

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 November 2014

Public Authority: Cardiff Council

Address: County Hall
Atlantic Wharf
Cardiff Bay
Cardiff
CF10 4UW

Decision (including any steps ordered)

1. The complainant requested internal correspondence and emails relating to a particular building in Cardiff Bay – the Coal Exchange. Cardiff Council ('the Council') responded stating that it considered section 12 to apply as compliance with the request would exceed the appropriate limit and it also considered the request to be vexatious under section 14 of the FOIA. The Council confirmed that its final position was reliance on section 14 and it was not prepared to undertake an internal review.
2. The Commissioner's decision is that the Council has incorrectly applied section 14(1) of the FOIA to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under the FOIA without relying on section 14(1) of the FOIA.
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.

Request and response

5. On 25 January 2014, the complainant wrote to the Council concerning a delay with an internal review on an earlier, related request (dated 4 October 2013) and submitted a new request for information in the following terms:

"All internal council correspondence and emails relating to the Coal Exchange from 1st October 2013 – 25th January 2014".

6. The Council provided the outcome of its internal review into the earlier request on 27 January 2014 and at the same time it responded to the new request of 25 January 2014. In relation to the new request, the Council stated that it considered section 12 to apply to the request. The Council advised that, under normal circumstances it would ask the complainant to refine the request, however, in this case a decision had been made to also apply section 14 of the FOIA to the request as the Council considered the request to be vexatious. The Council also stated that the decision was final and it would not be prepared to undertake an internal review in relation to the request.

Scope of the case

7. The complainant contacted the Commissioner following receipt of the Council's response of 27 January 2014 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, he asked the Council to confirm whether it was relying on section 12 **and** section 14 of the FOIA as a basis to refuse the request. The Council confirmed that it considered the request to be vexatious, and therefore it was only relying on section 14(1).
9. The Commissioner considers the scope of this case to be to determine if the Council has correctly applied section 14(1) to the request.

Reasons for decision

Section 14 – Vexatious requests

10. 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. There is no public interest test.

11. The term 'vexatious' is not defined in the legislation. In *Information Commissioner vs Devon County Council & Dransfield*¹, 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. The Tribunal concluded that 'vexatious' could be defined as the "...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
12. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) and harassment or distress of and to staff. 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" (paragraph 45).
13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests². 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.
14. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.

¹ UKUT 440 (AAC) (28 January 2013)

² http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

The Council's position

15. The Council stated that, despite making it clear to the complainant that the jurisdiction in terms of dealing with his requests was limited to request handling rather than the wider issues associated with the building in question, he continued to send correspondence to the information rights team which was not relevant to the handling of the request. The Council considers that the correspondence from the complainant reflects his annoyance with decisions made relating to the building in question and his personal feelings. The Council is of the view that the FOIA is not an appropriate vehicle for this.
16. The Council considers that the tone and/or language used by the complainant is unacceptable. The Council also considers certain correspondence from the complainant to be threatening, referring to one email where he stated that he would "name names" to the media, whilst at the same time copying the email to the media. The Council is of the view that this behaviour goes beyond any level which would be justifiably acceptable for any public sector employee. The Council said that, as a result of the complainant's contacts it was left with the difficult balancing act in respect of continuing contact between its officers and the complainant and ensuring that it protected its employees and did not expose them to unnecessary, unjustified or libellous statements and abuse.
17. The Council provided the Commissioner with a bundle of evidence to support its position. It believes that the level of correspondence was obsessive leading to the harassment of its staff. In particular, the Council referred to the following examples of statements made by the complainant to support its position:

Email 26 January 2014

"I had been given the excuse from your office at the end of December that you were on leave, and that was why the target for your report of end December was missed. I assume that you have not had over 4 weeks leave, so I feel justifiably aggrieved that you have not yet responded. Is there a more important issue in Cardiff at the moment?....or are you being 'leaned on' to delay matters?"

"I trust that my 'concerns' over public safety in Mount Stuart Square are being passed on to the appropriate department, if you feel this is outside of your 'jurisdiction'?.....(this will be a FOI request for the future)..... and a conduct complaint if appropriate. I don't plan to tiptoe around this matter anymore.

The attached council report seems to be an attempt to throw a smoke screen over proceedings. There is complete disregard for businesses in the area. The report seems keen to stress the dangerous state of the building and likely imminent collapse, yet no works have occurred..... but no collapse. Eh??”

18. The Council considers that the statements above not only to be completely inappropriate and disrespectful but to contain accusations that staff have not conducted the investigation appropriately. The Council considers the statements to be defamatory and unacceptable. Whilst it may be argued that an applicant’s feelings and language that there has been “a smoke screen over proceedings” is not a personal attack against an individual, the Council considers that, in light of the tone used and taking into account the individuals to whom the correspondence was directed, the language and tone used is unacceptable.
19. The Council also referred to a further statement in an email the complainant sent on 25 January 2014 to undisclosed recipients that he was “happy to go on-record with the issues and to name-names of those persons who have been involved”.
20. Aside from the email exchanges, the Council stated that the complainant telephoned staff in its information rights unit on 23 December 2013 in a very aggressive manner and the content of the conversation was defamatory of specific officers. It confirmed that staff would be prepared to provide statements relating to this interaction if required.
21. The Council argues that the role of the information rights team throughout the process has been to investigate its failure to deal with the complainant’s initial request of 4 October 2013 appropriately. The Council is of the view that the subsequent request of 25 January 2014 (which is the subject of this notice) was designed to place a burden on the Council. The Council considers that the effort required to meet the request would be “so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requestor.
22. The Council argues that the complainant’s tone, language and statements are justification that future requests would have no value and were made simply on the basis of personal grudges. The Council is of the view that the complainant decided to target his correspondence towards a particular employee or office holder against whom he had some personal enmity.

23. The Council provided some background to the subject matter in this case. It stated that the complainant did not agree that the Council had valid grounds to complete work at the building in question. In the complainant's view and in light of his experience as a structural engineer, he disagreed that the work needed to be undertaken. The Council considers that, for this reason, the complainant has a personal grudge and is using inappropriate routes to vent his opinions. The Council also stated that, despite clear advice and instruction not to copy or send emails to staff within the information rights team the complainant persisted in sending emails to particular officers.

The complainant's position

24. The complainant is concerned that the Council issued a dangerous building notice and proceeded to carry out a range of works at the building. The complainant has a business premises near to the site and has raised concerns that the Council was abusing its statutory powers and that there was a hidden agenda to progress development proposals in respect of the building, which is a listed building. Some of the work which the Council has carried out includes the relocation of services in the road around the building. This has resulted in changes to parking within the area which has caused significant disruption to local residents and businesses.
25. The complainant considers that matters concerning the building in question are of significant public interest. It is a Grade II listed building, and as the centre piece of the international coal trade and business community for 75 years, it is considered to have considerable historical significance. In February 2013, the complainant started a petition, calling on the council to preserve the building from substantial demolition, which has been signed by more than 3,000 people. He has also called for a public inquiry into the Council's handling of matters associated with the building.
26. The complainant considers there has been an absence of information about the Council's plans for the building. It was only by chance that he discovered that various meetings were taking place to discuss the matter. As well as his information requests, the complainant has been in dialogue with the Council about the matter. However, he alleges that deadlines for information being provided to him (outside of FOIA) were missed, including a copy of a structural report on the building. He also alleges that there are inaccuracies/ inconsistencies in the information which the Council has provided, both as a result of his requests and outside of FOIA. He also states that many of the Council's discussions and reports about the issue have been deemed unsuitable for public dissemination, for example, the matter was discussed at a Cabinet

meeting on 16 January 2014, but reports on the matter were deemed exempt under Schedule 12A of the Local Government Act 1972.

27. The complainant also referred to the Council's handling of his original request for information of 4 October 2013. This request consisted of 11 separate items relating to the building and the Council's handling of matters relating to the building. The Council responded on 23 October 2013 stating that the information requested was exempt under section 22 of the FOIA as it would be published in December 2013. On 25 October 2013, the complainant requested an internal review of the Council's handling of the request. The Council acknowledged the internal review request on 30 October 2013 stating that it was aiming to complete the review within 40 working days. The complainant also sent follow-up emails to the Council on 20 November 2013 and 2 December 2013.
28. The complainant chased the Council for a response to his internal review request on 15 December 2013. As he did not receive a response, he wrote to the Council again on 22 December 2013 expressing concern and frustration at the delays experienced. He sent a further email to the Council on 23 December 2013 referring to the fact that he had been advised that the officer responsible for dealing with the review was on leave until early in 2014. In this email the complainant stated that he would be making a complaint to the Commissioner about the delays experienced, and the lack of response to his recent emails. He also indicated that if he did not get a response he would involve the media in the matter in 2014. The Council responded on 23 December 2013 and explained that it was still in the process of dealing with the review and confirmed that it was hoping to conclude the review early in the new year.
29. The Council's handling of the request of 4 October 2013 was dealt with by the Commissioner under a separate complaint. The Commissioner wrote to the Council on 14 January 2014 about the delay with its internal review and reminded the Council of its obligations under the FOIA. The complainant wrote to the Council again on 25 January 2014 regarding the delay with its internal review. It was in this communication that he submitted the request for information which is the subject of this notice. In this email, the complainant stated that "I am sure that you can now understand why I now feel it necessary to copy the media into this and all future correspondence".
30. The Council provided the outcome of its internal review on 27 January 2014. The review concluded that it had failed to provide a valid response to the request of 4 October 2013 as the initial response had indicated the Council's intention to publish information which either did not exist, or where there was no clear intention to publish the information. The

initial response also led the complainant to believe that information would be published which was clearly exempt from disclosure under the FOIA. The revised response from the Council in relation to the request of 4 October 2013 was that some information was provided, some information requested was not held, some information was exempt under sections 40(2) and 42(1), and the Council also applied section 12(1) to other information requested.

31. The complainant is very unhappy that the Council considers his request to be vexatious. He considers his concerns relating to the subject matter to be genuinely in the public interest, and in protecting one of the finest buildings in Wales. He does not consider that asking difficult questions can be fairly considered to be annoying or disruptive. He acknowledges that entrenched positions were developing between himself and the Council. However he argues that the delays experienced without meaningful dialogue or communication have meant that he has been forced to "keep upping the pressure". The complainant considers that when deadlines to publish information and to respond to emails are not met it is reasonable to email and chase information. However, he strongly disputes that his emails have been threatening or disrespectful. He also contends that his emails have been widely circulated to ensure that "apparent ongoing attempts by Cardiff Council to claim 'other departments responsibilities', which simply serves to confuse and frustrate me, are getting to the appropriate department/contact".
32. The complainant has also indicated that a significant amount of public money is involved. He referred to a council report on the matter which confirmed that it had spent £830,000 on works to the building in question, including over £250,000 on professional fees.

The Commissioner's position

33. In its initial response to the request dated 27 January 2014, the Council stated that it considered section 12 to apply to the request. It stated that compliance would exceed the appropriate limit of 18 hours as the Council had 12,000 members of staff, over 5,000 of whom had email accounts which would need to be searched. However, when the Commissioner contacted the Council about the complaint it confirmed it was only relying on section 14 as the basis to refuse the case and it did not provide any representations to support the application of section 12. In its representation relating to the application of section 14 the Council referred to the burden in dealing with the request however, it did not provide the Commissioner with any detailed representations in support of the burden that compliance with the request would place on the Council. It simply stated that compliance would be "grossly oppressive" in terms of the strain on time and resources. The Commissioner has

therefore not afforded weight to the argument that the request would place a burden on the Council.

34. The primary argument for the Council's application of section 14(1) appears to be that the complainant has used abusive or aggressive language, and has made unfounded accusations against the Council and/or specific employees.
35. Whilst the complainant's language 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. Public authorities routinely deal with members of the public. Whether through frustration, or some other reason, the language used by a member of the public may sometimes be "challenging". The Commissioner considers however that those holding a public position should be accustomed to a certain amount of criticism but accepts that there is obviously a boundary of what is or is not acceptable. However, based on the examples and evidence provided by the Council, although the language of the complainant may not be pleasant, in this case the Commissioner does not consider it has crossed that boundary.
36. The Commissioner notes that the Council's supporting evidence in terms of the email correspondence suggests that much of the frustration on the part of the complainant is in relation to the Council's mishandling of an earlier request and the associated delays experienced. The Council has acknowledged that there were failings in its handling of this earlier request and its application of section 22 was incorrect, as referred to in paragraph 30 of this notice. The Commissioner also notes that it took the Council 63 working days to complete its internal review in relation to the earlier request. The Commissioner therefore considers that the language and tone of the statements made by the complainant (as referred to by the Council) have been significantly influenced by the Council's failure to respond to previous requests in line with its obligations under the legislation.
37. In terms of the purpose and value of the request, the Commissioner notes that the complainant has a personal interest in the subject matter as he has a business premises near to the site. However, the Commissioner also considers 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 to 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. He therefore does consider that there is a serious purpose behind the complainant's request.

38. The Council alleges that the complainant has "explicitly stated it is their intention to cause disruption to the public authority within his communications". The Commissioner appreciates that the complainant has expressed frustration at the Council's handling of this requests in what may be classed as strong terms. The Commissioner notes that, as a result of the delays, the complainant advised the Council on 23 December 2013 of his intention to pass details to the media should he not receive a "prompt conclusion" to the matter. However based on the representations provided by the Council, the Commissioner had been unable to find any evidence that the complainant explicitly stated his intention was to cause disruption to the Council. The Commissioner has seen no evidence to suggest that the request in this case was a deliberate attempt to cause annoyance or disruption to the Council but more a a sign of the complainant's persistence in pursuit of obtaining answers to his questions.
39. The Commissioner considers that the Council has not demonstrated that the burden imposed by the request is unjust in the circumstances. Taking into consideration the findings of the Upper Tribunal in Dransfield, that a holistic and broad approach should be taken in respect of section 14(1), and having considered all the circumstances of the case, the Commissioner does not consider that the Council has provided sufficient grounds to deem the request vexatious. It therefore follows that he finds that the Council incorrectly applied section 14(1) to the request.
40. The Commissioner requires the Council to either provide the information requested, or issue a fresh refusal notice without relying on section 14(1).

Right of appeal

41. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

42. 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.
43. 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

Anne Jones
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