Browne Jacobson

Freedom of information - vexatious and costly requests

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Responding to requests under the Freedom of Information Act 2000 ('the Act') may be both time consuming and costly for public authorities to manage. The Act offers procedural exemptions[1] under section 14, relating to repeat and vexatious requests; and section 12, relating to excessive costs. Whilst public authorities have historically been slow to refuse to respond to requests in reliance on either of those exemptions; three cases appealed to the Upper Tribunal last year should assist authorities in considering the appropriate response to those requests made under the Act that cause the greatest burden.

The leading judgment in this area is **Dransfield v Information Commissioner and Devon County Council** [2015] EWCA Civ 454. The Court of Appeal provided helpful instruction on how to approach sections 12 and 14 of the Act by approving the guidance provided by the Upper Tribunal. This guidance provided that the four broad issues that should be applied in deciding whether a request is vexatious are:

1. the burden of providing the information requested on the public authority and its staff;
2. the motive of the requester;
3. the value or serious purpose of the request; and
4. any harassment or distress to staff.

The Court of Appeal did not, however, provide a comprehensive definition of vexatiousness, instead taking the approach that the meaning would be 'winnowed out' as further cases came before the courts.

Burdensome as vexatious

Section 12 may only be relied on when the appropriate costs limit[2] is likely to be exceeded by complying with the request. The activities that can be taken into account in calculating costs for the purposes of this section are prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'), and do not include the activities likely to take up a significant amount of time: considering whether any exemptions apply and undertaking any necessary redactions. It is therefore often necessary for an authority to seek to rely on section 14 and the 'burdensome' aspect of vexatiousness to avoid dealing with requests that are likely to involve a significant amount of time but that time does not exceed the appropriate time limit. Where there are no other aspects of vexatiousness present, and/or where there is considerable public interest in the information sought by the request, it may be difficult to persuade the Information Commissioner and/or the Tribunal that refusal in reliance on section 14 is justified, especially when presented with an eminently reasonable requestor making a sensible request for information in the public interest.

It was exactly those issues that came before the Upper Tribunal in the case of **Cabinet Office v Information Commissioner & Ashton** [2018] UKUT 208 (AAC); namely where the issue of vexatiousness was based on burden alone, and whether a compelling public interest in the disclosure may necessarily trump the burden involved in complying with a request.

The case concerned a request made by Professor Ashton for six Prime Minister's Office files relating to British relations with Libya between 1990 and 2002. The Cabinet Office formally refused the request on the grounds that it was 'vexatious' within section 14(1) of the Act. The Cabinet Office had also submitted that the costs involved would have been, on its estimate, in excess of the appropriate limit under section 12 of the Act. This element of the case was dismissed by the First Tier Tribunal ('FTT') on the basis that the majority of the time allocated had been for the purpose of identifying redactions made in the need of public security. Such redactions were outside of the scope of prescribed costs under the Regulations so could not be taken into account in deciding whether the costs limit had been exceeded, rendering section 12 of no assistance to the Cabinet Office.

In respect of the section 14 exemption, reliance was on the burden of the request alone and there was no doubt that the request would have taken some considerable time for the Cabinet Office to review. The First Tier Tribunal did not accept the position of the Cabinet Office, instead reaching the conclusion that *"where a clear and substantial public interest in the request has been established, s14 cannot be invoked simply on the grounds of resources"*. Thankfully the Upper Tribunal disagreed.

The judgment of the Upper Tribunal is helpful in endorsing the view that section 14 can be relied upon in the context of burden alone without any other aspects of vexatiousness being present. The Upper Tribunal concurred with the summary of section 14 principles given in **CP v Information Commissioner** [2016] UKUT 427 (AAC), making clear that the public interest cannot be used as a trump card to justify the disclosure:

"The law is thus absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument." (paragraph 27)

The Upper Tribunal decided on the facts in **Ashton** that the First Tier Tribunal had not erred in law. In this instance, and the Upper Tribunal emphasised the particular circumstances of the case, the public interest in disclosure outweighed the burden that would be involved in dealing with the request.

The Upper Tribunal confirmed that as a matter of principle, the ICO was right to oppose the Cabinet Office's contention that *"section 14(1) entitled a public authority to refuse to comply with a request for information on the general basis that it is struggling to meet a large number of obligations with limited resources"* (paragraph 50). Public authorities should therefore be careful not to place great reliance on a general absence of resource when applying section 14.

Vexatious by conduct

Another appeal to consider the section 14 principles, again following **CP v Information Commissioner was the case of Oxford Phoenix Innovation Ltd v Information Commissioner & Medicines and Healthcare Products Regulatory Agency** [2018] UKUT 192 (AAC). The requestor in that case was an inventor of a medical device called the 'Whizz Midstream'. He had been in protracted discussions with the Medicines and Healthcare Products Regulatory Agency (MHRA) in relation to issues around competitors' products and regulatory compliance. He believed that there had been a conspiracy to send him out of business. Having made a number of freedom of information requests to which the MHRA provided a response, three further requests were refused under section 14 on the basis that they were vexatious. The ICO upheld the MHRA's refusals and the First Tier Tribunal similarly found the requests to be vexatious.

The Upper Tribunal accepted that analytical focus should be on whether a request itself is vexatious rather than on the requestor, but found that the First Tier Tribunal had been correct to take into account the history of dealings between the requestor and the MHRA and the fact that the requestor felt that the MHRA had been *"at war"* with him. The Upper Tribunal concluded that:

"The fact that there had once been a genuine dispute does not stop a request becoming "vexatious by drift" (see Dransfield in the Upper Tribunal). That is what the FTT decided here. In the FTT's assessment, Mr Levinson was using FOIA as a means of "carrying on the war by any other means". The tribunal clearly meant that any proper purpose to the request had been overshadowed and extinguished by his improper pursuit of the "war" with MHRA, and that was why it concluded that the MHRA was entitled to say "Enough is enough"."
(paragraph 87)

This is perhaps an unsurprising result, given the nature of the requestor's conduct and history between the parties. It provides helpful direction in the need to focus on the request itself rather the requester, whilst acknowledging that there is a need for proper consideration of the history of relations.

Costly requests

The other most commonly used exemption is in respect of costs. In **Kirkham v Information Commissioner** [2018] UKUT 126 (AAC), the costs exemption provided by section 12 of the Act was considered in detail.

In this case, Mr Kirkham had sought information from the University of Cambridge relating to the proposals that it had made to the Engineering and Physical Sciences Research Council which had called for applications for doctoral training. The University of Cambridge had offered to respond to part of one of the limbs of Mr Kirkham's request but had, in the main, relied on the costs exemption under section 12 in declining to respond to the remainder of the request. Importantly, the University of Cambridge had in fact made an estimate of the costs estimated to be incurred in dealing with the request. Much of Mr Kirkham's argument involved criticism of the methodology that the University of Cambridge had used in calculating that estimate, on the basis that a more stringent evidence-based approach with considerable mathematical rigour should have been applied. The Upper Tribunal was unwilling to accept his approach, stating:

"Mr Kirkham set out in detail what I take to be the gold standard mathematical approach to making an estimate… I do not accept that an estimate has to be made with the scientific rigour that he described." (paragraph 23)

Instead, the Upper Tribunal advocated for the reading of the term 'estimate' in line with its ordinary use:

"'Estimate' is an ordinary word that is used in everyday language without the precision that Mr Kirkham attributes to it. He may be right that in a scientific context, that meaning is the right one. But legislation is not interpreted in a scientific context. The touchstone is the ordinary use of language. I can find nothing in the context of the legislation to suggest a narrower meaning." (paragraph 25)

This case reflects what has always been good practice; that an authority seeking to rely on section 12 must have made an estimate of the costs involved and that estimate must be reasonable. Satisfaction of this test will be subjective to the authority but with an objective element of reasonableness which will allow the Commissioner and/or the Tribunal to remove from an estimate any amount that the authority could not be reasonably expected to have incurred because of the nature of the activity to which the cost relates or its amount.

Further, the Upper Tribunal accepted that whilst it is not for the ICO or the First Tier Tribunal to create their own estimates, they can and should rigorously test the estimate relied upon by the authority. That estimate need not be perfectly precise but the method followed *"must be capable of producing a result with the precision required by the legislation in the circumstances of the case… if it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls"*.

The requestor was willing to accept a search for the information requested which did not extend to *"every nook and cranny"*, which he considered would be sufficient for his purpose. The Upper Tribunal considered that such an approach would not have complied with the University of Cambridge's duty under section 1 of the Act.

The estimate relied upon by the University of Cambridge was based on undertaking the full search required for compliance with its duties under the Act, not with what the requestor would accept.

This is a useful case for public authorities considering the appropriate approach to making a reasonable estimate of the costs in complying with a freedom of information request. It also highlights the importance of ensuring such an estimate takes into consideration the authority's duty to find all information within the scope of the request that was made.

Summary

The balance between the right to information and the management of vexatious requests will no doubt continue to be the subject of litigation. These latest cases make clear that public interest will not always win out and relations between the parties can be considered in assessing whether a request is vexatious.

When it comes to cost, public authorities should ensure that estimates are completed, but there is no requirement to ensure they go beyond what would ordinarily be expected of an estimate.

Public authorities should also consider the Freedom of Information Code of Practice, published by the ICO in July 2018, for helpful guidance on the discharge of their functions and use of sections 12 and 14 in refusing to respond to requests. The Code, whilst noting that it is important to carefully consider applying section 14, indicates that it is not something only *"to be applied as a last resort or in exceptional circumstances"*. Considering this with the line of authorities in this area, we may be seeing a shift in direction of public authorities' ability to, and confidence in, refusing requests on the basis that they are vexatious or too costly.

[1] Sections 12 and 14 are threshold exemptions. If an authority relies on one or both of those sections it does not have to deal with the substantive request.

[2] The cost limit is calculated at a flat rate of £25 per hour. For central government departments the cost limit is £600 (24 hours) and for other public authorities it is £450 (18 hours).

Contact

Hannah Payne

Senior Associate

hannah.payne@brownejacobson.com

+44 (0)330 045 2371

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