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In the light of the Phase 2 Report of the Grenfell Tower Inquiry, and its criticisms of successive Governments, it seems sadly relevant

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'Vexatious' bid to see *consultee responses* on Fire Safety

Ministry refusal to disclose rejected

by the Information Commissioner

Another story from the category marked '*Surely this cannot have happened?'*

On 8th May 2018, just three weeks before the Grenfell Towers Inquiry settled on its *'list of issues to be investigated'* someone (we don't know who) submitted an FOIA request which has just been the subject of a Decision Notice by the Information Commissioner.[i]

The request was that the **Ministry of Housing, Communities and Local Government** (MHCLG) provide details of the 73 responses received by its predecessor DCLG, to a set of questions in a 2012 public consultation. The subject was proposed changes to Building Regulations and the questions concerned aspects of Regulation B2 abut the spread of fire caused by interior or exterior 'linings' (otherwise known as cladding). The Ministry refused. It claimed the request was 'vexatious' and after the obligatory internal review, it confirmed this decision. Maybe it thought it was a speculative 'fishing expedition'?

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It is truly puzzling that the Ministry thought this an appropriate political response in the wake of the post-Grenfell, Hackett Independent Review on Building Regulations and Fire Safety, but it gives us the opportunity to review the state of FOIA requests that are dismissed for being 'vexatious'.

In this case, the Information Commissioner's Office gave the Ministry short shrift. The term 'vexatious' now has a settled definition as being *'manifestly unjustified, inappropriate or improper use of a formal procedure.'* Backing down quicker than you could shout 'Sir Humphry', the Ministry changed tack and started to argue that its real reason was that it would place a *'grossly oppressive'* burden on them.

It identified eight different activities for which it would need resources. Here is the list in full:-

1. Identify the responses which include Section 1, Part B
2. Assess additional documentation and covering letters
3. PDF these responses
4. PDF any covering letters or additional documentation if in scope
5. Redact answers not relating to part B
6. Identify and redact personal data, including for sole traders or very small companies
7. Check for any requests for confidentiality
8. Carry out third party courtesy notifications as there are key stakeholders and we would with to protect this relationship.

It claimed that opening up and reading each email would take 90 seconds and 30 minutes each to extract the required information (plus 35 minutes for item 7where it applied). In fact there are well-established rules on which activities can be taken into account for the purposes of calculating the cost of responding, and the usual limit is 18 hours of a civil servant's time. Unfortunately for the Ministry, only three of its eight activities qualified under the rules, so it was not surprising that …"***the Commissioner does not consider that performing these activities would amount to a grossly oppressive burden to the MHCLG."***

It has 35 days from the decision notice either to comply with the request or draft a new, valid reason for refusal.

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Of course, there can be vexatious requests, and consultation professionals often have to deal with individuals who may cause them or their organisations *'…a disproportionate, or unjustified level of disruption, irritation or distress…'* These are the words used in the relevant Guidance, and there are clearly situations where it is a more finely balanced judgement than in the MHCLG case.

A great case study is a Decision Notice one week earlier in July[ii]. It concerned the popular **Kendrick School, Reading** which describes itself as *"a high achieving selective school for girls."* It refused to provide copies of responses to its consultations on its Admission Schemes. It argued that the request was vexatious by virtue of the burden it placed upon them. The School claimed the task would take 53 hours. The Information Commissioner thought the correct figure was 8!

Maybe the more interesting debate turned on whether the complainant's behaviour supported the charge that his requests were vexatious. The School pointed to his record of previous requests, and claimed that whatever it disclosed, it would not satisfy him. He was a persistent campaigner for improved access to selective schools for pupils from disadvantaged backgrounds. He complained that Kendrick had failed to consult on its expansion plans, and he ran a website which was critical of the School. He had also become involved in acrimonious correspondence about whether the Governors had been shown an email containing his arguments. The Commissioner acknowledged that some might consider him demonstrating *unreasonable persistence*.

Despite this, her overall conclusion was that his causes were *legitimate issues of public concern*, and the School's own conduct exacerbated the situation. It was not vexatious.

Since January 2018, *(This was up to August 2019 – ed)* there have been 23 Decision Notices on refused requests concerning consultation data. In about half of them the refusal was upheld. In the others, however, public bodies have been found responsible for delays and obfuscation, and one wonders what they feel they have to hide. The legislation provides many legitimate exemptions, and the best known is about the cost of providing the requested. For public consultations, however, the fundamental principle of TRANSPARENCY should ensure that very little is concealed. And if, as in the cases featured in this article, public bodies claim that it costs too much to provide access to consultee responses, something may be wrong with the way in which the data has been captured and stored.

A final thought about the Fire Safety consultation data request. Whoever agreed to refuse the information request on these grounds will not have won awards for political sensitivity. On the other hand, in this case, there might be rather a lot of people who feel they have every right to feel 'vexatious'.

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[i] ICO Decision Notice FS50784547; 23 July 2019
[ii] ICO Decision Notice FS50835713; 18 July 2019

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