

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 Section 15(1)(g) –
Frivolous or Vexatious

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 15(1)(g) of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 15(1)(g) of the Act by the Commissioner. It provides a brief summary of relevant issues relating to this provision.

This Note is intended to provide general guidance only and is not legally binding. The application of the provision in any particular case will always depend on the particular record(s) and the relevant facts and circumstances.

1.0 Section 15(1)(g) - Overview

1.1.1 This Note briefly explains the circumstances in which a request may be regarded as frivolous or vexatious or forming part of a pattern of manifestly unreasonable requests under section 15(1)(g) of the Act.

1.1.2 This is a discretionary provision which allows for the refusal to grant a request on administrative grounds, as opposed to a provision providing for the refusal of a request on the grounds that the record(s) is / are exempt.

Application of this Provision

1.2.1 The refusal of requests under section 15(1)(g) is not something that should be undertaken lightly. The provision and any of the Commissioner's decisions should not be taken as encouragement to ignore the rights of requesters.

1.2.2 The Commissioner takes the view that the FOI Act demands that FOI bodies meet very high standards in dealing with requests; however, he also takes the view that the legislation assumes reasonable behaviour on the part of requesters.

'Frivolous or Vexatious' Elsewhere in the Act

1.3.1 The term "frivolous or vexatious" appears in section 22(9)(a)(i) of the Act (and previously in section 34(9)(a)(i) of the FOI Act 1997) which concerns applications for review to the Commissioner. Section 22(9)(a)(i) provides that the Commissioner may refuse to accept an application for review or may discontinue a review if he is of the opinion that the application is frivolous or vexatious.

1.3.2 While a refusal or discontinuance of a review by the Commissioner is an entirely separate matter to a decision following a review concerning section 15(1)(g), the reasoning and interpretation of the term "frivolous or vexatious" by the Commissioner in the context of a refusal or discontinuance is of assistance in the understanding of the term in section 15(1)(g). References are made in this Guidance Note to the refusal or discontinuance by the Commissioner of reviews under section 34(9)(a)(i) of the 1997 Act and where this occurs they are denoted by a double asterisk (**) after the Case Number.

Other Provisions of the FOI Act

1.4.1 Other provisions of the Act which may possibly be relevant in a case where section 15(1)(g) is being considered include :

- section 15(1)(c) which relates to voluminous requests
- section 15(1)(i) which applies where the records have already been released to the requester or a previous requester and the records are available to the requester or it appears that the requester is acting in concert with a previous requester.

FOI History and Warning regarding Commissioner's Decisions

1.5.1 It should be noted that a reference to the Commissioner in the context of the decisions referred to in this Guidance Note may include an officer to whom the function of making the decision had been delegated by the Commissioner.

1.5.2 Section 15(1)(g) is similar to, although not the same as, section 10(1)(e) of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the applicability of section 10(1)(e) was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) in so far as they remain relevant. To simplify matters for the reader, all references to section 10(1)(e) in those decisions have been replaced by section 15(1)(g) of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by a single asterisk (*).

1.5.3 Section 8(4) of the 1997 Act was amended in 2003. Originally, section 8(4) provided that any reason given by the requester for making a request, or any belief or opinion of the FOI body as to what those reasons were, was to be disregarded. The FOI Amendment Act 2003 inserted the words “Subject to the provisions of this Act” at the beginning of this provision. (See Motive of the Requester below where the Commissioner’s approach to this provision in the context of section 15(1)(g)* is explained.) It is important to note that decisions of the Commissioner made under the 1997 Act before it was amended do not reflect this amendment.

1.5.4 While references in this Note are made to previous decisions of the Commissioner in so far as they remain relevant, it is possible that other parts of these decisions no longer represent the current position – this could be due to factors such as a change in the legislation or decisions of the Courts. Caution should be exercised in referring to any decision of the Commissioner relating to this provision that was made under the FOI Act 1997, or under the FOI Acts 1997 & 2003, to ensure that all parts of the decision being referred to remain relevant (including such decisions as are published on the OIC website).

2.0 Section 15(1)(g) – Frivolous or Vexatious

15. (1) A head to whom an FOI request is made may refuse to grant the request where

(g) the request is, in the opinion of the head, frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert,

2.0.1 Section 15(1)(g) provides that an FOI body may refuse to grant a request where, in the opinion of the body, the request is frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests.

General Approach

2.1.1 As stated above, the Commissioner takes the view that the refusal of requests on the grounds that they are frivolous or vexatious is not something that should be undertaken lightly by FOI bodies.

2.1.2 FOI bodies are required to go through the rigorous processing requirements of the FOI Act. However, the Commissioner also takes the view that requesters have a responsibility to act reasonably in relation to the processing of their requests by FOI bodies.

2.1.3 As in all cases before the Commissioner, a decision by an FOI body to refuse to grant an FOI request is presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that its decision was justified. Thus, the FOI body should explain its case to the Commissioner. In doing so, the FOI body should provide the relevant supporting information for its decision.

2.1.4 The Commissioner may, having had regard to the submissions, evidence and material provided by the parties to a review, make inferences or findings from the material, facts and circumstances before him. He will do so by reasonable, normal, or objective standards. He may have regard to his knowledge and experience and that of his Office.

Motive of the Requester

2.2.1. Section 13(4) of the FOI Act states that, "subject to this Act", any reason that the requester gives for the request and any belief or opinion of the FOI body as to what those reasons are shall be disregarded in deciding whether to grant or refuse to grant a request.

2.2.2 The Commissioner has found that the similar wording of the 1997 Act after it was amended (i.e. "subject to the provisions of this Act") allows an FOI body to take

into account the motive of a requester when considering whether a request is "frivolous or vexatious". In a judgment of the High Court concerning a decision by the Commissioner to discontinue a review (see 1.3.1 above), O'Malley J stated that there is no obligation on the Commissioner to prove the applicant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct. (Kelly –v- the Information Commissioner [2014] IEHC 479).

2.2.3 However, FOI bodies should be cautious in imputing motives to requesters when determining whether to refuse a request under section 15(1)(g). For example, FOI bodies should not assume that the fact that requests cause them administrative inconvenience is sufficient reason to refuse requests on the grounds that they are frivolous or vexatious. The receipt of frivolous or vexatious requests from a particular individual in the past is not *in itself* sufficient to conclude that a new request is *automatically* frivolous or vexatious. Each request must be considered on its own merits as measured against the relevant criteria.

2.2.4 Also, account should not be taken of the use which the requester might make of the records, if released.

Example: In Case 100218 the FOI body argued that the request in that case had not been made in order to ensure transparency in a public body or to examine the workings of a public body but to fuel a media frenzy and that access to the record was sought to undermine the staff of the FOI body concerned. The Commissioner accepted that the release of the records might result in some comment in the media. However he found that the Commissioner cannot take into account what use may be made of the information once released, as release of information under the FOI Act is regarded as release to the world at large.

The Characteristics of a Request falling within section 15(1)(g)

2.3.1 Section 15(1)(g) identifies three characteristics of a request which may lead to a decision to refuse a request; they are that the request:

- is frivolous or
- is vexatious or
- forms part of a pattern of manifestly unreasonable requests

2.3.2 These are three separate characteristics; for example, a request may be vexatious without being part of a pattern. However, they may also overlap; thus, what is frivolous may also be vexatious, and what is frivolous and/or vexatious may also form part of a pattern of manifestly unreasonable requests.

2.3.3 The FOI Amendment Act 2003 added the reference to a request which "forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters" who appear to have made the requests acting in concert. However, prior to the Amendment Act, the Commissioner had found that, cases of bad faith aside, whether a request was frivolous or vexatious should be judged by reference to the pattern of behaviour of the requester in relation to the FOI request or requests under consideration.

Frivolous or Vexatious

2.4.1 In Case 99151 the Commissioner considered the dictionary definitions of the word 'frivolous' and the word 'vexatious', noting that the Oxford English Dictionary (OED) defined frivolous (in its non-legal sense) as "*of little or no weight, value or importance; paltry, trumpery, not worthy of serious attention; having no reasonable ground or purpose*" and the word vexatious (in its non-legal sense) as "*causing, tending or disposed to cause, vexation*".

2.4.2 However he found that the adoption of these definitions gave rise to difficulties. For example, in the context of the definition of frivolous, he noted that a request which is of little importance to one requester can be of vital concern to another. And, in the context of the definition of vexatious, he stated that many public bodies find requests annoying in one way or another.

2.4.3 The Commissioner has found that a request is frivolous or vexatious where it is either :

- **made in bad faith** or
- forms part of **a pattern of conduct** that amounts to **an abuse of process** or **an abuse of the right of access**.

2.4.4 In determining whether a request is frivolous or vexatious there is also a need to look to the purpose of the Act, as disclosed by its long title and specific provisions, and at the nature of the process. The Long Title articulates the purpose of the Act as being to enable members of the public to obtain access to information consistent with the public interest and the right to privacy. While the Act demands that FOI bodies meet very high standards in dealing with requests, the corollary is that the legislation assumes reasonable behaviour on the part of requesters.

Requests made in bad faith

2.4.5 Where a requester's pattern of behaviour involves an abuse of process, the fact that he or she is unwilling to co-operate with the FOI body may be evidence of bad faith on the part of the requester. A request could also be made in bad faith (i.e. for an illegitimate or dishonest purpose with furtive design or ill will on the part of the requester) without any pattern of behaviour being present. (Case 99151)

2.4.6 However, simply because it is clear that a requester may use the information obtained in a manner which may be disadvantageous to the public body does not imply that the request is made in bad faith. (Case 99151)

Pattern of Conduct

2.4.7 As stated above, one of the criteria to be taken into account when considering whether a request is frivolous or vexatious is whether the request forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access.

A pattern of conduct requires recurring incidents of related or similar requests on the part of the requester. The time over which the behaviour is committed is also a relevant factor (Case 020375).

Example: In Case 030406** the Commissioner was satisfied that a pattern of conduct existed. The applicant had filed a total of 16 applications for review with the Commissioner between March and November 2003. From 17 December 2002 to 18 July 2003, he made at least 74 requests under the FOI Act to the FOI body. During this period, the FOI body received a total of 110 requests, which meant that the applicant accounted for over 65% of all requests received by the FOI body in the seven month period. Eight separate requests were received from him on one day. A number of his requests consisted of a series of requests or questions and the total number of different pieces of information or amendments to personal information requested exceeded 220.

2.4.8 The fact that a pattern of conduct exists is not, of itself, sufficient. The pattern of conduct must be such that there is *an abuse of process* or *an abuse of the right of access*.

Example: In Case 020375 the Commissioner found that the fact that a pattern of conduct existed did not end the matter; the pattern of conduct must amount to an abuse of process or an abuse of the right of access. He concluded that the requests in that case, viewed in the context of the applicant's total requests to the FOI body, amounted to an abuse of the right of access. He found that the applicant had made an excessive number of requests to the FOI body having regard to the time within which they were made and the number of requests received by the FOI body generally. The requests concerned an employee of the FOI body and, by his own admission, the applicant was involved in a dispute with the employee's family. The Commissioner found that the requests were not primarily concerned with the actions of a public body, but rather with seeking information on the employee.

Abuse of Process / Abuse of the Right of Access

2.4.9 The following is a **non-exhaustive** list of relevant factors which may be considered in determining whether a pattern of conduct amounts to an abuse of the right of access:

- (1) The actual number of requests filed: are they considered excessive by reasonable standards?
- (2) The nature and scope of the requests: for example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?
- (3) The purpose of the requests: for example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?
- (4) The sequencing of the requests: does the volume of requests or appeals increase following the initiation of court proceedings or the institution or the occurrence of some other related event?

(5) The intent of the requester: is the requester's aim to harass government or to break or burden the system?

It must be stressed that this list is non-exhaustive.

2.4.10 The outcome or cumulative effect of the requests is a relevant consideration. It is appropriate to consider the requests concerned in the context of other requests made to the FOI body and in the context of the requester's other dealings with the FOI body concerned.

Example: In Case 020375 the Commissioner found that the cumulative effect of the applicant's requests (all of which concerned an employee of the FOI body) was reaching the stage where an invasion of privacy could be occasioned to an employee by the granting of the requests. The Commissioner had found that an excessive amount of requests were being made by the applicant concerning the employee and his position with the FOI body.

2.4.11 In *Kelly –v- the Information Commissioner* [2014] IEHC 479, a judgment of the High Court concerning a decision by the Commissioner to discontinue a review (see 1.3.1 above), O'Malley J said that the Commissioner was entitled to take into account the context in which the applications were made – in that case, the long-running and unsuccessful pursuit of the appellant's grievances dating back approximately 12 years (at that time) with the FOI body concerned.

2.4.12 An FOI body relying on section 15(1)(g) for its refusal of a request should provide relevant supporting information to the Commissioner, including supporting information for factors (1) to (5) above where relevant. Such information might include, for example:

- the number of requests made by the requester to that FOI body
- the overall number of requests received by that FOI body generally during the relevant period
- the subject matter and/or nature of the requests made by the requester
- the background, if relevant, to the requests made by the requester and to the requester's dealings with the FOI body
- the pattern, if any, of the requests made.

The Number, Nature or Scope of the Requests

2.4.13 Of itself, the fact that a requester has submitted a 'large' number of requests does not indicate that any of these requests is frivolous or vexatious. The question of what constitutes a 'large' number of requests is so subjective as to be of little value. The number of requests received by a public body, both generally and from any one requester, must depend in part on its attitude to the release of information. For example, if a public body routinely resists requests for information which, perhaps, other public bodies would release administratively, then it may end up receiving a large number of FOI requests.

2.4.14 However, the relationship between the requests and other requests the requester may have made, together with the nature, frequency and time within which they are made may be relevant.

2.4.15 Section 15(1)(g) does not require an FOI body to assist, or offer to assist, the requester to amend his/her request so that it no longer falls within the parameters of paragraph (g). However, the requester's willingness to co-operate may be relevant in certain circumstances.

Example: In Case 100218 the Commissioner found that the request at issue was a single FOI request. He pointed out that the applicant agreed to narrow the range of his original request at the stage when it was still being considered by the FOI body; that he agreed to the deletion of any material which might serve to identify any particular individuals; and that, in the course of the review before the Commissioner, he further reduced the range of material being sought in order to make the review more manageable. He found that there was no evidence to suggest that the purpose of the request was to cause a nuisance, or to harass government or burden the system.

The Purpose of the Requests

2.4.16 One of the grounds for finding that a request is frivolous or vexatious is where an FOI request is made for a purpose other than the seeking of access to records.

Example # 1: In Case 100298 the Commissioner found that the applicant was using the FOI process with a view to pursuing a grievance which the Revenue Commissioners considered to have already been fairly and adequately addressed. Having considered certain statements by the applicant in a number of FOI requests, the Commissioner agreed with Revenue that they appeared to signal an intention on the applicant's part to continue to engage in making further requests, with an implied threat to use the process to disrupt and cause inconvenience to the normal operations of Revenue's internal administrative processes and structures.

Example # 2: In Case 120134** the Commissioner found that the purpose of the applicant's requests was directed at an objective unrelated to the access process. She considered the nature of seven applications for review to her Office against the background of the applicant's ongoing prolonged litigation with the FOI body concerned. She found that the applicant's use of FOI was, at a minimum, intended to increase the administrative burden which had been placed on the FOI body in dealing with his grievance dating back (at that time) approximately 11 years and to prolong the process of dealing with that grievance.

The Sequencing of the Requests

2.4.17 The sequence of requests and whether, for example, they follow or relate to other related events may be relevant.

Example: In Case 030406** the applicant did not deny that most, if not all, of his requests related to his grievance against the FOI body concerned. The Commissioner found that, as his grievances against the FOI body had multiplied, so too had his FOI requests.

A Pattern of Manifestly Unreasonable Requests

2.5.1 Section 15(1)(g) provides that a request may be refused where it forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who appear to have made the requests acting in concert.

2.5.2 As stated above, there may be a degree of overlap between the categories contained in section 15(1)(g). For example, where a pattern of conduct exists which may be characterised as “vexatious”, the request may at the same time form part of a pattern of manifestly unreasonable requests from the same requester.

Example : In Case 110102 the Commissioner found that the requests comprised a pattern of manifestly unreasonable requests. This finding was made in light of a number of factors, including the number of requests by the applicant, which were considered excessive having regard to the extent of information sought in each, and the short time period over which they were made. The Commissioner also agreed that the requests were excessively broad and unusually detailed, such that they would be seen as excessively burdensome by any reasonable person. He agreed that the requests had been made with the intention of accomplishing an objective unrelated to the access. The use of FOI in such a manner was found to be an abuse of the right of access, in which case the requests appeared to be vexatious.