

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2019

Public Authority: Fishburn Parish Council

Address: fishburnparishcouncil@hotmail.com

Decision (including any steps ordered)

1. The complainant has requested a copy of all recorded information held by Fishburn Parish Council ("the Council"), relating to the tender process for the proposed refurbishment of the Sports Pavilion.
2. The Commissioner's decision is that the Council has incorrectly relied upon section 14(1) of the FOIA to refuse the complainant's request. Additionally, the Council has breached section 10 of the FOIA, as it failed to provide a response to the request within 20 working days.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the part of the request that relates to the tendering process, which does not rely on section 14(1), in accordance with the FOIA.
4. The Council must take this step 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 and previous request

5. On 12 November 2018, the complainant made the following request to the Council:

"For my records, can you please advise the name and cost of the successful contractor."

6. The request was made after the complainant's tender for the refurbishment of the Sports Pavilion was unsuccessful.
7. The Council responded on 26 November 2018 and advised that it would not provide the information requested, as it considered that information about tenders was commercially sensitive information.
8. On 27 November 2018, the complainant explained that he had understood he was entitled to ask for the information under the FOIA.
9. The Council responded on the same day and advised it was withholding the information and relying on sections 40, 41 and 43 of the FOIA. It also stated the following; "You should appreciate that repeatedly arguing the point about the same issue is now taking up a disproportionate amount of time, so any further correspondence on this matter may be treated as vexatious, persistent, repetitive or otherwise an abuse of process, and will not be responded to...".
10. The complainant expressed dissatisfaction with the response later on the same day. He also asked for a copy of the minutes of a Council meeting held on 8 November 2018.
11. The Council responded later on the same day and stated that the minutes would be published in due course and sent to the complainant free of charge; however, it stated that this would not include commercially sensitive information. It also stated that it would not communicate further with the complainant regarding this matter.
12. On the same date, the complainant made a further request for information to the Council, addressed to the Parish Chairman. The Council's handling of this request is the basis for this decision notice.

Request and response

13. On 27 November 2018, the complainant wrote to the Council and requested information in the following terms:

"...I request a copy of all recorded information held by Fishburn Parish Council relating to the tender process for the proposed refurbishment of the Fishburn Sports Pavilion. I also request a full copy of the minutes for the Parish Council meetings held on 13 September 2018, 11 October 2018 and 8 November 2018".

14. The Council responded on 31 December 2018. It stated that it stood by its previous decision not to release the information about the tendering

process because "*a number of exemptions apply.*" It provided a copy of the meeting minutes that had been requested.

15. The complainant informed the Council that he was dissatisfied with the Council's response and that he would be making a complaint to the ICO. For this reason, an internal review was not carried out with regard to this request.

Scope of the case

16. The complainant contacted the Commissioner on 15 January 2019 to complain about the way his request for information had been handled.
17. The Commissioner asked the Council to clarify whether it considered the part of the request of 27 November 2018, which related to the tendering process to be vexatious, or whether it considered that, the information was exempt from disclosure.
18. The Council confirmed that it considered that the requests met the threshold of vexatiousness and also declined to answer the Commissioner's questions regarding any specific exemptions.
19. Under section 14(1) of the FOIA, a request may be refused from the outset as vexatious without a public authority needing to consider whether the requested information may be disclosed. In this case, therefore, the Commissioner is required to consider whether the Council is correct to have stated that the request is vexatious.
20. The scope of this decision is to determine whether the Council correctly refused to comply with the request under section 14(1) of the FOIA – vexatious requests. It will also determine if the Council responded to the request in accordance with section 10(1) of the FOIA – time for compliance.

Reasons for decision

Section 10 - Time for compliance

21. Section 1(1) of the FOIA states that:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

22. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *'not later than the twentieth working day following the date of receipt.'*
23. From the evidence provided to the Commissioner in this case, it is clear that the Council did not deal with the complainant's request of 27 November 2018 in accordance with section 10(1) of the FOIA. The Commissioner finds that the Council has breached section 10(1) by failing to respond to the request within 20 working days.

Section 14(1) - Vexatious requests

24. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
25. The term vexatious is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*. The Tribunal commented that vexatious could be defined as the *"manifestly unjustified, inappropriate or improper use of a formal procedure."*
26. The Tribunal's definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
27. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is vexatious by considering 4 broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
28. The Upper Tribunal did however, also caution that these considerations were not meant to be exhaustive. Rather it stressed the *"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."*
29. The Commissioner has identified a number of indicators, which may be useful in identifying vexatious requests; these are set out in her

published guidance¹. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.

30. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies"*.
31. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
32. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation, or distress.

The Complainant's Position

33. The complainant explained that they made the original request for information so that they could benchmark their tender against their competitors and improve the competitiveness of future tenders. He also explained to the Council that they know their prices are competitive but only against a similar sized company.
34. In his correspondence with the Council, the complainant added that they would not be able to compete with a sole trader, due to overheads, professional qualifications and health and safety, but stated that public bodies often evaluate quality as well as price to ensure all tenderers meet a pre-determined minimum standard.
35. The complainant stated within an email dated 27 November 2018 that he considered he had made a *"polite enquiry."*

¹ <https://ico.org.uk/media/1198/dealing-with-vexatious-requests.pdf>

36. Within the same email, he also stated that he wished to understand the Council's procedures when comparing tenders *"for the benefit of openness and transparency."*
37. He stated that he had concerns as to whether the successful company had been given the opportunity to add value and that his tender appeared to have been assessed on price alone.

The Council's Position

38. In its response to the earlier request, the Council informed the complainant that it treats tenders as commercially sensitive and as such, would not provide the information requested. However, when the complainant questioned the Council's response, the Council also stated that: *"You should appreciate that repeatedly arguing the point about the same issue is now taking up a disproportionate amount of time, so any further correspondence on this matter may be treated as vexatious, persistent, repetitive or otherwise an abuse of process, and will not be responded to..."*.
39. The Commissioner therefore asked the Council to clarify whether it considered the request of 27 November to be vexatious, or whether it was seeking to withhold the information under specific exemptions.
40. After the Commissioner asked the Council to confirm its position with regard to the request of 27 November 2018, it advised that it considered that the request *"reached the threshold of vexatiousness."*
41. The Council has informed the Commissioner that it believes the amount of contact the complainant made with the Council is disproportionate for a Council of its size.
42. It added that the complainant's request has caused an unjustified level of work and disruption for the Council.
43. The Council has also added that it believes the complainant's request has no serious purpose and was intended to cause disruption or annoyance due to their tender being rejected.

The Commissioner's decision

44. The Commissioner has carefully considered both the complainant and the Council's arguments and reviewed all of the information and evidence presented to her by both parties in order to reach her decision.
45. The Commissioner notes that the Council believes that the complainant made the request to cause disruption or annoyance as their tender was rejected.

46. The Commissioner also notes that the Council is a small organisation and she is aware that it can be burdensome to deal with persistent correspondence from any particular individual.
47. She notes that the correspondence cited by the Council as causing a disproportionate burden was received within the short period between the initial request of 12 November 2018 and the request under consideration in this notice.
48. The Commissioner considers that the tone of the complainant's correspondence, while persistent, is not unreasonably so and does not cross the line into obsessiveness. Rather, the complainant is seeking to understand in greater detail why the Council considers the information he requested on 12 November 2018 to be exempt from disclosure.
49. The Commissioner has examined the number and frequency of emails from the complainant to the Parish Council, and does not consider that they are excessive.
50. She considers that, while the complainant broadened his request on 27 November, this was in an effort to determine whether the Council held relevant information, and to attempt to understand any reasons the Council may have for withholding information. In her view, the complainant's request is for relatively specific information and she considers that it would not place much of a burden on the Council either to provide it, or to set out detailed reasons for its application of any exemptions.
51. The Commissioner does not consider that there is any deliberate intention to cause annoyance to the Parish Council; rather, she considers that the complainant is frustrated with what he considers an important issue and is seeking information. Public authorities are not in a position to punish genuine requestors simply because they do not want to deal with the matter at hand – the legislation places a specific requirement on public authorities to deal with requests for information in a specific way, regardless of their size. It is not for the authority to pick and choose elements that suit, but to give appropriate consideration to the rights of the individual as well as the limits that the legislation provides for.
52. The Commissioner is therefore not satisfied that the complainant's request is a manifestly unjustified, inappropriate, or improper use of the provisions of the FOIA.

53. The Commissioner, having taken all arguments and factors into account, considers that on this occasion, in all the circumstances of this case, the Council has incorrectly relied upon section 14(1) of the FOIA.

Other matters

54. The Council has appeared unwilling to justify its position in detail either to the complainant or to the Commissioner. The Commissioner is aware that the Council is a small organisation and considered that the request was taking up a disproportionate amount of time; however, the First-tier Tribunal has made clear that it is critical of public authorities who fail to provide a thorough response: A position with which the Commissioner wholeheartedly agrees. In this case, the Council has apparently relied on the complainant's request being vexatious in order not to have to consider the application of any relevant exemptions in detail. The Commissioner would remind the Council of its obligations when responding to future requests under the FOIA. The Commissioner would take a dim view of a repetition of the way in which the substantive exemptions available have been considered and would expect to see an improvement in the understanding of the obligations that the information access regimes present.

Right of appeal

55. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Andrew Wright
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