CROFTING COMMISSION
COIMISEAN NA CROITEARACHD

VEXATIOUS AND REPEATED REQUESTS GUIDANCE UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

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CONTENTS

INTRODUCTION

NB: All references to the 'Commissioner' refer to the Scottish Information Commissioner.

This Appendix summarises the Commissioner's general approach to:

i. **Vexatious requests**
   Under section 14(1) of the Freedom of information (Scotland) Act 2002 (FOISA), Scottish public authorities do not have to comply with requests that are vexatious.

ii. **Repeated requests**
   Under section 14(2) of FOISA, Scottish public authorities do not have to comply with requests that are repeated.

Although public authorities do not have to comply with vexatious or repeated requests, they cannot simply ignore the requests. In most cases, the authority must notify the requester that their request is being treated as vexatious or repeated.

The provisions in section 14 aim to protect the credibility and effectiveness of Freedom of Information laws. Most requesters exercise their rights to information responsibly, but there are rare occasions when this is not the case. These provisions provide a way of dealing with the few cases that:

- are unreasonable;
- would impose a significant burden on the financial and human resources of public authorities, or
- are deemed to be vexatious because of other impacts on the authority.

Public authorities should not use the provisions in section 14 lightly. They should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious or repeated. Requesters must not be unjustly denied the opportunity to make a genuine information request. Requests may be inconvenient, and meeting them may at times stretch an authority's resources, but these factors, on their own, are not sufficient grounds for an authority to deem a request vexatious or repeated.

There is no direct equivalent of vexatious or repeat requests under the Environmental Information (Scotland) Regulations 2004 (the EIRs). However, under regulation 10(4)(b) of the EIRs, a public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. The Commissioner has issued separate guidance for public authorities on regulation 10(4)(b) of the EIRs.

VEXATIOUS REQUESTS: SECTION 14(1) FOISA

What Does the Law Say?

Section 14(1) of FOISA states that a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.

Section 14(1): interpretation

There is no definition of "vexatious" in FOISA. The Scottish Parliament considered that the term "vexatious" was well established in law and chose to give the Commissioner latitude to interpret the term in that context, so that the interpretation might evolve over time in light of experience and precedent.

Essentially, section 14(1) is concerned with the effect of a request on the authority and its staff. It should be interpreted in the context of the importance of the right of access to information provided by section 1(1) of FOISA and must not be used to undermine that right. In recognising that a request may be vexatious, Parliament has acknowledged the damage which may be done to the right by disproportionate use of the vexatious provision.

There is no single formula or definitive set of criteria that allow a formulaic approach to be taken to determining whether a request is vexatious. Each request must be considered on the merits of the case, supported by evidence, clear evaluation and reasoning.

The following factors will be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious:

i. It would impose a significant burden on the public authority.

ii. It does not have a serious purpose or value.

iii. It is designed to cause disruption or annoyance to the public authority.

iv. It has the effect of harassing the public authority.

v. It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

This is not an exhaustive list and must not be used as a checklist. Depending on the circumstances, and provided the impact on the authority can be supported by evidence, other factors may be relevant.

APPLYING SECTION 14(1)

This section looks at:

i. how to determine if a request is vexatious

ii. what to take into account in determining whether a request is vexatious, and

iii. how to respond to a vexatious request.

How to Determine If A Request Is Vexatious

These are the sorts of factors public authorities are likely to consider when determining if a request is vexatious.

Significant burden

A request will impose a "significant burden" on a public authority where complying with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its financial and human resources away from other statutory functions. The authority should be able to demonstrate why other statutory functions take priority over its statutory duties under FOISA. If the public authority does not perform statutory functions, it should demonstrate why its core functions are of a higher priority than the statutory requirement to respond to information requests.

Generally, the authority should consider the impact of the request on its whole resources, rather than simply the part of the organisation most immediately affected. It should also be able to quantify the impact of the request and identify the key functions and/or tasks from which resources would require to be diverted to deal with it.

If the expense involved in dealing with a request is the only consideration involved, the authority should consider the excessive costs provisions in section 12 of FOISA.

The request lacks serious purpose or value

Public authorities should not reach this conclusion lightly. Even if a public authority thinks that a request lacks serious purpose or value, the requester might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. The requester is not obliged to share his/her motives for seeking the information with the public authority. The inclusion of this criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as vexatious.

The request is designed to cause disruption or annoyance

Again, this is not a conclusion an authority should reach lightly. Strictly speaking, a request is requester blind (see "Request not requester" on page 46) and the reasons for making the request are a matter for the requester. FOISA does not require the requester to state why they want information.

However, there are occasions where the intention behind a request cannot, in the whole circumstances of the case, be disregarded. For that reason, this factor considers the requester's intention in making a request. If the intention is evidently to cause disruption or annoyance to the authority, rather than to access the information, the request may be vexatious. It will be easiest to gauge a requester's intention where he/she has made it explicit. It may be possible for a public authority to gauge a requester's intention from prior knowledge of, and documented interactions with, the requester.

The request has the effect of harassing the public authority

This takes into account the effect a request has on a public authority regardless of the requester's intentions. Even if a requester did not intend to cause inconvenience or expense, 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. The language and tone of a request may be relevant in assessing this (for further guidance see discussion under Abusive or inappropriate language below).

The request is manifestly unreasonable or disproportionate

Regardless of the apparent purpose or value of a request, or the intention of the requester, a request may be deemed vexatious if, in the opinion of a reasonable person, it would appear to be manifestly unreasonable or disproportionate.

The effect on a public authority of dealing with the request will be relevant in determining whether this is the case. Relevant factors to consider include the complexity of the request, the volume of information requested, the time and resources that would be required to process it, and the impact on the authority's statutory and/or core operations (see above on "significant burden"). Balanced against these factors should be the wider value and (where known) purpose of the request, bearing in mind that FOISA is designed to give access to information and to promote transparency in public authorities.

What to Take into Account When Determining Whether A Request Is Vexatious

There are a number of general principles that apply to all considerations about whether a request is vexatious. While they do not make requests vexatious in themselves, they may have a bearing on how authorities reach their conclusions about the factors set out above.

Request not requester

The term “vexatious” must be applied to the request, NOT the requester.

It is not the identity of the requester that determines whether a request is vexatious, but the nature and effect of the request made in light of the surrounding circumstances. A request cannot be judged vexatious simply because a requester has been deemed vexatious in another context, for instance if they have made another complaint or because they may have submitted other requests that were vexatious.

However, a requester’s identity, and the history of their dealings with a public authority, may be relevant. An authority could reasonably conclude that a particular request represents the continuation of a pattern of behaviour which it has deemed vexatious in another context. It might, in those circumstances, decide the request can be refused as the continuation of the pattern of behaviour makes the latest request vexatious. This may arise, for example, where a requester has an ongoing grievance against a public authority, or could reasonably be described as conducting an extended campaign to the point that their behaviour can be described as obsessive.

Campaigning in furtherance of legitimate concerns is appropriate activity in a democratic society, and public authorities should not deal with a campaign as potentially vexatious simply because it is a campaign. Considerations to take into account could include, for example, evidence (from the history of the matter) that:

i. the campaign is either not well founded or has no reasonable prospect of success

ii. the requester has failed to take their concerns up with the relevant authorities, or

iii. they refuse to consider any alternative point of view on the matter.

There may also be cases where it is reasonable, on the basis of requester’s previous dealings with the authority, to conclude that the requester’s purpose is to pursue an argument and not actually to obtain information.

This doesn’t mean that requests for information should be refused automatically; the requester should be given reasons to help them understand the conclusions reached by an authority, and to be assured that proper processes have been followed.
The request may also be vexatious if:

i. there is no additional information that can be provided because all relevant information has already been disclosed; or

ii. it is unlikely that the additional information would shed light on, or alter, the requester's situation (because the subject in question has already been thoroughly addressed through the relevant complaints or appeals procedure).

A useful test is for the public authority to consider whether the information would be supplied if it were requested by another person, unknown to the authority. If it would, this might suggest that the request should not be treated as vexatious.

The public authority's actions

Where an authority intends to take account of prior dealings with a requester, it should consider whether its own actions may have contributed to the situation. For instance, if an authority has provided partial, ambiguous, or inconsistent responses to previous requests, this might have led to the requester making further requests in order to clarify the response. The Commissioner is unlikely to conclude that a request is vexatious if the public authority's actions helped protract dealings between authority and requester, especially if there is no evidence that the authority has met its duties under section 15 (see below, **the duty to provide reasonable advice and assistance**).

Series of requests or large numbers of requests

Where a request is the latest in a series, or where a large number of requests are submitted at once, they can be considered collectively when assessing the burden they impose on the public authority. However, a large number of requests will not necessarily mean any or all of those requests are vexatious. Certain kinds of requesters might reasonably be expected to make numerous requests to the authority.

If the number of requests made by one requester, at the same time or in close succession, is so great that no public authority could reasonably be expected to deal with them in accordance with the requirements of FOISA, the requests may be vexatious.

Abusive or inappropriate language

The use of abusive or inappropriate language will not, in itself, make a request for information vexatious. However, language a reasonable person would consider abusive or inappropriate in the circumstances may be a factor in deciding whether a request meets the criteria specified above.

The duty to provide reasonable advice and assistance

Under section 15 of FOISA, authorities must provide reasonable advice and assistance to requesters. If processing a request is likely to impose a significant burden on an authority, a requester should be consulted to help them refine their request in order to make it more manageable. How this is done will depend on the circumstances of each case, but the Commissioner would expect to see evidence of the authority's actions.

If an authority has taken reasonable steps to explain the difficulties involved in processing a request and offered assistance with refining the request, and the requester (without good cause) refuses to refine their request, it may be vexatious.

How to Respond to A Vexatious Request

Once an authority has decided that a request is vexatious under section 14(1), it must notify the requester in writing within 20 working days unless:

i. such a notice has already been given in relation to a previous identical or substantially similar request, and

ii. in all the circumstances, it would be unreasonable to expect the authority to serve another notice (section 16(5) – see **Appendix A**).

Where a notice is issued, it must include details of the requester's right to ask the public authority to review its decision and to apply to the Commissioner if they remain dissatisfied after that.

If the authority receives a request for review, it does not have to carry out a review if the original request (or the request for review itself) is vexatious (section 21(8)). If the public authority decides not to carry out a review it must notify the requester, in writing, within 20 working days. This notice must include details of the requester's right to apply to the Commissioner if they remain dissatisfied, and of the further right of appeal to the Court of Session. It is good practice to explain, as far as possible, the reasons for this decision.

A requester can apply to the Commissioner for a decision in two cases:

i. where they have received a notice telling them that the authority is not going to carry out a review, or

ii. where no such notice has been issued.

Decision-making and record-keeping

A decision to deem a request vexatious will often be contentious, and it is quite likely that the requester will exercise their right to request a review, and ultimately to make an application to the Commissioner. Such decisions should be taken at an appropriately senior level, and after careful thought.

It is important to keep records documenting the decision-making process, i.e. why the request was judged to be vexatious, and how the public authority came to this decision. The Commissioner will expect these decisions to be backed by detailed evidence and sound reasoning. If the authority is arguing that complying with the request would be a significant burden, it should be able to quantify the effect of compliance.

Good practice

If a public authority receives a high proportion of vexatious requests, it may be worth publishing the criteria which are used to determine if a request is vexatious. This will help staff members faced with making the decisions and also show requesters that an objective method of assessment is used.

REPEATED REQUESTS: SECTION 14(2) FOISA

What Does the Law Say?

Section 14(2) of FOISA states that, where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request. (See **Appendix A** for the full text of section 14.)

APPLYING SECTION 14(2)

Is A Request Repeated?

It should be relatively straightforward to establish whether a request is identical or substantially similar to a previous request, but it is a judgment call whether a reasonable period of time has elapsed between requests. There is no attempt to define a "reasonable period of time" in the legislation, because it will depend on the circumstances. Considering the following two questions will help public authorities to assess whether a reasonable period of time has elapsed:

i. Has the information changed?

ii. Have the circumstances changed?

Has the information changed?

It is important to consider the actual information captured by a request at the time it is received, and not just the subject matter or precise wording. Requesters often submit more than one request on a subject, possibly even in the same terms as earlier requests. This does not automatically mean the requests will be "repeated" for the purpose of section 14(2).

If the information captured by the new request is different to the information captured by the earlier request (i.e. new/additional information, alteration to existing information), the Commissioner is likely to conclude that a "reasonable period of time" has elapsed. Repeat requests for information that is routinely updated are likely to be justified within shorter intervals than requests relating to a completed or static process.

Where a request captures both new information and information considered in relation to an earlier request (and the circumstances have not changed – see below), there is no difficulty in giving fresh consideration to the new information. It may be appropriate to refuse the request insofar as it relates to the old information on the basis that the request is, in part, repeated. Alternatively, check with the requester, who may clarify that they did not intend to capture information they have already received.

Have the circumstances changed?

Authorities must consider whether circumstances have changed since the decision was taken about a previous request. If they have, a fresh decision on the new one is warranted. The passage of time may affect:

i. the risk of substantial prejudice arising from disclosure, and

ii. whether the public interest lies in withholding or disclosing the information.

If circumstances have changed since the last request, and a fresh look at the information or issues might lead to a different outcome, the Commissioner is likely to conclude that a "reasonable period of time" has elapsed.

PRO-ACTIVE RELEASE

If a public authority is receiving repeated requests for particular information, it should consider pro-actively publishing the information through its publication scheme.

COMPLYING WITH REPEATED REQUESTS

Section 14(2) is discretionary, not mandatory. Even if this section applies, it might still be reasonable to comply with the request; for instance, where the requester has lost or failed to retain the information, but then realised they still need it. Public authorities should give due weight to such representations where they are made.

How to Respond to A Repeated Request

Once an authority has decided that a request is repeated under section 14(2), it must notify the requester in writing within 20 working days unless:

i. such a notice has already been given in relation to a previous identical or substantially similar request, and

ii. in all the circumstances, it would be unreasonable to expect the authority to serve another notice.

Where a notice is issued, it must include details of the requester's right to ask the public authority to review its decision and to apply to the Commissioner if they remain dissatisfied after that.

If the authority receives a request for review, it does not have to carry out a review if the original request was repeated or the request for review is vexatious (section 21(8)). If the public authority decides not to carry out a review, it must notify the requester, in writing, within 20 working days. This notice must include details of the requester's right to apply to the Commissioner if they remain dissatisfied, and of the further right of appeal to the Court of Session. It is good practice to explain, as far as possible, the reasons for this decision.

A requester can apply to the Commissioner for a decision in two cases:

i. where they have received a notice telling them that the authority is not going to carry out a review, or

ii. where no such notice has been issued.

APPENDIX A

VEXATIOUS AND REPEATED REQUESTS – Sections 14, 16 & 21

SECTION 14 – VEXATIOUS OR REPEATED REQUESTS

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

Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

SECTION 16 – REFUSAL OF REQUEST

A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the requester a notice which states that it so claims; except that the notice need not be given if –

a) the authority has, in relation to a previous identical or substantially similar such request, given the requester a notice under this subsection, and

b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.

SECTION 21 – REVIEW BY SCOTTISH PUBLIC AUTHORITY

Subsection (1) does not oblige a Scottish public authority to comply with a requirement for review if –

a) the requirement is vexatious, or

b) the request for information to which the requirement for review relates was one which, by virtue of section 14, the authority was not obliged to comply.