Ministry of Defence
Access to Information

Guidance Note D6: Valid, Invalid and Vexatious requests

1 Valid requests

1.1 To be a valid FOI request, the correspondence must be in permanent form with a return name and address; be legible; and describe the information requested. See Guidance Note D8 Processes for Handling requests for Information. Requests for information made over the telephone are not valid requests under FOI, even if the Act is quoted. This distinction is not pedantry; if the request is not made in a permanent format, neither you, nor the applicant, can refer back and ensure that the answer fits the initial request. We have a duty to assist requesters, to be helpful and to ask applicants to make requests in writing, or if they are unable to do so, to make a note and confirm with the requester that this captures their request. Requests made by telephone should not be denied merely because they are not written

2 Invalid requests

2.1 A request may be deemed to be invalid if it
- is illegible or
- does not give an address for reply – e-mail addresses are acceptable or
- is not in permanent form *see Guidance Note B4* for oral requests under EIR or
- does not describe the information that is sought precisely enough to identify and locate it. In such cases, the duty to provide reasonable advice and assistance requires that you try to clarify the request with the applicant. *See Guidance Note D3 Duty to advice and assist*

2.2 In addition FOIA requests can be refused under s.12 if the cost of supplying the information would exceeds an appropriate limit, set at around £600 for public authorities and £450 for NDPBs. *See Guidance Note D9: Charging.*

3 Vexatious requests

3.1 Under s.14(1) of the FOI Act an authority is not obliged to comply with a vexatious request for information. This is not intended to include otherwise valid requests in which the applicant happens to take an opportunity to vent his frustration. S.14(2) states that where an authority has previously complied with a request for information, made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person, unless a reasonable interval has elapsed. Under EIR, regulation 12(4)(b), "a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable."

3.2 It is important to note that under the FOI Act and EIR regimes, **the individual cannot be declared vexatious;** s14 applies to requests received by a public authority, not to the person who has submitted them. So each request must be judged for itself- it cannot be deemed vexatious purely on the basis that the person who submitted that request had previously submitted one or more vexatious, though unrelated, requests or that they were **previously** been declared vexatious correspondents under another regime. All requests for information must be judged on a case-by-case basis no matter how many a person makes, although there are provisions to aggregate the costs of such requests. *See Guidance Note D9 on charging.* It may also be reasonable to conclude that a particular request is a continuation of behaviour judged vexatious in another context.

3.3 A useful test to apply in determining whether to comply with a request for information is to judge whether the information would be supplied if it were requested by another person, unknown

to the authority. If this would be the case, the information must be provided as the public authority cannot discriminate between different requesters. Abusive, offensive or threatening language does not automatically make a request vexatious, although it may be an indicator.

3.4 A request for information might be considered vexatious if one of the following applies:

- ✓ The applicant explicitly states that his or her intention is to cause a public authority the maximum inconvenience through a request, or you know this to be the case source (e.g. where a campaign group to which the applicant belongs has indicated this intention). This is the only instance where an applicant's motivations can be taken into account.
- ✓ The request clearly does not have any serious purpose or value. A request which is not a genuine endeavour to access information for its own sake, but aimed at disrupting the work of the Department, or harassment, may well be vexatious.
- ✓ The request is for information which is clearly exempt: Requests may be received for information which the applicant clearly understands to be exempt even after the application of the public interest test.
- ✓ The request can fairly be characterised as obsessive or manifestly unreasonable. This may be identified through a pattern of requests. Such cases will be exceptional. An apparently tedious request, for example, which in fact relates to a genuine concern, must not be dismissed.

BUT a request for information cannot be refused on the sole ground that it is made by a vexatious litigant. It is the request itself that has to be vexatious. *See Section 7 below.*

4 Repeated requests

4.1 The term "a reasonable interval" is not defined in the FOI Act. This is for the MOD to determine, depending on the type of information sought and any advice provided to the applicant in response to their previous request. The applicant may dispute the MOD's definition of a "reasonable interval" and complain to the Information Commissioner.

4.2 A request **cannot** be judged to be repeated if:

- ✘ The information held in relation to a request has changed since the request was last made. This may include, for example, requests regarding expenditure of the same category but over different financial periods.
- ✘ It is worded identically to a previous request. A key test will be regarding the information itself.
- ✘ It simply asks if any of the information held by a public authority has changed since it was previously requested.
- ✘ In the request, the applicant states that he or she lost the information but still requires it.
- ✘ The applicant states that he or she disposed of the information but has subsequently discovered that it was still required.
- ✘ The applicant reasonably requires another copy of the information previously sent to them, for instance because they have been obliged to supply the original to another body.
- ✘ It is a case where some of the information requested is new, but the rest has previously been supplied to the applicant. In such "hybrid" cases, it might be easier to comply with the request but only supply the information which has changed and classify the remainder of the request as repeated.
- ✘ The request is identical to that sent by another applicant.

5 Process for Dealing with Vexatious or Repeated Requests

5.1 Declaring a request vexatious or repeated (or both) should not be undertaken without full consideration of all factors listed and consulting your FOI Focal Point. If you are satisfied that the request is vexatious or repeated, you should record this on the AIT and the refusal to supply the information should be authorised at 1* level.

5.2 You must issue a notice to the applicant informing them of your decision to refuse their request for information because you consider it vexatious or repeated, and inform them why this is the case (unless it is a repeated request where a similar notice has been given previously) and provide details of the MOD's complaints procedure and inform the applicant of the subsequent right of appeal to the Information Commissioner.

6 How the process differs under EIRs

6.1 If a request for environmental information would be judged vexatious or repeated under the FOI Act, this is equivalent of "manifestly unreasonable" under EIRs. However, as there is no cost limit for compliance under the EIR, a request may be judged to be **manifestly unreasonable** due to the cost and work needed to comply with the request, for example if the response would seriously disrupt the everyday work of the public authority. As part of the duty to provide advice and assistance, you should ask the applicant to reformulate their request in order to reduce the cost involved to a reasonable level. If the applicant refuses, the request can then be judged to be manifestly unreasonable by virtue of it being voluminous. However, it will be for the MOD to make the case that complying with the request would be unreasonable.

7 Views of the Information Commissioner

7.1 In March 2006 the Information Commissioner issued a Vexatious Decision Notice which found in favour of Birmingham Council. The Council had advised a requestor that in light of his 49 logged requests over preceding 4 months, of which 22 had previously been complied with, it was refusing 25 of the latest 27 on the grounds they were vexatious. The Council argued that the number and nature of requests were designed to cause considerable inconvenience, harassment and expense to the public authority. This was based on the number, nature and frequency of requests which the Council considered to be demonstrably obsessive and manifestly unreasonable. In addition when the requestor was informed that his requests were considered vexatious, rather than modifying his behaviour he promptly submitted 11 more requests. The council also claimed that the FOI requests represented a continuation of vexatious behaviour on the part of the requestor that had previously manifested in a non FOI context.

7.2 In line with its published guidance ICO tried to consider whether the council had

- **demonstrated** the requests would impose a significant burden on the council;
- have the effect of harassing the Public authority;
- or could otherwise be characterised as obsessive or manifestly unreasonable.

Taken individually many of the requests appear perfectly reasonable and could certainly not be characterised as "frivolous" but the ICO made its decision largely based on the "effect" of the request rather than intent and found that the **effect** of the requests was a disproportionate inconvenience and expense to the public authority.

The full text of the *Vexatious Decision Notice* and the Information Commissioner's *Awareness Guidance No. 22 Vexatious or repeated requests* are at http://www.ico.gov.uk

8 FOI and litigation

8.1 The following is based on the Treasury Solictor's "FOI and litigation: guidance for litigators" which applies equally to requests under the DPA and EIR.

The essential point is that it is not possible to refuse a request for information on the basis that the request is a "fishing expedition" for use in litigation.

Any FOI request must be treated under the FOI regime, and it must be remembered that that regime is not suspended simply because litigation is in prospect, or in existence.

8.2 It is also assumed . . . that any information provided to TSol by clients, any advice given to clients and any information generated by TSol at the request of clients will all be treated as being "held" by TSol on behalf of the client under s3(2) FOI Act. This means that the client department will be responsible for determining to what extent such information should be disclosed or withheld, and for responding to any such request (although there may be circumstances where TSol are instructed to respond on their behalf). [**NOTE**: this view is being questioned by MOD legal section]

8.3 Once litigation has been formally commenced, any request for information must be treated as a request under FOI, notwithstanding that the CPR disclosure regime will also apply unless the request is specifically expressed to be made within the litigation/under CPR. Litigators will therefore need to liaise closely with the FOI contacts in their client department and to advise what impact FOI disclosure is likely to have on the litigation. It is unlikely that any of the exemptions will come into play on the sole ground that disclosure could prejudice the Government's position in the litigation. It will need to be discussed further whether this can be taken into account where there is reliance on a qualified exemption and the public interest balancing test applies.

8.4 It is anticipated that FOI disclosure will be sought, at least in high profile challenges, to obtain information/documents that would not normally be disclosed in judicial review proceedings and where, in the past, applications for disclosure have been successfully resisted. Litigators are therefore likely to be drafting witness statements against the background of disclosure of information/documents to the applicant and the withholding of information pursuant only to the specified exemptions under FOI. It will be essential for litigators to know what disclosure has taken place before the commencement of proceedings and what has been withheld and why- ***and hence essential that FOI releases and the decision to make them is well documented.***