 'belligerent and unreasonable' tone of former correspondence may be continued in later correspondence, Arden LJ agreed that this was a conclusion that the authority was entitled to reach [71].

Finally, Arden LJ confirmed that although she agreed with the Upper Tribunal's indication that the purpose of FOIA was to 'protect the resources' of an authority, this was qualified by the high standard required for a request to be rejected on grounds of vexatiousness [72].

Mrs Craven's case

After a wayleave had been granted for a new powerline on her land, Mrs Craven made three overlapping FOIA requests in 2005, 2006 and 2010 to the Department for Energy and Climate Change, relating to high voltage overhead cables, and in particular the law relating governing the installation of overhead lines. The Department treated her second two requests as vexatious under section 14(1) FOIA.

Mrs Craven appealed to the Information Commissioner who determined that the request should have been dealt with under the EIRs, but nevertheless would have been correctly refused as manifestly unreasonable. Mrs Craven appealed to the First-tier Tribunal and thereafter, to the Upper Tribunal.

The Upper Tribunal considered whether it had been right to consider that there was no material difference between the two tests under FOIA and the EIRs. It confirmed that although the tests were conceptually different, it was difficult to think of a case where the outcome would be different [22].

There is no equivalent to section 12 FOIA within the EIRs, which allows an authority to refuse a request where the cost of compliance would exceed a statutory limit. The Upper Tribunal was also required to consider whether an extremely burdensome request could be the basis for concluding that the request was manifestly unreasonable under the EIRs. It concluded that it could be, so long as not outweighed by the public interest.

Further, despite the existence of section 12, the Upper Tribunal indicated that such a request could be rejected under FOIA on the same basis [28 – 30].

With respect to the alignment between the tests, the Court of Appeal agreed with the Upper Tribunal. Arden LJ referred back to her assessment that the FOIA test should have an objective foundation, which equated with 'unreasonable' under section 12 EIRs. The word 'manifestly' simply means that the unreasonableness must be clearly shown. The difference between the tests was therefore 'vanishingly small' [78]. Authorities can therefore put aside any concern with respect to which regime applies and concentrate on assessing the

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facts.

Again, with respect to the costs of compliance, Arden LJ agreed with the Upper Tribunal, confirming that there was no reason why the authority cannot take this into account under section 12 EIRs, as long as it was balanced against the benefits of disclosure.

Further, there was no reason to read section 14 FOIA as being subject to a qualification 'that a request cannot be vexatious in part, or solely because of, the cost of complying with the current request'[85]. However, for the most part, she confirmed that it would obviously be simpler for the authority to rely upon section 12 FIOA, rather than section 14.

The Information Commissioner's guidance

It is unlikely that the Information Commissioner's already lengthy guidance on both vexatious requests under FOIA and manifestly unreasonable requests under the EIRs will need to be re-written following the Court of Appeal's judgment. Other than Arden LJ's emphasis upon 'objective justification' as a starting point for assessing a request, it is clear that she was not interfering with the guidance issued by the Upper Tribunal in *Dransfield* concerning section 14 FOIA.

Therefore, the guidance continues to provide an essential first port of call for authorities. It includes many sensible practical suggestions with respect to responding to potentially vexatious or unreasonable requests before resorting to the legislation.

In particular, it is always worth making further enquiries concerning the ambit of the request or providing guidance with respect to information available.

In some cases, it may be worthwhile first providing a warning with respect to the tone of correspondence.

The Information Commissioner states that rejecting a request as vexatious should not just be reserved for the most extreme circumstances.

However, he also counsels that, in certain cases, adopting a conciliatory approach may achieve a better result than immediately rejecting a request as vexatious. However, as with all matters associated with this aspect of FOIA, this also requires careful consideration and wise judgment.

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