

Decision Notice

Decision 158/2019: The Applicant and the University of the West of Scotland

Use of SafeMedicate: whether the request is vexatious

Reference No: 201900719

Decision Date: 29 October 2019



Scottish Information
Commissioner

Summary

The University refused to respond to a request on the basis that it was vexatious.

The Commissioner investigated, but was not satisfied that the University had demonstrated that the request was vexatious. He required the University to respond otherwise than in terms of section 14(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests); 15(1) (Duty to provide advice and assistance)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 16 April 2019, the Applicant made a wide ranging request for information to the University of the West of Scotland (the University). The request sought information relating to the use of SafeMedicate in University assessments; including the moderation or amendment of student results, the delay in SafeMedicate results being communicated to students and the availability of a paper copy of the exam.
2. The University wrote to the Applicant on 24 April 2019. It summarised the correspondence the Applicant had had with the University and other bodies about the use of the SafeMedicate system from 2017 onwards and notified him that it was refusing to comply with his request as it considered it to be vexatious, in terms of section 14(1) of FOISA.
3. On 24 and 25 April 2019, the Applicant wrote to the University requesting a review of its decision on the basis that he did not agree that his information request was vexatious.
4. The University notified the Applicant of the outcome of its review on 26 April 2019. The University maintained its position that his request was vexatious and upheld its application of section 14(1).
5. On 5 May 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the University's review because he did not agree that his information request was vexatious.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 4 June 2019, the University was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The University was invited to comment on this application and to answer specific questions, focusing on the requirements of section 14(1) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the University. He is satisfied that no matter of relevance has been overlooked.

Section 14(1) - Vexatious or repeated requests

10. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.
11. FOISA does not define the word "vexatious". The Commissioner's general approach, as set out in his guidance on section 14(1)¹, is that the following factors are relevant when considering whether a request is vexatious. These are that the request:
- (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
12. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all circumstances into account. The term "vexatious" must be applied to the request and not the requester, but an Applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.

University's submissions

13. In its initial response to the Applicant, the University referred to the 36 questions that formed his request for information and it stated that:

"It has been recognised by the Commissioner that if the request has the effect of harassing the public authority and/or its staff, it may be deemed vexatious when considered from the perspective of a reasonable person. In this case, the University has already responded to a large amount of correspondence and University staff have expressed concerns previously about repeatedly being asked to respond to questions on the use of the SafeMedicate system".

¹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

14. The University provided a summary of the Applicant's correspondence with itself and external bodies over the previous two years and it argued that the Applicant was using Freedom of Information legislation to reopen and continue dialogue about concerns that have already been handled through all available channels.
15. The University noted that none of the external bodies contacted by the Applicant had found in the Applicant's favour and it took the view that it was unlikely that the provision of further information (in this case) would bring the Applicant any resolution. The University argued that complying with the request would only serve to continue correspondence that has already been ongoing for several years without any conclusions.
16. In submissions to the Commissioner, the University stated that it had received more than 50 letters or emails from the Applicant since April 2017, including two FOI requests. The University submitted that there had also been considerable correspondence received from other parties on his behalf, such as the Qualifications Assurance Agency, Nursing and Midwifery Council, Scottish Government, Scottish Public Services Ombudsman and MSPs.
17. The University stated that staff members have expressed concern that the repeated correspondence was causing them stress and upset.
18. It noted that, while it was preparing its response to the Commissioner, it had to contact members of staff who had already notified the University that they were distressed by the matter and feel there is nothing further they can add to what has already been provided. The University submitted that it has a duty of care to provide all staff with a suitable working environment, which would include ensuring that they are not subjected to unjustified levels of stress.
19. The University argued that allowing the Applicant to use FOI legislation to re-open matters that have already been appropriately and rigorously addressed, both internally and externally, would have a significant detrimental effect on University operations and on its staff members.
20. The University was asked whether it considered it had complied with the duties contained in section 15(1) of FOISA, which require an authority to offer advice and assistance to a person who has made a request for information.
21. The University noted that it was aware of the requirements of section 15(1) of FOISA and it was satisfied that it had complied with those requirements. The University referred to the response it had provided to the Applicant's earlier information request (made prior to this request) and it submitted that it had responded to a question that was seeking clarification of issues that were not within the scope of FOISA. The University noted that there are other examples in that response where it provided clarification to questions that would not fall under the scope of FOISA.
22. The University stated:

"...given the considerable volume of correspondence received from [the Applicant] and the fact that a number of staff members had already indicated that they were stressed and upset by this repeated correspondence, it would be unreasonable to continually assist [the Applicant] to reframe his response to allow him to submit more requests to us in relation to matters where internal and external processes had already been exhausted and where three external agencies have not upheld the complaints against us."

The Applicant's submissions

23. The Applicant disputed that his request was vexatious. He contended that, despite the involvement of external bodies, the University had never answered the questions he had asked in his request, such as the reasons why students all have the same exam password for SafeMedicate.
24. During telephone conversations with the investigating officer, the Applicant expressed frustration with the lack of answers provided to him by the University over the last two years, and stressed that the only reason he made this request was to try and get information.
25. In written correspondence, he noted that the University has previously disclosed that it checks students' answers (on SafeMedicate) for typos and careless errors, but that it has never provided him with information on what happens if a "careless error" or "typo" is identified. The Applicant argued that the University must have a written policy on this procedure, but he has never been provided with it. The Applicant reiterated his view that his information request has merit and is not vexatious.
26. The Applicant referred to the University's response to his information request, noting its acknowledgement that responding to his request would not impose a significant burden either in cost or in staff time.
27. The Applicant commented that, during the last two years, he has tried to get answers to his questions about the University's use of SafeMedicate but, while he has often received replies, he has never received any answers. The Applicant noted that every time he has approached one of the regulatory bodies they have failed to provide him with clarity and he has had to approach another regulatory body to help. In his view, this has led to him going round in circles, and has enabled the University to claim that his request is vexatious.

The Commissioner's view

28. The Commissioner has carefully considered the submissions made by the University, intended to demonstrate that dealing with the Applicant's request was having a detrimental impact on its staff and that the Applicant was using FOISA to reopen matters that have already been rigorously addressed.
29. In this case, the Commissioner is limited to considering whether the University has provided sufficient evidence and submissions to support its claim that the application of section 14(1) was appropriate in the circumstances.
30. Even if a requester does not intend to cause inconvenience or create a significant burden, if a request has the effect of harassing a public authority and/or its staff, it may be deemed vexatious when considered from the perspective of a reasonable person.
31. The Applicant contends that his request has merit and is not vexatious as the University has never provided him with answers, despite the involvement of several external bodies. To investigate this point, the Commissioner selected five of the 36 requests made by the Applicant on 16 April 2019 and asked the University to provide him with evidence that it has provided the Applicant with information that satisfies each request.
32. In response, the University provided the Commissioner with copies of correspondence exchanged with the Applicant and it also provided additional information about each request.
33. The Commissioner has carefully reviewed the evidence supplied by the University. He does not accept that the documents referred to by the University have provided the Applicant with a response to the specific requests he has made in this current application. The University

has “married up” the requests to previous questions posed by the Applicant, but while they may be similar they are not identical and they capture different information. The University has also argued that the Applicant would have received some responses in a classroom setting or in face to face meetings. The Commissioner acknowledges that this may have happened, but he would require evidence of the information exchange at these meetings to uphold this. He must also recognise that comments made in a classroom setting or in face to face meeting cannot usually be equated with information disclosed in response to a FOISA request.

34. The Commissioner concludes that, in relation to these five specific requests, the University has not previously provided the Applicant with information that satisfies each request. The Commissioner considers it likely that the University will have addressed some of the remaining 36 requests previously, but it has not complied with the five specific requests he identified.
35. Given the lack of evidence to the contrary, the Commissioner cannot support the University’s argument that this request is simply a continuation of dialogue on issues that have already been resolved. It is clear that the University has not previously provided the Applicant with the information he has asked for.
36. The University has also argued that members of its staff are suffering from ongoing stress by the Applicant’s pursuit of matters which they consider to be resolved.
37. The Commissioner recognises that the University has an obligation to ensure that its staff work in a safe environment and that they are not subjected to unjustified levels of stress. The University has a duty of care to its staff and must consider their wellbeing. However, the University also has responsibilities under FOISA and it cannot deny the Applicant his right to access recorded information without just cause.
38. The Commissioner has reviewed the submissions made by the University as well as the examples of correspondence sent to the University by the Applicant. The Commissioner does not consider the Applicant’s correspondence to be abusive or aggressive. He does not consider 50 pieces of correspondence in two years to be overly excessive, especially when part of that correspondence originated while the Applicant was a student and related to issues regarding his course. It is reasonable to expect a University student to contact the University department he is studying at with questions about course exams and placements.
39. The University has stated that staff are “...*distressed by this matter and feel that there is nothing further they can add to what has already been provided*”.
40. The Commissioner accepts that staff members may be frustrated by the nature of this correspondence, but this does not in itself make a request for information vexatious. The unreasonable pursuit of a complaint, for which all appropriate remedies had been exhausted, might be vexatious, but the Commissioner must draw a distinction between the consideration of the Applicant’s specific complaints by other regulators and providing specific information sought by the Applicant. The Commissioner cannot see (and the University has not explained) why responding to such a request would cause staff undue stress. In reaching this conclusion, he has noted that the appropriate response to a number of the requests made by the Applicant may be to provide notice under section 17(1) of FOISA that the information requested is not held.
41. The Commissioner is not satisfied that it would be reasonable to view this request as harassment. He is not satisfied that the requester’s purpose, at this stage, was to pursue an

argument rather than to obtain information. The Commissioner has not received sufficient evidence to conclude that the Applicant has been provided with this information or a FOISA compliant response to his requests for information.

42. In the Commissioner's opinion, the University has not provided sufficient evidence that the content of the Applicant's communications, up until the point this request was received, would, in the opinion of a reasonable person, have the effect of harassing anyone.
43. In addition, the University has not provided the Commissioner with evidence that the Applicant has had any recent contact with the affected staff; it appears that another University department is processing the Applicant's correspondence and contacting the affected staff for comment. The Commissioner does not consider that this constitutes unjustified stress or harassment.
44. In this case, the Commissioner does not believe he has been presented with sufficient evidence to conclude that the request was vexatious. He is not satisfied that it would be reasonable to view this request as harassment, even viewed in a context of persistent correspondence (which, given the background, he does not accept is the case here). The Applicant has argued, and the Commissioner has accepted, that the University has not provided him with the information he has requested. In the circumstances, the Commissioner cannot consider his correspondence to be needlessly prolonging dialogue on a subject that has been thoroughly resolved; the University has not complied with the Applicant's request, therefore it cannot be considered resolved.
45. The Commissioner also considers it relevant that the request is only the second FOI request the Applicant has made to the University (and notes that, in fact, the first request was not valid).
46. In the circumstances, the Commissioner finds that the University was not entitled to refuse to comply with the request on the basis that section 14(1) of FOISA applied. He requires the University to carry out a new review in respect of the Applicant's request, and to respond to him otherwise than in terms of section 14(1) of FOISA.

Decision

The Commissioner finds that the University of the West of Scotland (the University) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. He finds that the University was not entitled to refuse to comply with the Applicant's request on the basis it was vexatious. In doing so, it failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the University to carry out a new review, in terms of section 21(4)(b) of FOISA, by 13 December 2019.

Appeal

Should either the Applicant or the University wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the University fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the University has failed to comply. The Court has the right to inquire into the matter and may deal with the University as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

29 October 2019

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

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

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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