IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0309
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 17 November 2014
FS50546312

Appellant: **Cardiff City Council**

First Respondent: **Information Commissioner**

Considered on the papers

Before
John Angel
(Judge)
and
Rosalind Tatam and Pieter de Waal

Subject matter: Section 14(1) FOIA (vexatious requests)

Cases: *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC)

DECISION

The Tribunal upholds the Information Commissioner's decision notice dated 17 November 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Coal Exchange is located in Mount Stuart Square in Cardiff Bay and is a historical building in need of significant repair to prevent it becoming derelict.

2. Cardiff City Council ("the Council") proposed demolishing the main building; only retaining its facades. This is opposed by those who wish to see the entirety of the building retained and restored.

3. On 4 October 2013, Mr Jon Avent (a businessman whose office is located opposite the building) submitted a multi-limbed request to the Council for information regarding the Coal Exchange ("October Request").

4. On 23 October 2013, the Council explained that the requested information would be published on its website in December 2013 and thus it was not obliged to comply with this request under section 22 FOIA.

5. On 25 October 2013, Mr Avent sought an internal review.

6. The parties engaged in further correspondence regarding the deadlines for an internal review in light of the proposed disclosure in December, and Mr Avent submitted a further request for information on 20 November.

7. On 22 December 2013, Mr Avent advised the Council that as he had not had sight of any internal review in respect of the October Request he would make a formal complaint to the Council and/or complain to the Information Commissioner ("Commissioner").

8. On 23 December 2013, the Council informed Mr Avent that it was still working on its internal review response and that it hoped to conclude its review in the New Year.

The Request

9. On 25 January 2014, Mr Avent wrote to the Council to express his frustration and dissatisfaction with the delay in providing its internal review of the October Request.

10. In the same letter, he also made the request for information which is the subject of this appeal as follows:

> *"…I would also, by this email, issue a further Freedom of Information request for the following:-*
>
> *All internal council correspondence and emails relating to the Coal Exchange from 1st October 2013-25th January 2014…"*
>
> ("January Request").

11. On 27 January 2014, the Council provided Mr Avent with the outcome of its internal review of its handling of his October Request. Mr Avent complained to the Commissioner who dealt with it under reference FS50529131 and issued a decision notice dated 3 November 2014. As far as we know this decision has not been appealed to the First-tier Tribunal ("FTT").

12. In the same letter of 27 January 2014, the Council also set out its reasons for refusing the January Request as follows:

"…I can confirm that the Council is unable to answer your request as the cost of complying would exceed 18 hours of officer time and I am therefore issuing an exemption under Section 12 …

…Under normal circumstances I would ask you to re-define your request to be more specific … However, in this case the decision has been made to apply an exemption under Section 14(1) … It is clear that you are submitting requests which are intended to be annoying or disruptive or which have a disproportionate impact on a public authority…

…Please note that this is a final decision and the Council will not undertake an Internal Review, if requested, in this decision…"

("the Refusal Notice")

13. The Council went on to state that Mr Avent's emails in relation to his October Request and his request for an internal review of the Council's handling of that request were *"…disrespectful and threatening. The tone and language used … is completely unacceptable. … It is also inappropriate to pass emails and email account details on to members of the media …"*

14. Mr Avent complained about the refusal to his January Request to the Commissioner.

15. During the course of the Commissioner's investigation, the Council confirmed that it was seeking to rely only on section 14 to refuse to deal with the January Request.

The Decision Notice

16. The Commissioner issued a decision notice on 17 November 2014 ("DN").

17. The Commissioner made the following findings:

- Whilst Mr Avent's language in his communications with the Council *"…may certainly be described as accusatory it is not, in the Commissioner's view of such magnitude or severity to make the request a vexatious one…"* (§35 DN);

- The Commissioner also found that Mr Avent's language and tone was *"…significantly influenced by the Council's failure to respond to previous requests in line with its obligations under the legislation…"* (§36DN);

- Whilst Mr Avent did have a personal interest in the subject matter given his position as the occupier of a business near to the Coal Exchange, there was a wider public interest in the disclosure of the requested information *"…given the status of the building in question, the impact that works to the building had on the immediate area, any potential health and safety risks associated with the building and the amount of public money involved. He therefore does consider that there is a serious purpose behind the complainant's request…"* (§37DN):

- The Commissioner had been unable to find any evidence that *"…the complainant had explicitly stated his intention was to cause disruption to the Council…"* (§38DN).

18. In light of the above, the Commissioner found that section 14(1) was not engaged and accordingly ordered the Council to comply with the request or to issue a new refusal notice which did not seek to rely on section 14.

19. The Council submitted a Notice of Appeal on 15 December 2014.

20. The case was considered by the Tribunal on the papers lodged by the parties who agreed that a hearing was not required.

The Legal Framework

21. Section 14 of the Freedom of Information Act 2000 ("FOIA") provides:

> *"14. – (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".*

22. FOIA does not define the term "vexatious". However, the Upper Tribunal has considered the meaning of the term in *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC). By way of overview, Judge Wikeley stated at §10 of the judgment that:

> "*The purpose of section 14…must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA.*"

23. He continued at §24 that:

> "*the term* [vexatious] *in section 14 carries its ordinary, natural meaning within the particular statutory context of FOIA. It follows, I believe, that the ordinary dictionary definition of "vexatious" as "causing or tending or disposed to cause…annoyance, irritation, dissatisfaction, or disappointment" can only take us so far. I accept as a starting point that, depending on the circumstances, a request which is annoying or*

irritating to the recipient may well be vexatious – but it all depends on those circumstances".

24. Therefore, and whilst making it was clear that they were *"not intended to be exhaustive, nor … meant to create an alternative formulaic check-list",* Judge Wikeley took the view that it was helpful to approach the question of whether a request was truly vexatious by considering four broad issues or themes:-

    (1) The burden placed on the public authority and its staff which takes into account "*…the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question…. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor…*" at §29.
    (2) The motive of the requester;
    (3) The value or serious purpose of the request; and
    (4) Any harassment of, or distress caused to, the public authority's staff.

25. Judge Wikeley commented at §43 that:

    "…The question ultimately is this – is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?"

Grounds of Appeal

26. The Council makes four points to challenge the DN. The <u>first ground of appeal</u> relates to whether the request is vexatious and follows the check list in §24 above.

<u>Disproportionate Effort</u>

27. The Upper Tribunal commented at §35 *Dransfield* that section 14 FOIA *"serves the legitimate public interest in public authorities not being*

exposed to irresponsible use of FOIA, especially by repeat requesters whose inquiries may represent an undue and disproportionate burden on scarce public resources". The Council submits that the January Request forms part of a prolonged endeavour by Mr Avent to use the FOI regime to seek to exert considerable influence over what the Council does with the building.

28. The scale of the additional January Request, the Council says, also fits the description of the *"disproportionate effort"* indicator of vexatiousness in the Commissioner's Guidance as a request whereby the Council would have to expend a disproportionate amount of resources in order to meet it.

29. The Council accepts that it has a duty to provide advice and assistance to applicants and this, it says, was clearly done in this case. Mr Avent received information through the response to the October Request and internal review. He was invited to meetings and received correspondence outside of the FOIA process through officers directly engaged on the Coal Exchange project.

30. We have reviewed the evidence. Following the DN, the Council reverted to the section 12 exception and emailed Mr Avent on 12 December 2014 saying they were "prepared to ….issue a valid response to your request dated 25 January 2014" but that they "would have to consider issuing a refusal notice based on the cost limits as defined in Section 12" if he could not provide clarification of the information he was seeking "in order to enable us to process the request within the cost limits". The Council asked him for "clarification... to consider the options for conducting searches of systems to provide information which [you] are specifically interested in." He was asked, in effect, to indicate who might have the information requested so as to narrow the search, which he did (by email dated 14 December), specifying approximately 10 people. However, the following day the Council appealed against the Commissioner's DN to the FTT.

31. Despite the Council maintaining that it had complied with the Commissioner's guidance to provide advice and guidance in such circumstances, there is no evidence to suggest that they invited Mr Avent to help with their search over the period when they were initially dealing with the January Request in early 2014 or in their Refusal Notice, rather claiming in the 12 December 2014 email (almost a month after the Commissioner had issued a DN rejecting the Section 14 Refusal Notice) that the Council had "5000 employees with access to electronic systems" and suggesting a disproportionate effort would be required. We find this was unrealistic and unnecessary, and seems exaggerated.

32. There are around some 18 emails in the evidence before us sent by Mr Avent during the time period leading up to the January Request[1]. Most of these are towards the end of that period and express what appears to us as an understandable frustration at the lack of progress in dealing with his October Request. Also the delays in the Coal Exchange building repairs and the consequent negative impact Mr Avent felt this had on for his business and commercial operation would seem to us have added to his frustration.

33. If the matter had been dealt with properly by the Council then the number of emails would have been, no doubt, far less. This is against a background where the Council were apologising to Mr Avent for the length of time they had taken to deal with the October Request – see email of 27 January 2014. In an internal email of 26 January 2014 a Council officer commented on "the appalling way in which Economic Development have dealt with this matter".

34. We agree with the Commissioner that it is disingenuous of the Council to claim a disproportionate effort in these circumstances.

[1] The Council's submission states 26 emails, but if so, not all of these were before the FTT.

Purpose and value of request

35. Mr Avent asked for all internal correspondence held by the Council during a limited timeframe between the date of his October Request and the date of his January Request, covering what the Council describes as his "inappropriate" emails.

36. The Council maintains that, in the main, the data held during that time was in relation to the handling of Mr Avent's October Request under FOIA as opposed to any valuable information relating to that request (e.g. any ongoing legal challenges and the use of the Section 78 powers, which Mr Avent had enquired about in the October Request). The Council therefore argues that there was no serious purpose behind the January Request for internal correspondence and emails.

37. However, we note that the focus of the January Request was not on internal correspondence relating to the handling of the October Request but on internal correspondence "*relating to the Coal Exchange".* And we agree with the Commissioner's finding (DN §37, also noted in §17 above) that *"there is a wider public interest in the subject matter of the request given the status of the building in question, the impact that works on the building have had on the immediate area, any potential health and safety risks associated with the building, and the amount of public money involved."*

38. The Council contends that the detail sought by Mr Avent is excessive and disproportionate in the circumstances, and goes beyond what he needs to participate meaningfully in consultations regarding the building as the handling of a request for information does not impact or contribute to decisions made in relation to the building or use of any legislative powers.

39. Moreover the Council argues the January Request would not have covered information held as a matter of public interest as per the initial

October Request. The January Request asked for internal Council correspondence during a timeframe which would have resulted in any searches being focused on correspondence in relation to Mr Avent's October Request and its internal review. The Council therefore challenges the Commissioner's decision that there was a wider public interest in the subject matter of the January Request.

40. The Council refers us to §71 in *Dransfield* where the Upper Tribunal noted *"[t]he file shows beyond and shadow of a doubt that Mr Dransfield regards himself as a lone prophet, a man with a mission to expose the alleged failings of Devon CC in the field of health and safety".* The Council considers that the evidence in this case portrays Mr Avent within the email exchanges as someone who regards himself as a vital communication link to the people of Cardiff, and as an invaluable exposer of wrongdoings and inefficiencies by the Council. It believed that it was this view of himself and his role as a building surveyor that led to Mr Avent's disagreement with the Council's handling of the Coal Exchange building, and that these motives were not adequate justification for the further January Request.

41. We remind ourselves that there are two related requests in this case – the October Request and the January Request. For the purpose of determining whether the January Request was vexatious, it is not possible in our view to consider that request in isolation to the October Request. The January Request was clearly triggered by the way the October Request was handled and by the underlying subject of the Council's proposals for the Coal Exchange. As we have already noted, the January Request relates to "all internal Council correspondence and emails relating to the Coal Exchange…" and is not restricted to internal correspondence about procedural aspects of the handling of the October Request or its internal review. Mr Avent has since explained that he was interested in emails and correspondence authorising expenditure on the building. In our view the Council's

narrow interpretation of the intended scope and purpose of the January Request is unjustifiably restrictive, speculative and inappropriate.

42. Therefore, although Mr Avent may have a personal reason for making the Requests, he is clearly not a lone voice. There is evidence from the local business community, Cardiff Civic Society, Institute of Historic Building Conservation, The Victorian Society and the BBC's reporting of the situation to show a clear public interest concern about what will happen to the Coal Exchange and any health and safety issues involved, which we find point to Mr Avent's concerns (and his Requests) having a public purpose and value.

43.

Mr Avent's conduct

44. The Council maintains that emails sent by Mr Avent demonstrate an accusatory tone as well as inappropriate comments regarding staff members' private lives. The Council believes such comments, aimed towards the officer undertaking the review, are defamatory because they imply accusations of wrong doing.

45. The Council also believes that Mr Avent's conduct was intended to cause worry and distress to an employee who had no decision making power in relation to the building and to further influence the officer to release information through persistent intimidation and by threatening press involvement.

46. The Council also claims that Mr Avent spoke to a member of its information team on 23 December 2013 and that he behaved in an aggressive manner. Mr Avent has no recollection of this and no evidence has been produced from the person involved to substantiate this allegation. We therefore place no reliance on the allegation.

47. We have considered the emails in question, and, although some of the phraseology used was intemperate and unnecessary, on the whole we do not consider the correspondence or conduct to be unacceptable in the circumstances of this case. As referred to in §32 above the Council had to a large extent, through its handling of the October Request, triggered the January Request and Mr Avent's understandable frustrations.

48. In our view the Council's assertions about Mr Avent's conduct are overstated and we do not consider it to amount to harassment of staff. Although one member of staff is disturbed by Mr Avent's forthright approach he seems to accept that this is the result of the way the Council had handled his Requests.

49. We therefore find that the issue of Mr Avent's behaviour (perhaps the Council's main argument) is not well founded and that in all the circumstances of this case the January Request could not be described as vexatious on this basis.

50. We accordingly find that the January Request was not vexatious and that the Council was wrong to refuse it on the basis of section 14 FOIA.

51. The Council's second ground of appeal is that the Commissioner has "…*failed to ask the authority for further supporting evidence as we outlined we were content to provide. Therefore, a decision was made without the full facts and evidence being provided by the public authority…*"

52. In view of our independent finding (on the evidence presented to us by the Council) that section 14 does not apply, this complaint about the Commissioner is not a matter which concerns us because under section 58(2) FOIA "the Tribunal may review any finding of fact on which the notice in question was based".

53. Even if we are wrong we note that the Commissioner refers to his letter to the Council of 2 July 2014, sent during the course of his investigation, in which he states as follows:

> *"…On receipt of a complaint under the FOIA, the Information Commissioner will give a public authority one opportunity to justify its position to him before issuing a decision notice …*
>
> *…It is your responsibility to satisfy the ICO that you have complied with the law. .. This is your opportunity to finalise your position with the ICO. …*
>
> *… please explain fully why in the circumstances of this case the Council relied on section 14(1) to refuse the request …*
>
> *…To fully assess Mr Avent's complaint, I will require the above information and any further evidence you may have relied on for refusing the request. If you chose not to submit any further response the Commissioner may proceed to make a decision based solely on the information which has already been supplied to him…"*

54. Therefore if the Council had further evidence which it wished to be considered by the Commissioner; it could have and should have provided the same when requested to do so. Even at the Notice of Appeal stage it had not provided such evidence.

55. Therefore it appears to us that the Commissioner fulfilled his public law duty to act fairly when reaching a decision under section 50 FOIA in this case.

56. In the third ground of appeal the Council states that the *"…Commissioner failed to take on board the full representations provided…"* As with the previous ground, this is not a matter which the Tribunal has jurisdiction to consider.

57. In the fourth ground of appeal the Council states that it *"…believes that the ICO Decision sets an unacceptable precedent which goes against the Council's own policy on managing risk and duty of care to employees…"*

58. This is not a matter which is relevant to the question of whether the DN is in accordance with the law or whether the Commissioner erred in exercising a discretion, and it is therefore not a matter upon which we have jurisdiction. In any case, the Commissioner must consider each request and complaint on its own facts and merits to assess whether it falls within the scope of section 14 as described in the *Dransfield* decision.

59. We agree with the Commissioner that, while neither the Commissioner nor the FTT are bound by their earlier decisions, both aim for consistency in its decision-making process in relation to section 14 based on the specific circumstances of a particular case.

60. We also agree with the Commissioner, that the Council cannot secure the outcome it seeks in this appeal by pursuing to obtain a *"…clear definition of when section 14(1) is engaged…"* Appeals are determined on facts, not in the abstract.

61. We therefore dismiss this appeal and require the Council to comply with §3 of the DN within 35 calendar days of this decision.

Costs

62. We have concerns about the way this appeal has been pursued by the Council, and its merit. The Tribunal is considering making an order for

costs against the Council under rule 10(1) of the GRC's Rules of Procedure 2009 because it would appear the Council has acted unreasonably in bringing these proceedings. We wish to provide the Council with the opportunity to make written representations as to why we should not make such an order and as to the amount of costs or expenses to be paid, if such an order is made, within 35 calendar days of the date of this decision. We would also invite the Commissioner to make any representations he wishes to make in relation to an order for costs and the amount of costs and expenses under rule 10(6), again within 35 calendar days of this decision.

Signed:

John Angel
Judge

Dated: 23rd April 2015