

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2012

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested information from the Department for Transport (the 'DfT') on the use of airport security scanners ('scanners') at airports in the UK. Specifically, the complainant sought information on whether certain airports had made representations to the DfT on whether an alternative to passing through scanners should be offered to passengers. The complainant also requested information as to the DfT's intentions in respect of continuing to use the scanners at Manchester Airport.
2. The Commissioner's decision is that the DfT was entitled to refuse the request under section 14(1) of the FOIA on the grounds that it was vexatious. He does not require the DfT to take any further action.

Background

3. The complainant has been in correspondence with the DfT in relation to the issue of scanners. These scanners were deployed at airports around the UK with the aim of addressing perceived gaps in airport security following an attempted attack on Northwest airlines flight 253 to Detroit on Christmas Day 2009. The UK brought in the scanners via the issuing of Directions under the Aviation Security Act 1982.
4. An interim code of practice was published by the DfT to give guidance to airports on the use of the scanners. On 29 March 2010 the DfT launched a public consultation on the code with a view to publishing a final version. The consultation closed on 19 July 2010.

5. The complainant was not content with what he viewed as an undue delay by the DfT in publishing the received replies to the consultation and its response to those replies. He also has privacy and health concerns over the use of the scanners. Specifically, he has concerns about the degree to which the scanners are able to penetrate the skin and the associated privacy and health implications of this. The complainant considers the scanners to be discriminatory to disabled people. The complainant has also raised with the DfT the issue that there is no alternative offered to those who are selected to go through the scanners.
6. The complainant was informed by the DfT that those with concerns about going through a scanner due to medical reasons or having a disability may carry their medical records with them to show to security staff. The complainant has objected to this and has sought to challenge the continued use of the scanners in their present form through correspondence and FOIA requests.
7. On 6 July 2011 the European Parliament voted in a non-legislative resolution to allow airports within the EU to use scanners as long as certain conditions were met. This included the prohibition within the EU of scanners which use ionising radiation and the right to opt for an alternative to screening.
8. The complainant made a request to the DfT in regard to the position of airports around the UK on offering alternatives to scanning. He also sought information on the DfT's intention on the continued use of scanners within the context of EU decisions.
9. The Commissioner is aware that since the complainant made his request the European Commission has issued regulations on this matter. The DfT has released a summary of the replies to the consultation and its own response to those replies. The DfT has also stated that it intends to continue its use of scanners without an alternative opt out. However, this has not entered into the Commissioner's consideration as he is only able to consider the circumstances up to the time of the DfT's response to the complainant's request.

Request and response

10. On 5 August 2011, the complainant wrote to the DfT and requested information in the following terms:

"I would like to know the following:

(1) Has Manchester Airport, or Heathrow Airport, or Gatwick Airport

made any representations to the Secretary of State for Transport, or to anyone else at the DfT, at anytime in the last 18 months, to the effect that passengers should be allowed an alternative security check (full body pat-down etc...) to body scanners if a passenger objects to body scanners on health/safety/privacy grounds?

(2) Does the DfT intend on continuing the Manchester Airport trial of x-ray body scanners beyond October 2011 if the European Parliament votes, by October 2011, for the European Commission legislative proposal to ban x-ray body scanners throughout European airports?"

11. The DfT responded on 31 August 2011. It stated that it was refusing the request as vexatious under section 14 of the FOIA. The DfT referenced the Commissioner's guidance on vexatious requests and stated that the request fell to be viewed as such a request.
12. Following an internal review the DfT wrote to the complainant on 14 September 2011. It stated that its decision to class the request as vexatious and therefore refuse it under section 14 of the FOIA was correct. The DfT expanded on its initial refusal providing further detailed reasons why the request was deemed to be vexatious. These reasons were given with reference to the Commissioner's guidance on deciding vexatious requests.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he disputed that his request was vexatious and maintained that the DfT had incorrectly applied section 14 of the FOIA. The Commissioner's investigation therefore focused on the DfT's application of section 14 to the complainant's request.

Reasons for decision

14. Section 14(1) of the FOIA states that a public authority does not have a duty to comply with a request if the request is vexatious. As a general principle, the Commissioner considers that this section of the FOIA is meant to serve as protection to public authorities against those who may abuse the right to seek information.

15. The Commissioner's approach to what constitutes a vexatious request is outlined in his guidance 'Vexatious or repeated requests'¹. The guidance sets out a number of points to consider in determining whether a request is vexatious, namely that:

- o Could the request fairly be seen as obsessive?
- o Is the request harassing the authority or causing distress to staff?
- o Would complying with the request impose a significant burden in terms of expense and distraction of staff?
- o Is the request designed to cause disruption or annoyance?
- o Does the request lack any serious purpose or value?

In establishing which, if any of these factors apply, the Commissioner will consider the history and context of the request. In certain cases, a request may not be vexatious in isolation but when considered in context it may form a wider pattern of behaviour that makes it vexatious.

16. The Commissioner recognises, however, that it is the request and not the requestor that must be vexatious for section 14 to be engaged.

17. When investigating a public authority's application of section 14(1), the Commissioner is mindful that finding a request vexatious is not as serious in consequence as determining vexatious conduct in other contexts. Consequently, the threshold for vexatious requests need not be set too high.

18. In determining whether section 14 was applied correctly, the Commissioner has considered the evidence provided by the DfT and the complainant under each of the above headings, and the context and history of the correspondence and contact up until the date of the DfT's response to the request. Both the DfT and the complainant have sought to rely on evidence or arguments that pertain to facts occurring after the date of the DfT's response to the request and therefore the Commissioner has not borne these in mind when considering this case.

¹ The guidance is available online at the following link:
http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx#vexatious

Could the request fairly be seen as obsessive?

19. An obsessive request is often a strong indication that the request is vexatious. Contributory factors can include the volume and frequency of correspondence and whether there is a clear intention to use the request to reopen issues that have already been addressed.
20. In the Commissioner's view, the test to apply here is one of reasonableness. In other words, would a reasonable person describe the request as obsessive? The Commissioner's published guidance states that although a request in isolation may not be vexatious, if for example if it is the latest in a long series of overlapping requests or other correspondence then it may form part of a wider pattern of behaviour that makes it vexatious.
21. At the internal review, the DfT argued that the request could fairly be seen as obsessive. It explained that the complainant had written to it over 70 times since February 2010 on this issue of scanners. It explained that the correspondence had primarily focused on the content of the Frequently Asked Questions (FAQs) on the DfT's website.
22. The DfT stated that the complainant had made 15 FOIA requests to it between 29 June 2011 and 24 August 2011 on the subject of security scanners, most of which consisted of several questions. The DfT argued that in most cases the requests covered similar ground to that covered in non-FOIA correspondence. The DfT referenced an email sent by the complainant to it on 6 September 2011 in which he stated that the issue has become something of an obsession for him. However, the Commissioner has not considered this as evidence in this case as the correspondence was sent to the DfT after the request was made.
23. The DfT provided the Commissioner with a spreadsheet which detailed the correspondence from the complainant and extracts from that correspondence. This included 14 requests for information under the FOIA from 12 June 2011 to 20 August 2011 and 70 pieces of non-FOIA correspondence from 2 February 2010 to 21 July 2011. The Commissioner has also viewed the requests, responses and associated internal review correspondence.

Reopening of issues

24. The DfT has accepted that the specific questions posed in the request have not been asked previously. However, the DfT has argued that the request seeks to reopen the issues of privacy and potential alternatives for those who do not wish to be scanned. It has also argued that the complainant's FOIA requests as a whole seek to reopen issues that it has dealt with, namely those of the publication of the consultation

response, privacy, alternatives to being scanned, and FAQs on its website.

25. The Commissioner is of the view that this request is different from previous requests. Whilst linked to similar general issues raised in previous requests such as privacy and alternatives to scanning, which have been answered by the DfT, it primarily seeks to gain an insight into the attitude of airports to scanners and the DfT's future policy.
26. With respect to the DfT's argument that the complainant has sought to reopen issues through his FOIA requests that have been dealt with previously, the complainant has argued to the Commissioner that this was not reopening but seeking clarification.

Publication of consultation response

27. The DfT has argued that the complainant's obsession is demonstrated through his frequent correspondence and requests related to the publication of the consultation. It had, on 4 February 2011, confirmed that no definite time could be given for publication of the consultation due to the policy consideration issues involved.
28. The complainant has argued that he has merely attempted to establish when the consultation would be published and that his FOIA requests were not reopening this issue. However, the Commissioner considers that the DfT had provided the complainant with a reasonable answer, albeit for him an unsatisfactory one.

Privacy

29. The DfT has argued that the complainant has sought to reopen the concerns that he has about the privacy implications of scanners, these having already been dealt with adequately.
30. The complainant first raised these issues in correspondence dated 2 February 2010. The DfT has argued that it attempted to assuage the complainant's concerns as much as it was able to. It has argued that it has done so and that the complainant has concerns which cannot be assuaged because they are based on false assumptions and a misunderstanding of the operation of the scanners.
31. The Commissioner is of the view that the complainant's requests are focused around the privacy concerns that he has regarding scanners. He has noted that the DfT has made endeavours to reassure the complainant regarding these privacy concerns.
32. Indeed the complainant was invited by Manchester Airport to inspect the scanners with expenses paid. Yet the complainant refused to take up

this offer because he believed that the equipment would somehow be rigged to mislead him.

33. It would appear to the Commissioner that, whilst the subject of scanners is, as the DfT has acknowledged, a controversial one which engages concerns about privacy, the complainant's concerns are ones which are unlikely to be pacified. This is because it would appear to the Commissioner that the complainant's main issue is the use of scanners as a whole.

Alternatives to being scanned

34. The DfT has argued that its position on alternatives to scans and why it regarded that they could not be offered has been clearly available in the public domain in the form of information contained within the consultation. It has further argued that the complainant has made repeated FOIA requests related to the issue of alternatives to being scanned.
35. Whilst the Commissioner has considered that some of the complainant's requests are associated with this issue, they generally focus on different aspects of alternatives such as the attitude expressed by those who replied to the consultation towards being offered alternatives or the limited number of airports in the UK having scanners. Therefore the Commissioner considers that the DfT's argument here has some weight, but to a limited degree.

Website FAQs

36. The DfT has argued that the complainant's requests have shown an obsession to reopen the issue of FAQs on its website. The complainant has submitted that the volume and frequency of his requests and non-FOIA correspondence is reflective not of an obsession but of his attempts to get the DfT to admit that scanners penetrate the skin. The FAQs on the DfT website were available to the public to provide background information to accompany the consultation. FAQ 24 stated that the scans did not penetrate the skin.
37. On 25 February 2010, in normal correspondence, the DfT informed the complainant that scans did not penetrate the skin.
38. However, on 17 March 2010 the DfT informed the complainant that whilst the scan images did not show internal organs, *'denser areas of the body such as bones or prosthetic body parts will show on the images.'*
39. On 12 June 2011, in a FOIA request, the complainant explained that in his opinion FAQ 24 could not be correct as there was information

available that showed the scans did penetrate the skin and that their image penetration is 2cm.

40. In response on 24 June 2011 the DfT stated that scanners may penetrate the skin. However it stated that in its view the FAQ was not incorrect and so would not be amended. The DfT did however later correct the FAQ to indicate that scanners may penetrate the skin and informed the complainant of this.
41. The Commissioner is of the view that the complainant was attempting to use his FOIA request to compel the DfT to undertake certain actions, such as amend its publicly available FAQs to come into line with the response that he had personally obtained together with other evidence that he had gathered.

Opinions of third parties

42. The DfT has explained that in its view the complainant has been unwilling to accept the opinions of third parties on this issue of scanners.
43. Specifically, the DfT states that the complainant has disagreed with the conclusions of the Commissioner, the Parliamentary and Health Service Ombudsman (PHSO), the US Transport Security Administration (TSA) and the US Department of Homeland Security (DHS) in relation to the use of scanners and the DfT's policy and actions.
44. The complainant sought the opinion of the Commissioner in respect of scanner use and compliance with the Data Protection Act 1998 (DPA). The Commissioner informed the complainant that according to the information he had supplied, there would be no breach of the DPA through scanner use. From information provided by the DfT it appears that the complainant did not accept that conclusion.
45. The DfT also informed the Commissioner that the complainant had lodged a complaint with the PHSO that it had not taken further because the DfT had made a commitment to update the FAQs on its website once the government had announced its response to the consultation. It would appear that the complainant was dissatisfied with this outcome.
46. In information that the DfT provided to the Commissioner, the complainant has corresponded with the TSA and the DHS in the US regarding scanner use and has remained dissatisfied with their responses.
47. The complainant has submitted that the Home Affairs Select Committee has confirmed to him that scanners are designed to penetrate into the body. However, the Commissioner does not consider that the evidence submitted to him by the complainant is sufficient to support this claim.

48. The complainant has also sought to rely on the 'Information Commissioner's report to Parliament on the state of surveillance' published in November 2010. The complainant has argued that the report contains information that scanners are designed to penetrate the skin.
49. The Commissioner notes that the section of the report that deals with scanners comments that *'their advocates argue that such scanners have a far superior ability to detect threatening objects held in or about the person.'* However, within that report the Commissioner did not comment on the validity of such arguments.

Volume and frequency

50. The Commissioner has noted that to some degree the complainant's pursuit of FOIA requests and other correspondence may have been fuelled by the DfT's responses to previous correspondence which had not received responses within 20 working days.
51. Yet, overall, the frequency, volume and content of the FOIA requests and non-FOIA correspondence are unjustified by these issues.
52. The Commissioner considers that, in the context of the issues discussed above, the large volume and high frequency of the FOIA requests and non-FOIA correspondence is to be regarded as suggestive of obsessive behaviour.
53. Further, the Commissioner has noted that in the table of correspondence and extracts provided to him by the DfT, the complainant announced his intention to continuously email the DfT and later he made the same intention clear regarding FOIA requests on the issue of scanners.
54. The Commissioner therefore considers that, based on the evidence before him, the request is not obsessive in isolation but forms part of an obsessive pattern of behaviour, when considered within its wider context. He considers that the correspondence has crossed a line separating persistence from obsession.

Is the request harassing the authority or causing distress to staff?

55. This factor takes into account the effect a request has had on a public authority, regardless of the requestor's intention. This is an objective test, based on whether a reasonable person would be likely to regard the request as harassing or distressing.

56. The Commissioner's guidance on this factor refers to the volume and frequency of correspondence as being relevant issues alongside the use of hostile, abusive or offensive language and mingling requests with accusations and complaints.
57. In considering whether the request harassed or caused distress to staff the DfT concluded that it did. It considered that the frequency of correspondence and tone of that correspondence was of relevance. The internal review explained that discussions with staff had been undertaken and that the language of some of the complainant's emails was considered to be accusatory and threatening at times.
58. The DfT gave an example of an email sent to it on 20 June 2011 stating that the complainant intended to submit large numbers of FOIA requests as he was dissatisfied with the way his correspondence has been handled. It further stated that the complainant's tone was hostile on occasions and it again gave a specific example of a FOIA request made on 20 August 2011 (after the request was made that is the focus here, though before the DfT responded). The DfT stated that the disproportionate amount of time spent dealing with the complainant's requests was having a negative impact on staff morale.
59. As explained above, the Commissioner considers that the volume and frequency of requests and non-FOIA correspondence is high in this case. The Commissioner is particularly struck by density of the requests with a number of requests being made in a short space of time, not giving the public authority the chance to reply to one before another one was received.
60. The Commissioner accepts that public authorities and their representatives must expect to be exposed to an element of robust and persistent questioning as well as criticism. In this case the Commissioner considers that the tone and content of some of the extracts of non-FOIA correspondence provided by the DfT would likely have been seen by any reasonable recipient as hostile and provocative. However, the Commissioner is not of the view that the language used could be seen as threatening.
61. For example on one occasion the complainant wrote to an official at the DfT stating *'you are a disgraceful liar...you are far too busy deceiving and lying to other people.'*
62. Such language was directed towards one particular official on two occasions. The DfT has argued that this is evidence of the complainant targeting that individual. However, the Commissioner considers that based on the evidence he has seen, only limited weight may be apportioned to this argument.

63. The DfT has also argued that the complainant has mingled requests with complaints and accusations. It has given as evidence the complainant's request of 20 August 2011. The Commissioner considers that the language used and form which it took may be fairly seen as hostile and provocative.
64. The complainant has stated that it was not his intention to harass or cause distress to staff. However, the Commissioner considers that, in the circumstances, the request did have that effect.

Would complying with the request impose a significant burden in terms of expense and distraction of staff?

65. The DfT considered that responding to the request would not have in itself imposed a significant burden. However, it noted the Commissioner's guidance and the case of *Betts v Information Commissioner EA/2007/0109* (19 May 2008).
66. It stated that the case was relevant in that taking into consideration the wider context and history was an important principle. The internal review argued that responding to the request would be likely to generate further correspondence from the complainant and would have imposed a significant burden, particularly in diverting staff from their core responsibilities.
67. The Commissioner has considered this request as one element of the total correspondence received by the DfT from the complainant on the subject of security scanners. This correspondence and the actions taken by the DfT in replying to the FOIA requests in response to it has, in the Commissioner's view, created a significant administrative burden.
68. Taken in isolation, complying with this request would not be an unreasonable burden. However, the Commissioner accepts that the number of FOIA requests made by the complainant has meant that the DfT has been involved in a large amount of work dealing with those requests.
69. The DfT has argued to the Commissioner that providing responses and internal reviews to the complainant's requests has entailed obtaining clearance from senior officials, seeking legal advice and involved the distraction of staff from every day duties. It has argued that complying with the request would perpetuate what it regards as a significant burden. The DfT has stated that this is especially the case in an environment of reduced funds due to the government's deficit reduction measures.
70. In support of its argument the DfT has explained that the security scanner policy lead has spent up to 14 hours a week over a sustained

period dealing with the complainant's requests. Additionally the DfT has argued that other members of its policy team and correspondence team have been distracted from their every day work. An estimate was provided whereby in some weeks half of the correspondence team's time was taken up with the complainant's issues, with a detrimental affect on other work commitments.

71. The Commissioner would expect a public authority to allocate sufficient resources to handle FOIA requests and the associated activities that result. However, he accepts that a point must be reached where it is unreasonable for a public authority to comply with a request where that request is part of a systematic campaign with cost and staffing implications. This is particularly the case where, as the DfT has argued, a complainant is very likely to continue making requests that impose a significant burden upon a public authority.
72. It is clear to the Commissioner that the complainant is seeking to use FOIA requests to lever the DfT into changing its policy on scanners. In this context the Commissioner considers it unlikely that the complainant will stop making such requests, until this goal is achieved, and perhaps beyond that.
73. Therefore it is reasonable to assume that the DfT's staff will continue to be sent requests and that this will impose a significant burden both in terms of costs and distraction of staff away from their core functions.

Is the request designed to cause disruption or annoyance?

74. The internal review argued that the request itself was not suggestive of it being designed to cause disruption or annoyance. Yet it determined that taken with the large amount of correspondence and the declaration of intent to submit large numbers of FOIA requests, it was part of an ongoing strategy to disrupt and annoy. The complainant has stated that it was not his intention to cause disruption or annoyance.
75. Although the Commissioner has noted the complainant's stated intention to continue to make FOIA requests he does not consider that it can be concluded that the request was specifically designed to cause disruption or annoyance. Whilst the complainant may have been aware that his requests would annoy the DfT, this is most likely to be a by-product of his primary intention to change DfT policy and to expose what he viewed to be misinformation given to him and the public.

Does the request lack any serious purpose or value?

76. The FOIA is usually considered to applicant and motive blind. However, in cases where the public authority has determined a request to be vexatious, the Commissioner considers that if that authority has shown

a request lacks serious purpose or value then it may add weight to that determination.

77. The DfT accepted that the complainant had genuine and deeply felt concerns over aspects of security scanners. It stated that it considered the request to be underpinned by a serious purpose. However, it was of the view that the requests themselves may carry less value. This was because it had informed the complainant on a number of occasions that it intends to publish its consultation on security scanners and the responses it received. This would be done once all relevant factors had been weighed and policy considerations concluded. It explained that the seriousness of purpose and value of the request was decreased because it was preventing the DfT from concentrating on the process that would lead to publication. The Complainant has explained that he wishes to bring the DfT to account, to expose what he views as its provision of misinformation and to exercise his democratic rights.
78. The Commissioner agrees that the complainant has clearly genuine personal concerns about the use of scanners and their ramifications on health and privacy. The complainant has drawn the Commissioner's attention to the Equality and Human Rights Commission's submission to the consultation which expressed concern about the lawfulness of scanner use. The Commissioner is also aware of the European Union's interest in this issue. However, the Commissioner does not seek in this case to comment on the lawfulness or otherwise of scanner use. He does however consider that the complainant's request is, in general terms, within an area of public interest.
79. The Commissioner therefore considers that the request does not lack serious purpose or value. He is however of the view that the FOIA is not the correct vehicle for pursuing this topic in the manner that the complainant has done.

Gardner v Information Commissioner EA/2011/0054

80. The complainant has argued to the Commissioner that the *Gardner* case is of relevance to his. The Commissioner accepts that the factors the Tribunal took into account in *Gardner* are relevant to considerations of whether a request is vexatious. However, the weight that should be given to those factors depends very much on the circumstances of each case.
81. In *Gardner* the Tribunal found that the complainant's persistence was justified because the issues that the complainant was seeking information on had never been properly resolved. The Commissioner

accepts that this is an issue to factor into any assessment of whether the request is obsessive. However he is not of the view that the complainant's concerns in this case have been left unresolved in so far as it would be reasonable to expect a public authority to resolve them.

82. At paragraph 15 of *Gardner* the Tribunal found that although the appellant's language had been intemperate at times it considered that the experienced staff would not have been concerned by it.
83. In this case the Commissioner is of the view that the language used by the complainant went beyond what an official should reasonably be expected to endure.
84. At Paragraph 16 of *Gardner* the Tribunal found that although dealing with the complaints that the appellant had about his property would have significant resource implications for the public authority, the burden of dealing with the request, or any further follow up requests, would not be significant.
85. In this case the Commissioner is of the view that the complainant does not have an issue or issues that could reasonably be resolved without a change in government policy. He therefore considers that the complainant is likely to continue making FOIA requests. The history of his making requests is suggestive of future requests being high in density and with a concomitant level of expense and distraction.
86. In *Gardner* the Tribunal was also satisfied that the requested information would help the appellant establish whether he had been treated fairly compared with the money spent on neighbouring properties. The request therefore had a serious purpose. The Commissioner has already stated that he is of the opinion that in this case the request had a serious purpose. However, that serious purpose is, in the Commissioner's view, outweighed by the other factors that he has considered.

Conclusion

87. Taken in the round, the Commissioner considers that the DfT has demonstrated that the request is vexatious and that it therefore applied section 14(1) of the FOIA correctly. Although the request does not lack a serious purpose or value and raises issues of personal importance to the complainant and general public interest, this does not outweigh nor justify the manner in which the complainant has chosen to pursue the DfT.

88. The volume and frequency of FOIA requests and non-FOIA correspondence combined with the tone of some of the latter leads the Commissioner to conclude that the request can fairly be seen as obsessive, harassing and imposing a significant burden on the DfT.

Right of appeal

89. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

90. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
91. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF