

Information Matters: New ICO Guidance on Section 14 FOIA – dealing with vexatious requests

Helen Mulligan and Jeremy Isaacson | 6 January 2016

We are writing just a quick post to draw your attention to the fact that the Information Commissioner's Office has issued a new, revised version of its popular guidance on section 14 FOIA, which covers dealing with vexatious requests.

The guidance has been updated to reflect the Court of Appeal's judgment in *Dransfield*, which was handed down in May 2015. Specifically, there was a suggestion that sections of Lady Justice Arden's judgment on the face of it hinted at a new, higher threshold for vexatiousness, with a particular focus on the *value* of the request. This would have been a significant departure from the existing judicial guidance on vexatiousness contained in Judge Wikeley's ruling when *Dransfield* was considered by the Upper Tribunal in 2012. Readers will remember that the Upper Tribunal's judgment forced the ICO to completely re-write its guidance on vexatiousness, introducing a much more flexible regime in place of its rigid "checklist" approach.

Many FOI officers will be relieved to see that - as far as the ICO is concerned - the Court of Appeal ruling should not be interpreted as creating a new, higher threshold for vexatiousness and that it is therefore 'business as usual' in terms of applying the existing law. This reflects the ICO's position in the decision notices on s14 which were issued in the second half of 2015.

The relevant portions of the new guidance, including relevant extracts from the Court of Appeal ruling, are contained in paragraphs 20 to 22 of the new guidance as follows:

- “20. At the subsequent Court of Appeal Case (*Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015)), Lady Judge Arden observed that;

“...the emphasis should be on an objective standard and that 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.” (Para 68)

21. Whilst, on face value, the Judge's ruling might appear to suggest a higher test for vexatiousness, with more of an emphasis on the value of the

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request, we don't regard it as a departure from the position taken by the Upper Tribunal. This is because she also went on to say:

"The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious."
(Para 68)

22. This being the case, we would suggest that the key question the public authority must ask itself is whether the request is likely to cause a **disproportionate** or **unjustified** level of disruption, irritation or distress."

Mr Dransfield has been refused permission to appeal to the Supreme Court, so it looks like this will be the final word on a case which has totally re-shaped the interpretation of Section 14. However, the Court of Appeal judgment does, arguably, indicate a slight swinging back of the pendulum on vexatiousness in favour of requesters, even if the Court of Appeal ultimately supported the Upper Tribunal. Whilst the ICO is clearly sticking to its guns for now, it will be interesting to see whether future Tribunal decisions further strengthen that position, or take us (once again) in a new direction on this difficult and highly subjective area.

The timing of the publication of the new guidance coincides with the on-going work of the *Independent Commission on Freedom of Information*, which - amongst other things - is considering the burden FOIA imposes on public authorities and, specifically, whether that burden is justified by the public interest in the public's right to know. Section 14 is, of course, one of the provisions in FOIA which helps public authorities refuse burdensome requests (alongside the s12 costs exemption - see our earlier post on the interplay [here](#)).

You can view the new version of the ICO's guidance via [this link](#).

For more information on the revised guidance or in relation to Freedom of Information more generally, please contact [Helen Mulligan](mailto:helen.mulligan@farrer.co.uk) (helen.mulligan@farrer.co.uk; 020 3375 7196) or [Jeremy Isaacson](mailto:jeremy.isaacson@farrer.co.uk) (jeremy.isaacson@farrer.co.uk; 020 3375 7513) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the [Intellectual Property](#) page on our website.

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