The Campaign for Freedom of Information

Lower Ground Floor
5-7 Highgate Road
London NW5 1JY
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk

Response to Information Commissioner Office consultation

Prioritising access to information complaints

22 December 2022

About the Campaign for Freedom of Information

The Campaign for Freedom of Information was set up in 1984 and played a key part in persuading the government of the day to introduce the Freedom of Information Act 2000 and securing improvements during its Parliamentary passage. Since the Act came into force in 2005 the Campaign has monitored and sought to improve its operation, provided assistance to requesters and trained both requesters and public authorities.

The Campaign's work is funded by the Joseph Rowntree Charitable Trust, the Joseph Rowntree Reform Trust and the Andrew Wainwright Reform Trust.

Summary

We welcome the ICO's proposed objective of prioritising complaints that are of significant public interest and its target of prioritising 10-15% of all complaints, while improving the speed with which non-prioritised cases are dealt with. These are ambitious targets which may not be easy to meet. If achieved they will – together with the separately proposed action to address delays by public authorities - reinvigorate the whole FOI system.

However, we:

- **do not agree that particular types of requester should be given priority**

- **have serious concerns about the ICO's proposal to reject more complaints as 'frivolous or vexatious' without investigation. The way in which this would be done would also deprive requesters of any right of appeal against the ICO's decision.**

Public interest criteria

The consultation paper identifies a number of criteria which the ICO will use in deciding which complaints should be prioritised on the grounds of significant public interest. These are whether the case is subject to significant media interest, whether it involves a large amount of public money, whether the requester needs the information to respond to a significant public consultation within a deadline, whether the information would have a significant impact on vulnerable groups of people and whether the information would have significant operational benefits (presumably to the ICO).

We agree with these criteria but they are not comprehensive. For example, information needed to promote informed discussion of legislation before Parliament should be covered, regardless of whether it has attracted the media's attention.

Complaints which illustrate a pattern of delay or non-compliance by a public authority or authorities in responding requests should also qualify for prioritisation. These would presumably fall under the 'operational benefit' heading referred to above but should be specified.

We question whether 'round robin' requests should be listed under the 'operational benefit' heading. Round robin requests may sometimes be made to compare the performance of authorities within a region or sector. But they are often made to seek commercial opportunities or to attempt to substantiate clearly fanciful hypotheses. The primary focus should be on the

public interest in the requested information itself. A series of requests aimed at building up a regional or national picture of how authorities are meeting their responsibilities may be of particular public interest - but this depends on the issue involved. The mere fact that multiple identical requests have been made to different authorities is not in itself a factor that we think should be given weight.

We welcome the consultation paper's recognition that new criteria may need to be adopted in response to new complaints.

Requester type

The consultation suggests that requests may be prioritised based on the type of person making the request. We do not believe that the identity of the requester (e.g. as a journalist, civil society group, elected representative, or representative of a vulnerable group) should be a factor in prioritisation. Members of these groups are likely to make requests which are in the public interest. However, they may also seek information which is of historical rather than current, is designed to generate light-hearted 'diary' items or is intended to further a long-term objective which, while in the public interest, may not currently be time-sensitive.

We do not think the new approach should focus on these specified types of requester – or on the identity of the requester at all. The test should be that the withheld information is of significant public interest and the request is made by a person who has an ability to contribute to public debate. This would better satisfy the applicant-blind principle than giving priority to specified groups. It would also avoid disadvantaging those (such as independent experts, researchers, bloggers, trade unions or professional bodies) who are not in the proposed groups but may make an equally important contribution to informing public debate. At its simplest, a researcher who is in the habit of passing significant information obtained under FOIA to a journalist who then reports on it should be as capable of benefiting from prioritisation as a journalist who makes such requests themselves. However, someone who makes requests about newsworthy matters but makes no serious effort to publicise the information would not qualify for prioritisation under this test.

Under this approach there would be no need to separately list a person supporting vulnerable groups (as a qualifying requester) and information directly affecting vulnerable groups (as a qualifying public interest), as the consultation document does. Only the latter would need to be specified.

Reducing the period in which a complaint should be made

The consultation document proposes reducing the period within which a complaint to the ICO can be made from three months to six weeks from the public authority's final response, unless there are exceptional mitigating factors. We think this is reasonable.

Chance of success

The prioritisation of cases may need take account of the likelihood that the final outcome of a case could be additional disclosure. For example, there may be no point prioritising requests for an authority's legal advice, unless there are specific reasons to believe it may be one of the rare cases where the public interest balance could favour disclosure. The same may be true for requests for cabinet committee papers or those which on their face appear to involve exemptions such as those in sections 23 or 44, unless it seems likely that these may have been wrongly claimed.

Knock-on effects of prioritisation

Although the ICO is used to comparing the public interest case for and against disclosure in particular cases, this proposal involves rating the public interest in *different* complaints *against each other* – an entirely different exercise. While the decision in some cases may seem obvious, in other cases we assume it will involve rejecting cases which have virtually the same claim to prioritisation as those selected, but which cannot be accommodated because of the large numbers. We would be concerned if the consequence of prioritising some requests meant that other meritorious but unprioritised cases took longer to deal with than at present. We recognise that the intention is that this should not happen. We hope the ICO will monitor the actual effects of the approach in practice and be prepared to adjust it to ensure that the improvements achieved for prioritised cases is not at the expense of increased delays for other cases, particularly those which themselves involve significant public interest. We would also be concerned if the prioritisation arrangements increased the chance of some complaints being rejected altogether without investigation on the grounds of being frivolous or vexatious (see below).

Documenting outcomes

It is important that the outcomes of the prioritisation policy should be publicly accessible. We suggest that:

- The ICO's monthly summary of open FOI/EIR casework should include the number of prioritised cases

- the ICO's quarterly datasets of completed FOI/EIR complaint cases should indicate which cases have been prioritised

- the ICO should publish figures comparing the time taken to deal with equivalent prioritised and unprioritised complaints in its annual report. These should ensure the compared groups are similar, e.g. by including only cases involving the investigation of exemptions and s.12/s.14 refusals in both groups.

Frivolous requests

The ICO is entitled to reject complaints without investigating them under section 50(2)(c) of FOIA if they are 'frivolous or vexatious'. The consultation document proposes that the ICO should reject complaints to it as 'frivolous' where '*there is such a low public interest in the information requested that it would be a disproportionate use of our resources to investigate it.'*

This suggests that the ICO will only investigate complaints where they involve sufficient *public interest* - implying that it will not investigate those which serve a *purely private* interest. Nothing in FOIA suggests that the latter are invalid or an abuse of the legislation.[1]

In deciding whether a request is vexatious, the question of whether it has a serious purpose is critical. The Upper Tribunal has held that '*A request can have a value or a serious purpose while serving an entirely private interest.'*[2] The question of whether a request has a serious purposes is even more relevant to a potentially frivolous request as ordinarily 'frivolous' refers to something which lacks serious purpose.

---

[1] The Upper Tribunal has held that: 'The long title of FOIA describes it as an Act to make provision for the disclosure of information held by public authorities, and there is no provision which expressly confines the use of information requested under s1(1) to the pursuance of public interests. Also, there is no prior qualification for the making of a valid freedom of information request: any person can make such a request at any time, usually without cost. So, FOIA can legitimately be used to assist private interests where a person's interests are affected by matters on which a public authority holds information.' *Browning & Information Commissioner & Department for Business, Innovation and Skills, [2013] UKUT 236 (AAC)* at 55

[2] *Soh v Information Commissioner*, [2016] UKUT 249 (AAC) at 80

But it does not follow that a request which lacks *public interest* is frivolous, particularly if it serves a *serious private interest*. This may occur when, for example, someone seeks information from a public authority to assist in a case alleging unfair dismissal by their employer. The lack of a *public* interest in such a case should not mean that a complaint to the ICO about a refusal to disclose is necessarily *frivolous*. The consequence would be that the ICO would not investigate the complaint, there would be no decision notice on it and therefore no right of appeal to the First-tier Tribunal. The requester's only remedy would be to challenge the 'frivolous' finding by judicial review.[3] We do not object to the ICO treating complaints as frivolous when requests have no serious purpose, but the focus should be the lack of serious purpose – not the lack of public interest.

Vexatious requests

We strongly disagree with the measures proposed to reduce the time the ICO spends investigating vexatious refusals. The consultation proposes that where: *'a public body has clearly followed the Commissioner's guidance, modelled on the tests set out by the Tribunal, we will not make a decision as we will consider the complaint itself vexatious.'* The consultation adds that where it appears that an authority has wrongly applied the tests or not applied them at all the ICO *will* investigate the complaint.

This suggests that where an authority appears to have applied the correct test(s) for deciding that a request is vexatious, the ICO may simply accept its word without confirming the facts and will treat a complaint about the refusal as itself vexatious. We do not understand how this can provide a fair remedy for requesters whose requests may have been unfairly refused as vexatious.

The ICO's guidance on vexatious requests is a complex document running to 46 pages. There are a range of different factors which may indicate that a request is vexatious and which may combine in innumerable ways. In each case, a public authority is required to reach *'what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.*[4] Many cases turn on the question of whether the likely burden of complying with a request has been correctly assessed and whether it is disproportionate in relation to the value of the information.

There is no mechanical way of approaching these questions and no basis for assuming that because an authority has correctly *described* the relevant tests it has correctly *applied* them.

---

[3] *Dransfield v Information Commissioner*, [2020] UKUT 346 (AAC), 49-50
[4] *Information Commissioner v Devon CC and Dransfield*, [2012] UKUT 440 (AAC) at 82

For example, in 2016 the Cabinet Office received a request for certain details of all projects commissioned under a particular framework agreement. This was initially refused as prejudicial to commercial interests and later on the grounds that it was vexatious. The Cabinet Office accurately cited a section of the ICO's vexatiousness guidance which deals with requests which involve a substantial volume of information, where potentially exempt information is scattered throughout and working through this volume of material to find and redact the exempt information would cause 'a grossly oppressive burden'.

The Cabinet Office explained that the requested information consisted of 6,189 contracts; that four separate exemptions were likely to be involved and that each contracted piece of work would have to be reviewed to identify and remove sensitive information.

This claim fell apart when the ICO examined the withheld information. It found that it was held in a single spreadsheet. There was no 'substantial volume' of information. The spreadsheet contained no details of the projects and no evidence of any exempt information except perhaps the fees paid under the contracts. These were contained in a single column which could simply be withheld from disclosure. The ICO rejected the claim that the request was vexatious and ordered release of the remaining information.[5]

This may not happen in future. Under the present proposals, the ICO would be under no obligation to test such claims. If it found the authority's account plausible it could treat a complaint about the decision as itself vexatious, dismiss it without investigation with no right of appeal to the tribunal.

The Court of Appeal has said that by adopting the term 'vexatious':

> *'Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the [FOI] right'*[6]

The proposals appear to dispense with any suggestion that this hurdle is a high one.

We do not think complaints about such decisions should be treated as vexatious themselves solely because the authority claims to have followed ICO guidance and the ICO accepts the claim.

---

[5] ICO Decision Notice F550640132, September 2017
[6] *Dransfield v The Information Commissioner* [2015] EWCA Civ 454 at 68

The ICO's datasets of closed cases indicate that it has issued 78 decision notices on requests refused as vexatious under section 14(1) of FOIA over the year to the end of 2021. It has overturned that the public authority's decision in 30% of these (23 out of 78).[7] A significant proportion of public authority vexatious findings are therefore being overturned on investigation.

The consultation paper raises the prospect that such investigations may be dropped altogether if the ICO accepts the authority's claim to have followed its guidance. This conclusion will presumably be reached without independently examining the facts of the case. The dangers are illustrated by the Cabinet Office case above. We do not consider this approach justified, particularly as the result will be to reject the complaint without investigation and with no right of appeal. The result may be to encourage public authorities to refuse more requests as vexatious in the knowledge that they will now be less likely to have to demonstrate to the ICO or tribunal that the refusal is justified.

---

[7] These statistics are from the Campaign's analysis of the following datasets: 'FOI Complaints Q4 2020/21', FOI Complaints Q1 2021/22', 'FOI Complaints Q2 2021/22', 'FOI Complaints Q3 2021/22' available here.