



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0026

Decided on the papers without a hearing

**Before
KAREN BOOTH
JUDGE**

**MIKE JONES and DAVID WILKINSON
TRIBUNAL MEMBERS**

Between

FAISAL QURESHI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE FOREIGN AND COMMONWEALTH OFFICE

Second Respondent

DECISION AND REASONS

DECISION

(NB In this Decision: the Respondent is referred to as “the Commissioner”; the Second Respondent is referred to as “the FCO”; the Freedom of Information Act 2000 is referred to as “FOIA”; and references to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

1. The decision notice issued by the Respondent on 8 February 2018 (reference: FS50698949) is not in accordance with the law and the appeal is allowed. The following decision notice is substituted in its place.

“The FCO incorrectly decided that section 14(1) applied to the request for information dated 4 November 2013.

In dealing with this request, the FCO seriously contravened the time limits in sections 10 and 17 of FOIA.

Within 35 days, the FCO must communicate to Mr Qureshi the information it holds that falls within the scope of the request for information or issue a fresh refusal notice complying with section 17.”

REASONS

Background to the appeal

2. Mr Qureshi is a film maker and journalist. He has a longstanding interest in the case of Helen Smith, a British nurse who died in unresolved circumstances in Jeddah, Saudi Arabia in 1979.
3. Prior to making the request for information that is the subject of this appeal, he also made the following FOIA requests to the FCO for information about the Helen Smith case.
 - **Request 1:** On 20/1/08 he made a request relating to the case without a date range. He was asked to refine that request on cost grounds (section 12), which he did on 29/1/08 (**Request 2**), when he narrowed the period to 20/5/79-31/5/79. Request 2 was refused in reliance on section 40(2) and (3) and section 44(1)(a). (page 47)
 - **Request 3:** On 15/5/11 he made a request for information relating to the case and to Helen Smith’s father (who had died on 16/4/11). Request 3 was refused in reliance on sections 27(1)(a) and 40(2). (page 47)
 - **Request 4:** On 10/4/13 he made a request for information relating to the case and held in file reference 9/3766. The FCO disclosed the information requested with redactions made in reliance on sections 27(1)(a) and (c), 40 and 41. (page 47)

- **Request 5:** On 27/8/13 he requested information relating to the period “after 1980” (page 119). He was asked to refine that request on cost grounds (page 122), which he did on 27/8/13 (page 121) (**Request 6**) when he narrowed the period to 1980-1982. On 24/9/13 (page 123) the FCO refused request 6 on cost grounds (section 12 of FOIA) but suggested that he refine it further. (pages 119 and 121)
- **Requests 7 and 8:** On 24/9/13 Mr Qureshi submitted a fresh request (request 7) on the same terms but for information relating to the period 1980-1981 (page 125). On 25/9/13 he submitted a further request (request 8) for information relating to the period 1981-1982 (page 128). On 21/10/13, in two separate letters the FCO refused requests 7 and 8 on cost grounds (section 12) and again suggesting that he refine the requests further. (pages 125, 128, 131 and 133)

The request for information that is the subject of this appeal

4. On 4/11/2013 Mr Qureshi submitted a further request to the FCO (**Request 9**) for information relating to the period 1/1/81 to 1/6/81 (page 135).

His request was in the following terms

‘..... This is a revision of my original request with the reference number: 0889-13

I am looking for any documents relating to the activities and death of British citizen Helen Smith in Jeddah on May 1979.

My previous request on the Helen Smith case (REF: 0314-13) was to ask for the release of the contents of FCO 8/3766 which was successful but the documents only covered the period of 1980.

I am now looking for any documents that deal with the death of Helen Smith during the period of 1st Jan to 1st June 1981.’

5. The FCO sent a holding response on 28/11/13 (page 138) estimating that they would provide a full response by 27/12/13 and a further holding response on 19/12/13 (page 140) with a new estimated date for a full response of 21/1/14. Further holding responses followed on a regular basis.
6. In the meantime, Mr Qureshi made a further request for information to the FCO on 11/1/16 (**Request 10**) in the same terms but in relation to the period 1/6/1981 to 31/12/1981. The FCO refused that request on 15/1/16 in reliance on section 14(1) of FOIA on the basis that “taking into account your request 1032-13 on this subject which is ongoing, we assess your request as currently drafted would fall into section 14 where ‘Requests which would impose a grossly oppressive burden but are not covered by the section 12 costs limits.’” (page 61). That refusal was the subject of a complaint to the Commissioner who (in a decision notice dated 2/6/16 – reference FS50618433 – page 60) upheld the FCO’s decision. Mr Qureshi did not appeal against that decision.

7. On 20/3/17 the FCO sent a full response (page 142) to request 9 confirming that the FCO held information relevant to the request but was withholding it in reliance on the following FOIA exemptions: section 27(1)(a), (c) and (d) (international relations); section 38(1)(a) (health and safety); section 40 (personal data) and section 41(1) (information provided in confidence). They had also considered the public interest test in relation to the qualified exemptions cited (sections 27 and 38) and decided that the public interest in maintaining those exemptions outweighed the public interest in disclosing the information.
8. On 20/3/17 Mr Qureshi requested an internal review of the FCO's decision (page 145). The review response was sent on 5/7/17 (page 148). The FCO upheld their decision in relation to the exemptions already cited but "*additionally concluded that section 14(1) (vexatious) also applies, given our extensive experience of working on this request*" on the basis that responding to the request was likely to cause a disproportionate or unjustified level of burden or disruption.

The complaint to the Information Commissioner

9. On 4/9/17 Mr Qureshi complained to the Commissioner (page 151).
10. On 1/11/17 a Senior Case Officer wrote to the FCO drawing their attention to the Commissioner's guidance on section 14(1) in the context of a request where it is claimed that compliance would impose a grossly excessive burden not covered by the section 12 (cost of compliance) exemption. The case officer advised that there is a high threshold for such a claim and that a viable case is only likely to be made out where all three of the following can be made out:
 - the requestor has asked for a substantial volume of information;
 - the authority has real concerns about potentially exempt information; and
 - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
11. The FCO response to the Commissioner's enquiries is at page 170. Paragraphs 4 to 9 address the three criteria referred to above.

The Information Commissioner's decision

12. On 8/2/18 the Commissioner issued her decision (page 1). She decided that the FCO was entitled to rely on section 14(1) to refuse the request, on the basis that complying with the request would place a grossly oppressive burden on it.

The appeal to this Tribunal

Appeal grounds

13. Mr Qureshi appealed to this Tribunal on 14/2/18. His grounds of appeal are set out on page 13. He disagreed with the application of section 14(1) on the following grounds.

- The FCO had plenty of opportunities in 2013 to reject the request on that basis but instead forced him to wait nearly 4 years.
- In relation to a “far larger request” for documents from the Cabinet Office, the Tribunal had rejected section 14.
- The FCO were considering 428 pages of information in this case, but he has previously received documents from the FCO that have been in excess of 1000 pages.

Commissioner response to appeal - (page 16)

14. The response included a summary of the leading caselaw relating to section 14(1) in the context of a one-off burdensome request (as an alternative to relying on section 12) and the following points.
- The propriety of Mr Qureshi’s motive in making the request was not in doubt and neither was the potential value/public interest in at least some of the information.
 - On balance, the burden imposed by the request on the FCO is sufficiently excessive to trigger reliance on section 14. It is inherently plausible that there will be extensive references to personal data and to international relations and that the process of locating it and considering it for sensitivity would be extensive in a file of over 400 pages.
 - The ongoing notoriety/high profile nature of the case underlines the degree of sensitivities still likely to be in issue.
 - The Commissioner is mindful of not allowing FCO to take advantage of its unacceptable delays, but at least some of the time taken over the stakeholder consultation is supportive of the FCO’s time estimates and general burdensome nature of the request.
 - The argument about the release of other larger files is unpersuasive. The FCO has consistently relied on section 14 in relation to requests for Helen Smith files.
 - The size of the file is only one indicator – a file of 1000 pages may require little review, whilst a file half the size may have sensitive information on every page.

Mr Qureshi’s response – (page 23)

15. After providing a timeline of his requests, Mr Qureshi made the following points.
- Given the FCO’s rejection of similar FOIA requests, they already had a good idea of what work would be involved.
 - The FCO asked for several revisions of the original request before they accepted it and has done in other cases.
 - The FCO only decided to apply section 14 at the internal review stage, which suggests that the decision was “...a last minute gambit for motives best known to themselves that have still not been adequately explained.”
 - The FCO has not satisfactorily explained why the FCO rejected request 10 on 26/2/16 but waited until 20/3/17 to reject the request which is the subject of this appeal.

- v. He has noted the content of paragraphs 28-31 of the Commissioner's decision notice. Paragraph 31 suggests that if he had requested information relating to a 3-month period in 1981 the response would have been the same. "It appears that the Respondent had no inclination to release any documents but relied on an excessive delaying tactic which wasted [Mr Qureshi's] patience and time."

Joinder of the FCO

16. On 23/3/18 the FCO was made a party to the appeal as the Second Respondent.

FCO response - (page 46) with attachments

17. The FCO provided a chronology of relevant events, summarised the role/approach of the tribunal and made the following points.
- i. Should the Tribunal find that section 14(1) does not apply, the FCO will seek to rely on the exemptions cited in their refusal notice.
 - ii. The FCO adopts the Commissioner's analysis of the law applying to section 14(1), but adds references to the idea of proportionality being inherent in the policy behind section 14(1) (*Wise V IC*) and Judge Wikeley's approval of a description "that "vexatiousness" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".
 - iii. The FCO made the following submissions on the grounds of appeal.
 - iv. Mr Qureshi's assertion that he limited the period of his request in accordance with the FCO's suggestion is without factual or legal merit. But in any event that assertion does not establish any legal basis for the tribunal to interfere with the Commissioner's decision.
 - v. Mr Qureshi's frustration at the delay in dealing with his request is appreciated and the Commissioner's criticism noted. However, the referral to an excessive delaying tactic is rejected. The FCO issued regular written apologies for the delay and explanations for it throughout the relevant period. Their diligence and thoroughness were the subject of positive comment from the Commissioner. The delay is clearly regrettable but does not itself constitute a basis for allowing the appeal. No point arises from the timing of the section 14 exemption which arose as a direct consequence of the internal review process itself. The reference to a last-minute gambit ignores the comprehensive rationale set out in the FCO's letter to the Commissioner of 12/1/18. Mr Qureshi's case is not assisted by the earlier rejection of request 10; each case was concerned with different documentation and projected hours of work.
 - vi. The Commissioner has accepted that the 428 pages of information assessed as falling within the scope of the request is a substantial amount of information. Mr Qureshi has not set out any proper basis for disagreeing with that finding.

- vii. The FCO was able to definitively quantify the time spent assessing the material for relevance at 4 hours and 52 minutes.
- viii. The “sensitivity review” time was estimated at 44 hours and 10 minutes.
- ix. The time spent on the case was a product of the volume of information and the complex and difficulty of the sensitivity review required.
- x. An additional 48.5 working days were required for attending to further tasks (including consultation with various stakeholders etc.). It was estimated that up to 40 people could be impacted by disclosure.
- xi. The request was therefore exceptionally time consuming.
- xii. The rationale was accepted by the Commissioner who found that the accuracy of the FCO’s time estimate for the sensitivity review was to be accorded “considerable credence” as it was based on a previous review of similar material.
- xiii. Mr Q had not sought to challenge the Commissioner’s decision regarding exempt information.
- xiv. The FCO explained the difficulty in isolating exempt information as accepted by the Commissioner and unchallenged by Mr Q.
- xv. The Commissioner’s decision notice did not address the exemptions relied on but alluded to them and indicated her acceptance that various exemptions are likely to be engaged.

Mr Qureshi’s response to the FCO (page 69)-79) with attachments

18. Mr Qureshi’s main points were as follows.

- i. He accepts the FCO’s account of his FOIA history and their outline of his case. It is clear that the FCO has a consistent policy of denying releases of this request that go beyond the 30 year rule.
- ii. It appears that request 4 was successful because those documents had already been prepared for release into the National Archive.
- iii. The assertion that he does not establish any legal basis for challenging the Commissioner’s decision is at odds with his citation of *Ashton* in his appeal grounds.
- iv. The Respondents have not adopted the required holistic/broad approach applicable to vexatious requests.
- v. The correspondence shows that he took a reasonable approach when responding to the FCO and taking on board their suggestions.
- vi. The application of section 14(1) led to a lack of scrutiny by the Commissioner of the original exemptions cited. As regards their comments on his assertions about the tactical use of section 14(1) and their explanation to the Commissioner, he had only seen extracts from their letter to the Commissioner.
- vii. As regards his successful request on the Dennis Skinner case, there are many similarities between the 2 cases. Given the controversy surrounding the Skinner case one would expect that a lot of documents

would have been withheld but around 23 folders of information were disclosed (about 2,549 pages) and there were no requests for a narrowing of the request.

- viii. As regards the 3 criteria that the commissioner considered: (i) he had reduced the time period of interest to a level that was deemed acceptable and there had been ample opportunity for the FCO to refuse the requests under section 12; (ii) if the FCO had real concerns about potentially exempt information, why did the Commissioner not ask for supporting evidence of this; (iii) he is unconvinced “..that the documents are scattered throughout the requested material ” (as explained in paragraphs 28-34).
- ix. There is no indication that the Commissioner has reviewed the 428 pages of extracted material.
- x. As it has been established that individual folders have been created in this case which in his experiences, are likely to be filed chronologically and to contain duplicates, he remains unconvinced by all of the FCO’s assertions.
- xi. He is concerned about the FCO’s reference to (further) narrowing the date range of his request “because isolating material in this way would give a selective and distorted view of the event and individuals associated with it”. He questions where in FOIA this is justified.
- xii. In paragraphs 45-63 of the response he set out some comments on the FOIA exemptions in sections 27, 38 and 41.

FCO’s response (additional open bundle)

19. The FCO submitted a brief response, making the following points.
- i. For the avoidance of doubt, the FCO would resist any attempt to extend the scope of the appeal to include matters arising before the requests dated 4/11/13.
 - ii. The FCO does not consider the FOIA response to the Skinner request to be relevant to this appeal.
 - iii. The successful request (FOI 0314-13) was for a specific file and not for material scattered across different files/file record series. Mr Qureshi is incorrect to refer to the documents relating to this case having suddenly been spread out again.
 - iv. The FCO is better placed than Mr Qureshi to evaluate the impact of disclosure on international relations and in any event this appeal is about section 14(1) and not section 27 (or the other exemptions originally cited).

Appellant’s final submission with attachments (additional open bundle)

20. The Appellant made the following points in his final submission.
- i. In his response document dated 24/6/18, he had simply pointed out that the FCO’s own timeline had shown a consistent pattern of denying FOIA requests relating to the Helen Smith case, no matter what period of time was cited. This is continuing, as demonstrated by a further FOIA

- request he made to the FCO on 22/2/18 asking for documents relating to 1997, which has been refused in reliance on section 38.
- ii. He considers that his Skinner request is relevant as it (and other similar requests) show that the FCO file and collate such documents in chronological order.
 - iii. And it has in any event been established that there are filing systems relating to the Helen Smith case. The cover sheet of the file released to him demonstrates this.
 - iv. He goes on to make further observations about the section 27 issue.
 - v. He refers to another section 14 case (Paul Arnold v IC - EA/2018/0061) “in which section 14 was thrown out”.
 - vi. He refers to the list of indicators in the Commissioner’s section 14 guidance. He is not convinced that any apply given the scale of what was cleared and released in related FOIA requests.
 - vii. He relies on previously published material (as listed in paragraphs 46-51) to strengthen his case for release of the withheld information.

The powers of the Tribunal

21. The task of the Tribunal is set out in section 58 of FOIA:

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The issue we had to decide

22. The only issue we had to decide was whether request 9 was vexatious, within the meaning of section 14(1) of FOIA (“Section 1(1) [of FOIA] does not oblige a public authority to comply with a request if the request for information is vexatious.”).
23. For the reasons mentioned below, we could not consider any points relating to the exemptions referred to in the FCO’s refusal notice and review letter. We could not consider the amount of information provided in other cases as each case turns on its own facts and circumstances.

The evidence and the type of hearing

24. The evidence before us consisted of: the paper evidence in the open bundle of documents (176 pages); and the paper evidence in the additional open bundle of documents (Government Legal Department (FCO) letter dated 7/8/18, Mr Qureshi's final submission and attachments and case management directions dated 18/9/18).
25. All three parties requested a paper determination. After considering the bundle of evidence (which included the very thorough and detailed submissions from the parties referred to above) we were satisfied that we were able to determine the appeal without an oral hearing and that it was fair and just to do so.

Relevant law

26. Section 12 of FOIA ((exemption where cost of compliance exceeds appropriate limit) is the most obvious basis upon which to refuse a request on cost grounds and should, as a matter of good practice, be relied on where it can be¹.

However, there are limitations on what may "count" for section 12 purposes. Section 12 can only apply to the costs a public authority reasonably expects to incur in: determining whether it holds the information; locating the information (or a document which may contain the information); retrieving the information (or a document which may contain the information); and extracting the information from a document containing it². It cannot be relied on in respect of the costs of considering whether the information is exempt information or the costs of considering public interest issues. It is well established, however, that section 14 can extend to such a case.

27. Upper Tribunal Judge Wikeley provides a very helpful and thorough summary (paragraphs 24-27 of his judgement) of the section 14 case law in *Cabinet Office v IC and Ashton [2018] UKUT 208 (AAC)*, in the context of a case concerning a request that had been refused in reliance on section 14(1) on cost grounds.

28. He summarised the Upper Tribunal and Court of Appeal decisions in the leading case of *Dransfield v Information Commissioner [2015] EWCA Civ 454*, referring to:

- The Upper Tribunal's guidance on the purposes of section 14 (to protect the resources of the public authority from being squandered on disproportionate use of FOIA), as approved by the Court of Appeal (subject to the qualification that this was an aim which could only be realised if "the high standard set by vexatiousness is satisfied").
- The test under section 14 being whether the request is vexatious, not whether the requestor is vexatious.
- The four broad (non-exhaustive) issues/themes identified by the Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious (the burden on the public authority and its staff; the motive of the

¹ *Craven v IC and DECC [2012] UKUT 442 (AAC)* at [25]-[31].

² The Freedom of Information and Data protection (Appropriate Limit and Fees) Regulations 2004.

requestor; the value or serious purpose of the request; and any harassment or distress of and to staff).

- The Upper Tribunal's guidance as to burden; the context and history of the particular request, in terms of the previous course of dealings between the requestor and the public authority must be considered in assessing whether the request is properly to be described as vexatious.
- The Upper Tribunal's guidance that, in deciding whether a request is vexatious: "Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests."
- The Court of Appeal's rejection of the submission that past requests were relevant only if they tainted or infected the request that is said to be vexatious.
- The additional guidance given by the Court of Appeal (Arden LJ) in paragraph 68 of the decision (the need to apply an objective standard, the high hurdle of satisfying section 14(1) and the need to consider all the relevant circumstances in order to reach a balanced conclusion).

29. In paragraph 27, Judge Wikeley summed up as follows: "*The law is absolutely clear. The application of section 14 of FOIA requires a holistic assessment of all the circumstances. Section 14 may be invoked on the grounds of resources alone to show that a request is vexatious. A substantial public interest underlying the request for information does not necessarily trump a resources argument.*"

In the same paragraph he went on to quote, with approval, an extract from the Commissioner's written response to that appeal:

"a. In deciding whether a request is vexatious within the meaning of section 14(1), the public authority must consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.

b. The burden which compliance with the request will impose on the resources of a public authority is a relevant consideration in such an assessment.

c. In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious."

30. The parties have cited other relevant decisions of the First-tier tribunal, but they are not binding precedents.

31. The Commissioner's views, as expressed in paragraph 13 of her decision notice, are based on the ICO guidance entitled *Dealing with vexatious requests* (section 14) (paragraphs 69-74). That guidance gives a helpful steer, but it is guidance and not the law.

What we decided and why

32. We decided that the relevant circumstances of this case were as follows.
33. There has been no suggestion by the FCO or the Commissioner that motive was a factor in their decision or that there was a lack of value/serious purpose behind the request. Indeed, in paragraph 27 of her decision notice the Commissioner makes the following comment: "In reaching this conclusion, the Commissioner wishes to emphasise that she has, as she did with the complainant's similar request, taken into account the purposes and value of the request. The Commissioner recognises that disclosure of the information could provide the public with an insight in to the Helen Smith case and potentially lead to greater transparency in relation to the FCO's role in the case."

There has been no suggestion that Mr Qureshi has harassed or caused distress to FCO staff. From the evidence we have seen, Mr Qureshi's communications with the FCO have been polite and temperate.

34. In this case, burden is the only factor cited by the FCO and the Commissioner which potentially points towards vexatiousness.

Despite the number of requests made by Mr Qureshi in relation to the Helen Smith case, however, there has been no suggestion that the previous course of dealings between him and the FCO was a factor in the FCO's decision to refuse the request on section 14 grounds. This did not surprise us. Despite having made 9 requests for information about the Helen Smith case, Mr Qureshi has been (partially) successful in relation to one request only (request 4). The request that was the subject of this appeal (request 9) was modified on three occasions before it was accepted by the FCO. There has been no suggestion that concerns about future burden were a factor in the FCO's decision.

35. The FCO's section 14 case therefore focussed only on the alleged cost burden of dealing with this request.

36. In this regard, we found as follows.

By 20/3/17, when the FCO responded to the request (page 142), the FCO had:

- located and identified the information falling within the scope of the request, which was included within three specific files totalling 428 pages of information;
- undertaken "extensive stakeholder consultation" (second paragraph of the letter at page 142);
- "carried out a detailed sensitivity review of the requested material" (fourth paragraph of the same letter); and

- concluded that four FOIA exemptions applied and conducted a public interest test in relation to the two qualified exemptions.

By 5/7/17, when the FCO sent their internal review response (page 148), they had undertaken “a further sensitivity review of the requested material” (page 49) and concluded that the information remained sensitive, the exemptions remained valid and the information should continue to be withheld. It was at that stage that they had “additionally concluded that section 14(1) (vexatious request) also applies, given our extensive experience of working on this request”. In the penultimate paragraph of that letter they said, in support of their reliance on section 14(1): We consider that the amount of time required to identify, review the information and undertake the necessary consultation with stakeholders has placed a significant and disproportionate burden on our resources.”

37. It is clear from this that, in relying on section 14(1) at this late stage, the FCO were taking account of tasks and costs that had *already* been undertaken/incurred (some of which could potentially have been grounds for refusing the request in reliance on section 12 at a much earlier stage). Having located the information, undertaken a very lengthy consultation exercise with stakeholders, conducted two sensitivity reviews and decided that all of the information within the scope of the request was exempt (and, in relation to the qualified exemptions, that the public interest test favoured retention), there did not appear to be any remaining burden to which section 14(1) could apply.
38. It follows from this that the three criteria considered by the Commissioner were not relevant to the issue of whether the request was vexatious on resources grounds, given that the resources referred to had already been utilised. The Commissioner’s office appears not to have focused on that crucial fact.

Although it is unnecessary to say so, we felt that we should also mention that we were not in any event persuaded by the Commissioner’s acceptance of the FCO’s assertions in relation to the three criteria referred to in paragraph 13 of the decision notice. We accepted that 428 pages of information can be described as a substantial amount of information, but we were not persuaded that, relative to the amount of withheld information we have seen in other cases, that amount of information reaches the bar of being so substantial that it should count as such for section 14(1) purposes. We considered the estimated sensitivity review time of 44 hours and 10 minutes (which would equate to approximately 6 standard working days, based on a 7-hour day) for 428 pages of information to be improbably high. We were also puzzled by the reference in paragraph 21 of the Commissioner’s decision notice to relevant material being “scattered throughout the 103 files” when paragraph 16 clearly states that there were only 3 files in scope.

39. Having assessed all of the relevant circumstances we decided that the request was not vexatious. The FCO’s section 14 claim was solely and erroneously based on costs and resources that had already been utilised. There was a clear and substantial public interest underlying the request for information. There was no basis upon which we could find that section 14(1) applied.

Case management directions dated 2/1/19 and 1/2/19

40. We met as a panel to determine this appeal on the papers on 4/12/18. We decided on that date that we were not satisfied that section 14(1) applied but that we needed to consider the exemptions that the FCO had also relied on before we could determine the appeal. We adjourned for that purpose.
41. Following the hearing I issued the attached case management directions dated 2/1/19. The Commissioner subsequently requested that we issue a decision (preliminary or final) about section 14 (and the FCO requested extensions of time to the dates set out in the directions). The Registrar then issued the attached directions dated 1/2/19.
42. As a panel, we subsequently decided that the appropriate way forward (in accordance with the “overriding objective” in rule 2 of the Tribunal’s procedural Rules³ (“to deal with cases fairly and justly”) was to issue a final decision about section 14. The Commissioner had properly made her decision on the basis of section 14(1) only, even though we disagreed with her conclusion. Section 14(1) is not a FOIA exemption. It is a provision that negates the section 1(1) obligations to confirm whether relevant information is held and, if it is, to communicate it to the requestor. Section 14(1) was not a *preliminary* issue in this case it was the *main* issue. If we insisted on requiring sight of the withheld information and submissions on the application of the exemptions before we finally determined the appeal, this would effectively deprive the Commissioner and the FCO of their right to challenge our decision on the section 14(1) issue.
43. This decision is, therefore, our final decision on section 14(1) and our final determination of this appeal.

Conclusion

44. The Commissioner incorrectly decided that section 14(1) applied in this case and her decision notice is not, therefore, in accordance with the law. The appeal is allowed and we substitute the notice set out in paragraph 1 above for the Commissioner’s notice.

**Signed: Karen Booth
Judge of the First-tier Tribunal**

**Date: 2 March 2019
Promulgated: 6 March 2019**

³ The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/76), as amended.