

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2014

Public Authority: London Borough of Bromley
Address: Bromley Civic Centre
Stockwell Close
Bromley
Kent
BR1 3UH

Decision (including any steps ordered)

1. The complainant has requested information on how the London Borough of Bromley deals with procedural breaches occurring in a tendering process.
2. The Council relied on sections 12 (cost) and 14 (vexatious request) not to comply with the request. The Commissioner's decision is that neither of these sections are engaged and therefore the Council has breached the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant information held relevant to the request of 26 April 2013.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Construction (Design & Management) Regulations 2007 (CDM) integrated health and safety measures into building construction projects. The Regulations require projects of a particular size or projects extending over a certain period of time to provide a CDM Co-ordinator to ensure appropriate health and safety measures are followed and enforced for a relevant project. The Regulations require the Co-ordinator to be qualified and to be competent to fulfil this role.
6. The complainant, who was at the time an employee of the Council's Property Division, devised an on-line training programme to train up property professionals into the role of CDM Co-ordinator. The original intention was to use the training programme for the Council's own staff. However, it became apparent that there was a demand for such training from other local authorities and organisations so a website was developed and implemented.
7. The site was well received by the construction profession and it won several awards. However, the Council maintains, the site was not a commercial success. Therefore, the Council decided to sell the site and an advertisement was placed in the Building Journal on 4 May 2012 with the sale being completed in December 2012.
8. The complainant made a FOI request, regarding the sale, to the Council on 20 March 2013. The Council responded on 12 April 2013.
9. The complainant made a further FOI request to the Council on 21 April 2013, asking 14 questions mainly about the sale of the CDM website. The Council responded to this request. However it determined that the request was not a request for held information but was seeking explanations from the Council for its behaviour. It therefore provided explanations for its actions. This approach by the Council was not subject of a complaint to the Commissioner.

Request and response

10. On 26 April 2013, the complainant requested information from the Council as to -

"...how the authority would deal with a serious breach of procedures during a tender process for disposal of Council assets where clear evidence had been discovered that there has been an ongoing conflict of interest".

11. On 18 June 2013 the Council substantively responded, as laid out below:

"Given the history of the matter and the extensive amount of correspondence to date, I am satisfied that the Council has already exceeded the 18 hour threshold for the exemption set out in Section 12 of the Freedom of Information Act 2000.

In addition, I consider that, having regard to the Information Commissioner's Guidance, notwithstanding the above point it is also legitimate for the Council to aggregate time spent on matters referred to us by both yourself and [Name removed], as that would appear to satisfy the necessary tests for the enquiries submitted to be considered to be taken together for the purposes of the threshold Section 12.

I also give close consideration to the Information Commissioner's Guidance dealing with vexatious requests under Section 14 of the Freedom of Information Act 2000 and, I consider that several of the indicators set out in that Guidance are met as far as your FOI Act requests are concerned".

12. The Council subsequently declined to review its decision, notwithstanding that the complainant had requested the same.

Scope of the case

13. The complainant contacted the Commissioner on 23 September 2013 to complain about the way his request for information had been handled.

Reasons for decision

14. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:

- the duty to inform the applicant whether or not requested information is held and, if so,
- the duty to communicate that information to the applicant.

Section 14(1)

15. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.

16. In *Information Commissioner vs. Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request.
17. In further exploring the role played by circumstances, the Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. They also cited two previous section 14(1) decisions where the lack of proportionality in the requester's previous dealings with the authority was deemed to be a relevant consideration by the First Tier Tribunal.
18. After taking these factors into account, the Tribunal concluded that 'vexatious' could be defined as the '...manifestly unjustified, inappropriate or improper use of a formal procedure' (paragraph 27). The Commissioner notes and concurs with this definition.
19. On 20 March 2013 the complainant made a request for information to the Council relating to the marketing of the Bromley owned website CDM2007.org. The request was put as a number of questions regarding the sale of the website. The Council provided a substantive reply to the complainant's request of 20 March 2013 on 12 April 2013.
20. On 20 April 2013 the complainant, being dissatisfied with the Council's reply of 12 April 2013, made a further request for information again centred on matters concerned with the website.
21. The information request of 26 April 2013 in reality, once again, covered the procurement process relating to the CDM site. The Council maintains that the request was sent to at least three other officers of the Council.
22. The Council has explained that dealing with the requests has placed a significant and unreasonable burden on it. Several senior officers of the Council have spent a considerable amount of time already in dealing with requests for information and correspondence from the complainant and a third party relating to the CDM website. Where concerns have been raised over the process following the disposal of the CMD platform, then even where the Council has made it clear it will not correspond further, litigation from the complainant has not followed. The Council suggested that this arguably also points to unreasonable persistence by the complainant, who is through the information requests effectively undertaking litigation by correspondence rather than pursuing a legitimate request for information.
23. The Commissioner has viewed the "other information requests", and whilst they were sent to the Council over a short period of time this is

little evidence to suggest that they amount to vexatious conduct on behalf of the complainant. They are not overly long or abusive in nature or otherwise onerous for a public authority to deal with. The Council in fact deemed, at least in part, that those two earlier "requests for information" were not actual requests for information but rather the complainant putting questions to it. The Council's replies to these earlier two "requests for information" were not complained about by the complainant. Accordingly they were not adjudicated upon by the Commissioner.

24. The Council considers that it has addressed the complainant's concerns / grievance regarding the website and that it has spent a great deal of time doing so. Consequently, anything he now sends to it relating to this issue constitutes unreasonable and undue persistence; therefore any FOIA requests on it are unreasonable and not legitimate. The Commissioner notes that the complainant would dispute an assertion that the Council has properly and fully addressed his concerns. The Commissioner, on the facts of this matter, cannot endorse the view that the FOIA request of 26 April 2013 was entitled to be automatically viewed as unreasonable and not legitimate. This particularly true since the request was seeking information that had not been specifically sought before. That is, how the Council "*would*" (emphasis added) deal with a serious breach of procedure regarding a disposal of its assets. Additionally the Commissioner takes cognisance that the Council has previously sought to answer narratively the prior information requests rather than answer them in accordance with FOIA.
25. Due to the matters described above the Commissioner cannot find that the totality (both in terms of their number and content) of the "information requests" was enough to deem the third one was vexatious for the purposes of FOIA.
26. The Council supplied the Commissioner with a bundle of copy correspondence that had emanated from, or been generated by, the complainant and a third party connected to him. The subject matter of the documents and letters mainly regard issues surrounding the CDM. The Commissioner's view, after reading the material is that it is somewhat voluminous but not particularly so, given the matters in dispute. The language and tone of the complainant is apt, business like and accords with the issues at hand. The Council may rightly view the volume as being excessive. However it did utilise its own procedures to deal with the complainant and his correspondence it deemed excessive. The Council has therefore regulated and does not reply to the non – FOIA correspondence from the complainant, relating to his on-going grievance.

27. After considering these matters carefully the Commissioner finds that the information request of 26 April 2013 was one that cannot be properly viewed as vexatious for the purposes of the FOIA. He does not consider that it was a '...manifestly unjustified, inappropriate or improper use of a formal procedure'. The Commissioner was initially concerned that the complainant had made three requests for information from the Council over a relatively short period of time. However the Commissioner, after considering the matter and the requests in particular, is not satisfied that they were sent with a mischievous intent by the complainant. It is somewhat natural that a reply to one information request may lead to questions and concerns that legitimately leads to a further request for connecting information. In the circumstances of this case the Commissioner is satisfied that the complainant's information request was not an unreasonable one that fell foul of section 14 of the FOIA.

Section 12

28. Section 12 of FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:

- either comply with the request in its entirety or;
- confirm or deny whether the requested information is held.

29. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government and £450 for all other public authorities.

30. Regulation 5(1) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) states the following:

"In circumstances in which this regulation applies, where two or more requests for information...are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority...of complying with all of them."

31. Regulation 5(2) goes on to state:

"This regulation applies in circumstances in which –

- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
 - (b) those requests are received by the public authority within any period of sixty consecutive working days."
32. When estimating the cost of compliance, a public authority can only take into account the cost of the following activities:
 - determining whether it holds the information;
 - locating the requested information, or records containing the information;
 - retrieving the information or records; and
 - extracting the requested information from records.
33. On 18 June 2013, the Council informed the complainant that:

"Given the history of the matter and the extensive amount of correspondence to date, I am satisfied that the Council has already exceeded the 18 hour threshold for the exemption set out in Section 12 of the Freedom of Information Act 2000."
34. On 8 January 2014., the Council informed the Commissioner that:

"... the subject matter of the requests covered areas which had been extensively dealt with in correspondence with the complainant and the 3rd party over the previous months. ... On this basis, it was satisfied that the exemption in Section 12(1) of the Act is engaged and even if (which it did not accept) the 18 hour threshold in dealing with issues relating to the procurement was not exhausted at the point of its response on 12th April it would have been exhausted responding to the requests of 21st and 26th April 2013".
35. It is clear to the Commissioner that, in estimating the cost of complying with the complainant's information request the Council erroneously took into account matters outside of those outlined in paragraph 32 above. In particular it wrongly took into account time it had already spent with the complainant on matters outside of the confines of the FOIA. The time it "spent on the amount of correspondence to date" and notwithstanding "... the subject matter of the requests covered areas which had been extensively dealt with in correspondence with the complainant and the 3rd party over the previous months" are matters not relevant for the purposes of section 12.

36. The Commissioner notes that the Council wishes to aggregate the time spent on all the complainant's FOI requests and this is legitimate in certain instances. The Council says that totalling this time and the time taken on dealing with the complainant's other correspondence would breach the cost threshold. However, as explained above, time spent on the "other correspondence" is not calculable time for the purposes of section 12. (The Council does not maintain that that dealing with the "three requests" alone had or would exceed the cost limit.)
37. Due to the matters explained and discussed above the Commissioner finds that section 12 is not engaged and cannot be relied upon by the Council not to meet the complainant's request for information.

Right of appeal

38. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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

Alexander Ganotis
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