

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2016

Public Authority: Halton Borough Council
Address: Municipal Building
Kingsway
Widnes
WA8 7QF

Decision (including any steps ordered)

1. The complainant has requested recorded information which concerns the contract – the Project Agreement and the Demand Management Participation Agreement associated with the Mersey Gateway Project.
2. The Commissioner's decision is that Halton Borough Council is entitled to refuse the complainant's request in reliance on section 14(1) of the FOIA, on the grounds that the request imposes a disproportionate burden on the Council.
3. The Commissioner requires the public authority to take no further steps in this matter.

Request and response

4. On 14 October 2014, the complainant submitted a multi-part request for recorded information concerning the Funding of the Mersey Gateway Project.
5. The terms of the complainant's request which concern to this notice are:

"1. Copy of Contract

*I ask that the contract(s) with the Consortium be made public now.
Will you also say on what date the contract was signed.*

4. Unitary Charge

How much is the unitary charge that the Council will pay to the Consortium each year, and how in broad terms is it calculated?

Is the £1.86bn the expected total unitary charge payments over the period up to 2044? If it is then does the £1.86bn allow for the expected effects of any formula which would increase the amount of any variable part of the charge? If it is not the expected total then what is the £1.86bn and how has it been calculated?

Will you confirm that the unitary charge bills will include VAT. If the figures you are quoting for the unitary charge include this VAT, then how much will this VAT be each year. Will you also confirm that the Council expect to be able to recover from HM Revenues and Customs all the input tax that they pay on the unitary charge.

5. Toll Income.

5.1 Will you confirm that the Council gets the toll income?

5.2 The statement makes it fairly clear that it is the Government who will bear the toll income risk and that their contingent liability will be £1,698 million. Is this correct?*

[*Referring to a written statement to Parliament at <https://www.gov.uk/government/speeches/Mersey-gateway-bridge>]

5.3 So is VAT payable on the toll income? And if not, then as the Council are not operating the tolls directly, what is the argument that has been used to avoid VAT on the tolls income?

5.4 Is there such a Demand Management Participation Agreement in place? If not then is one being negotiated?"

6. The Council responded to the complainant's request on 6 January 2015. The relevant responses were:

"1. Copy of Contract

It is the Board's intention to publish the redacted Final Business Case, not to publish the contracts. Apologies for any confusion this has caused. Please also see our response to HATFOI2014Z.

4. Unitary Charge

a) This is a new request. Our response is included in the attached document We have allocated the reference HATFOI2014Z.

b) This is a statement. To reiterate, the £1.86bn is a combination of the UC, SS and other costs.

c) N/A

d) See B

e) To clarify, neither figure includes VAT.

5. Toll Income

5.3 Noted

5.4 This is a new request. Our response is included in the attached document. We have allocated the reference HATFOI2014Z."

7. On 20 January the complainant wrote to the Council again. In his email he stated:

"There were 13 main questions. I am now regarding them as being dealt with apart from 1, 4b and d and 5. For those questions as far as I am concerned the Council is refusing to supply the requested information and I am asking for a review of the Council's decision."

8. On 22 May the Council sent the complainant its internal review decision. The Council confirmed that it holds a copy of the Project Agreement ("the PA" also referred to as the contract) and the Demand Management Participation Agreement ("the DMPA"). The Council's decision was now to refuse the complainant's request in reliance on section 14(1) of the Freedom of Information Act.

9. The Council stated:

- "The PA and DMPA contain several thousand pages. You have requested a substantial volume of information;*
- The amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the Authority and would be disproportionate and unjustified;*
- Meeting the request is likely to cause a significant amount of disruption;*
- We have real concerns about potentially exempt information being provided; and*

- *Potentially exempt information cannot easily be isolated because it is scattered throughout the requested material."*
10. The Council referred to the complainant's complaint about it not providing him with a full breakdown of the £1.86bn Unitary Charge. It pointed to the large amount of correspondence the complainant had sent and confirmed to him that he had not asked for such a breakdown. The Council asked the complainant to clarify what information he seeks, if it is different from the information it had already provided.

Scope of the case

11. The complainant contacted the Commissioner on 23 March 2015 to complain about the way his request for information had been handled.
12. The complainant complained about the Council's response to parts 1, 4b, 4d and 5 of his request.
13. The Commissioner has investigated whether the Council is entitled to rely on section 14(1) of the FOIA on the grounds that his request is vexatious.

Reasons for decision

Section 14 – vexatious requests

14. The Commissioner has investigated whether Halton Borough Council is entitled to refuse the complainant's requests in reliance on section 14(1) of the FOIA on the grounds that the requests are vexatious.

Reasons for decision

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 where section 14(1) has been applied.
16. The term 'vexatious' is not defined by the FOIA. However, guidance on vexatious requests provided by the Upper Tribunal in *Information Commissioner and Devon County Council v Mr Alan Dransfield* (GIA/3037/2011) places emphasis on the importance of adopting a holistic approach to the determination of whether or not a request is vexatious.

17. The Upper Tribunal judgment proposed four broad issues that public authorities should bear in mind when considering whether FOI requests are vexatious: (i) the burden of meeting the request; (ii) the motive of the requester; (iii) the value or serious purpose of the request; and (iv) and harassment or distress which the request causes. The judgment concurred with an earlier First-tier Tribunal decision in *Lee v Information Commissioner and King's College Cambridge* (EA/2012/0015, 0049 and 0085) that vexation implies an unjustified inappropriate or improper use of a formal procedure.
18. The Upper Tribunal also cautioned 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" (paragraph 45). The Tribunal stated the importance of remembering that Parliament has expressly declined to define the term 'vexatious'. Consequently, the four broad issues (above), "*should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms*".
19. The Commissioner's guidance¹ on the application of section 14(1) makes clear that the key question for a public authority is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. The public authority should also take into account the background and history of the request where this is relevant.
20. 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 a case will need to be considered in reaching a judgement as to whether a request is vexatious.

The Council's representations to the Commissioner

21. The Council has clarified for the Commissioner that its application of section 14(1) applies to all the parts of the complainant's request.
22. To support its application of section 14(1), the Council has advised the Commissioner that since August 2014, the complainant has submitted

¹ http://www.ico.org.uk/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

more than 40 requests under the FOIA, together with 'voluminous' amounts of information in support of his requests.

23. The Council assures the Commissioner that it has satisfactorily answered the vast majority of the complainant's requests, even though many of them relate to information which has already been place in the public domain, and that the complainant has had access to the information having been a party to the Public Inquiry in 2009.
24. The Council points out that the information associated with the complainant's request is extremely complex. Consequently, the Council has offered to meet with the complainant to discuss the matters he wishes to raise. The complainant has declined the Council's offer but has confirmed to the Council that he is against the tolling on the two bridges to which the requested information relates.
25. It is the policy of the current and of previous Governments to instigate tolling in respect of both bridges.

Background information

26. The Mersey Gateway Crossings Board Ltd (the Board) is a special purpose vehicle established by Halton Borough Council with the delegated authority to deliver the Mersey Gateway Bridge project and to administer and oversee the construction and maintenance of the new tolled crossings, including the tolling of the existing Silver Jubilee Bridge.
27. The Board's term of reference and delegated authority are expressed in a Governance Agreement with the Council which is set to last for sixty years. The Board will deliver the project on behalf of the Council and will operate as a commercial not-for-profit organisation on an arm's length basis.
28. The Board works with the Merseylink consortium on a day-to-day basis to ensure that all aspects of the contract are adhered to, ranging from Public Relations and Communications, environment, traffic management, to employment and skills.
29. The requested information relates to the Mersey Gateway Project and the main contracts are between the Mersey Gateway Crossings Board and the Council, Merseylink Consortium. They are referred to as the Project Agreement ("the PA") and the Demand Management Participation Agreement. Both contracts were signed on 28 March 2014 as confirmed to the complainant on 7 November 2014.
30. The Project Agreement is a design, build, finance, operational and maintenance agreement. It uses a typical project finance structure

requiring a special purpose vehicle as the single point of accountability. It secures finance by way of limited recourse debt.

31. The Project Company is responsible for the design, procurement and installation of the toll collection system and for satisfying the live testing trials. This includes not only the tolling infrastructure, equipment and systems on the Mersey Gateway and Silver Jubilee Bridges ("SJB"), but also all off-site systems, equipment and personnel required to satisfy the live testing regime. The Project Company will sub-contract this responsibility to the Construction Joint Venture ("CJV") under the Design & Construction Contract and the obligations in that agreement will be supported by the CJV's security package.
32. The Contract Period will expire 26½ years after the date of the original Target Permit to Use Date and it is expected to be 30 years overall since construction is expected to take 3½ years.
33. The Project Company will be paid on an 'availability basis' through a payment mechanism to maximise the quality of the 'crossing experience' and the availability of the asset, and links payment to performance.
34. The Project Agreement has been drafted in accordance with the Standardisation of PFI Contracts version 4 ("SoPC4") guidance and other precedents in the UK roads sector. During dialogue, bidders did not seek to make material changes to the SoPC4 risk allocation.
35. HM Treasury issued its "Standardisation of PF2 Contracts" guidance in December 2012 during the dialogue period. Elements of the guidance or its required drafting were incorporated into the revised draft Project Agreement issued prior to Final Tender.
36. The SOPC4 and PF2 Contracts guidance are available on the www.gov.uk website; therefore the guidance which was used and forms the contractual basis of the PA is already in the public domain. The Board accepts that it could have provided more assistance to the complainant by providing him with a link to the www.gov.uk website. However, the Council did attempt to engage with the complainant by offering a meeting to discuss his requests. This offer was refused.
37. Demand Management Participation Agreement ("DMPA") relates to the delivery of open road tolling revenue collection services and to demand management services to the Council and the Crossings Board.
38. Under the DMPA, the DMPA Company will be responsible for operating a comprehensive end-to-end revenue collection service in respect of both the Mersey Gateway Bridge and the SJB on behalf of the Council. The DMPA Co will also provide tolling strategic services to the Board.

39. The DMPA Company will be paid a Service Subsidy for providing the toll service.
40. The DMPA is a bespoke agreement, and is possibly the only agreement of its kind. The Contract Period will expire in March 2021.
41. The Council does not consider the requested information to constitute environmental information. It spent a significant amount of time, prior to the Public Inquiry in 2009, preparing an Environmental Statement. This covered a number of environmental topics and provided summaries to the various surveys undertaken by the Council prior to the Procurement phase of the project. Elements of the Environmental Statement have been publicly available on the Council's website and the Mersey Gateway Project website since 2009. It was also published during the planning application stage.
42. Given that the complainant refused the Council's offer to meet, it is unclear to the Council whether the information he is requesting is environmental in nature and therefore subject to the Environmental Information Regulations 2004 ("the EIR").
43. The Council offered to assist the complainant to refine his request to ensure that it was dealt with under the correct information access legislation. The complainant did not respond to this offer. That being the case, and the fact that the complainant was a main objector at the 2009 Public Inquiry and had access to all of this information, the Council determined that the request should be dealt with under the provisions of the FOIA rather than the EIR.
44. The Commissioner agrees with this approach for purely practical reasons, given the size of the contract, the complainant having declined to refine or focus his request and the fact that the environmental information has already been made available by the Council.
45. The Project Agreement and the DMPA comprise of more than 350 documents and equate to over 6800 pages of information or more than 1.8 million words. The information contains many schedules and some of these have multi-appendices in a variety of formats.
46. The Council considers this to be a significant amount of information and meeting the complainant's request would cause a disproportionate level of disruption.
47. Both the Project Agreement and DMPA include schedules which can be properly characterised as being commercially sensitive or confidential in nature. It is the Council's position that the schedules would need to be redacted of this information as they indicate that many of the

requirements of the schedules are applicable until the expiry of the contracts.

48. Likewise, some of their requirements relate to specific clauses or pricing information. The Council accepts that some of this information could be searched for, collated and reviewed by relatively junior members of staff. However, there are numerous other pieces of information which are less well-defined. This type of information would require more senior members of staff to undertake a thorough examination of the documents to determine what wording would constitute commercially sensitive material and would therefore need to be extracted and/or redacted.
49. Notwithstanding the time which the Council estimates would be required to undertake this activity, the Council also asserts that it would be in breach of the contract it holds with the PA and DMPA. It stresses that the costs associated with the Council having this contract terminated by Merseylink and/or the DMPA Company would be significant to the local authority.
50. The Council points out that the complainant has made a significant number of information requests concerning the issue of tolling on the two bridges. To deal with the complainant's request, the Council has expended over 50 hours of senior personnel time.
51. To deal with the request in this case would require the Council's Commercial and Contracts Manager to review and prepare any information which could be disclosed. This, as the Council asserts, would impose a grossly oppressive burden on the authority at a critical time within the construction phase of the contract. It is estimated that to fully undertake the task required to review the requested information would cost in excess of £11,000. This is based on an estimate of the task requiring 450 hours of work, charged at the £25 hourly rate which is provided by the Fees Regulations. The Council estimates that it would require 4 minutes for each of the 6800 pages of information associated with the complainant's request.
52. The Council assures the Commissioner that each page of the requested information would need to be considered in order to avoid the disclosure of commercially sensitive information. This would be a significant burden to the Board, at a difficult time, and where there are very limited resources to undertake the necessary work.

The Commissioner conclusions

53. The Commissioner accepts the Council's representations in respect of the size and contents of the requested information. He also accepts the

estimate of the time the Council would require to review that information in order to determine what parts could be disclosed without prejudice to any commercial interest and to any duty of confidence it owes.

54. He has no doubt that the complainant's request is made to further the public's understanding of a significant development which will affect the many people who will use the Mersey bridges.
55. In this case, the Commissioner must assess the burden of the request on the local authority and must do so in terms of the disruption, irritation and level of stress which the complainant's request has or would generate.
56. The Commissioner has noted that the Mersey bridges have already been the subject of a Public Inquiry and that the vast majority of information associated with this has already been placed into the public domain. This fact leads the Commissioner to consider that the publicly available information goes a significant way in providing accountability of the project.
57. The Commissioner must take into account the Tribunal's position in its Dransfield decision that a holistic approach is required to determine whether a request is vexatious. Here, the Commissioner has decided that to comply with this request would present the Council with a serious and unjustified burden; to the extent that the request can justifiably be characterised as grossly oppressive in the circumstances which prevailed at the time the request was made.
58. The Commissioner notes the merits of the complainant's request. However, on balance, he has decided that complying with it the request would constitute a disproportionate and significant burden. This burden is such to allow the Council to rely on section 14(1) on the grounds that it is vexatious.

Right of appeal

59. 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@hmcts.gsi.gov.uk

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

60. 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.
61. 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 White
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