

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2017

Public Authority: Brighton & Hove City Council

Address: Kings House
Grand Avenue
Hove
East Sussex
BN3 2LS

Decision (including any steps ordered)

1. The complainant has requested information relating to a previous decision notice issued by the Information Commissioner and the council's subsequent appeal to the First Tier Tribunal (Information Rights). The Commissioner's decision is that Brighton & Hove City Council has correctly applied the vexatious provision at section 14(1) of the FOIA. She does not require any steps to be taken.

Request and response

2. On 15 January 2017, the complainant wrote to Brighton & Hove City Council ('the council') and requested information in the following terms:

"Under the terms of the Freedom of Information Act please supply all internal emails, memos, and processing notes relating to the council's appeal to the information rights tribunal reference EA 2016.0119.

Please supply all internal emails, memos and processing notes relating to the Information Commision [sic] Officer's decision notice reference FS50609004."
3. The council responded on 3 February 2017 and refused the request as vexatious under section 14(1) of the FOIA.

4. On 7 February 2017 the complainant requested an internal review.
5. The council provided its internal review response on 1 March 2017 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 1 March 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the council has correctly applied section 14(1) of the FOIA to the request for information.
8. The council's response to the Commissioner's enquiries states that if the Commissioner does not accept its arguments that the request is vexatious then, in the alternative, it would argue that the requested information should not be disclosed because it falls within section 42 of the FOIA. This provides an exemption for information in respect of which a claim for legal professional privilege could be maintained. It also said that insofar as some of the material caught by this request inevitably contains some of the previously exempted information it would also seek to re-apply the exemptions used to withhold the information in response to the original request (sections 41 and 43).
9. Given that the Commissioner has found that section 14(1) applies in this case, she has not deemed it necessary to consider the exemptions at sections 41, 42 or 43 of the FOIA.

Reasons for decision

10. 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.
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

¹ UKUT 440 (AAC) (28 January 2013)

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 therefore needs to consider 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.
14. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her 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.

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

15. As way of background to the issue and in order to provide context and history, the council provided the Commissioner with the following information:

"The British Airways i360 ("the i360") is operated by Brighton i360 Ltd ("the Company"). The i360 is a vertical cable car located on the Brighton seafront, offering views of the coast and surrounding areas to paying visitors. The projected cost of the i360 was £46m. The project was partially funded by Brighton & Hove City Council ("the Council"), who provided the Company with a Public Works Loan Board loan worth £36m. The remainder of the funds are provided by a Public Enterprise Partnership loan and private equity partners. The i360 was opened to visitors in 2016.

On 15 September 2015, the Complainant wrote to the Council and requested information in the following terms: -

"Brighton i360 rental agreement

(1) Please supply me with a document that sets out the full rental agreement between the council and the operators of the Brighton i360 for the tenancy of the site.

(2) Please supply the complete and unredacted Brighton i360 business review carried out by D&J International Consulting."

The Council allocated the reference **FOI5394/15** to this request and responded on 14 October 2015, stating that it did not hold the information requested at (1).

On 23 October 2015, the Council wrote to the Complainant with a substantive response in relation to (2) of the request. This information takes the form of a report entitled "Brighton i360 Business Review", prepared for the Council by D&J International Consulting ("the Report"). The Council stated that it held the information requested in (2) but declined to disclose it on the basis that: (a) Parts 1-5 of the document were otherwise available, and therefore the Council was exempt from disclosure by way of Section 21 of the Act; and (b) Section 6 of the Report ("Section 6") was exempt under section 41 and section 43(2) of the Act, and the public interest favoured withholding the information.

The Complainant requested an internal review on 23 October 2015. The Council maintained its position upon an internal review, which reported back to the Complainant on 21 December 2015.

On 25 December 2015, the Complainant complained to the Commissioner in relation to the Council's failure to disclose the information requested at (2).

Following an investigation (ICO reference **FS50609004**), the Commissioner issued a Decision Notice on 31 March 2016. The Commissioner concluded that neither of the exemptions contained within s.41 or 43(2) of the Act applied.

The Council appealed the decision to the Information Tribunal on 27 April 2016 (Ref: **EA/2016/0119**).

On 15 January 2017 – and importantly whilst that Appeal was still extant - the complainant submitted a further request for information to the Council for internal emails memos and processing notes relating to request FOI5394/**15** and complaint **FS50609004**. The Council responded on 3 February 2017 and refused the request as vexatious under section 14(1) of the Act. On 7 February 2017 the complainant requested an internal review. The council provided its internal review response on 1 March 2017 in which it maintained its original position. That request is now the subject of this complaint.

On 2 March 2017 the Tribunal published its unanimous decision upholding the Council's appeal (Ref: **EA/2016/0119**). The Tribunal agreed with the Council's submissions that the requested information was covered by the exemptions under S41 and S43 of the Act on the basis that disclosure of that information would prejudice the commercial interests of i360 Ltd and those of the Council and that the balance of the public interest lay in withholding the requested information."

16. The council said that complying with this request alone would not exceed the appropriate limit in terms of section 12 of the FOIA but cost is not the only or main issue in this case. It said that in coming to a conclusion as to whether a request, or the impact of dealing with it, is justified and proportionate it is entitled to consider the number, breadth, pattern and duration of previous requests made by an individual under the FOIA framework and take them into account when considering whether the particular request is burdensome. It explained that it's records show that the complainant has made at least 9 requests since 2014 specifically about the i360 and at least two of these have been "meta requests", that is requests about the internal discussions on the

handling and decisions of the response to the released requests, and that this has placed a substantial burden on the resources of the authority.

17. The council submitted that, taking into consideration the background and context of the request, the complainant has demonstrated an unjustified persistence that makes this request vexatious. It said that the request was clearly framed to draw out recorded information the status of which was already the subject of an appeal to the Information Tribunal and that this is an improper use of a formal procedure. It said that the request is intended to cause disruption to the authority and its staff, is without merit and an abuse of process.
18. The council summarised that, taking into account all of the relevant circumstances, it considers that complying with the request in this case would place a disproportionate and unjustified burden on the council. In reaching this decision the council said that it was particularly mindful that this is a process which is already subject to rigorous independent review by the Information Tribunal whose decision is awaited.
19. As stated in paragraph 13, the Commissioner needs to consider 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.
20. In relation to the serious purpose and value of the request, the complainant explained to the Commissioner that:
 - "The request is substantially different to previous requests regarding the funding arrangements around the i360.
 - The public authority's reasons for responses to previous requests has often been unclear. This meta request will help the public to obtain clarification on how the council reaches its decisions on matters concerning Freedom of Information.
 - The amount of money spent by the public authority to appeal against the decision by the Information Commissioner's Office has been publicised by the media (link attached³). The information

requested now will help to allay genuine grounds for concern about the authority's actions."

21. The council does not accept that the request is substantially different to previous requests and believes that it is intended to elicit withheld information about the i360 business case via the 'back-door.' The Commissioner considers that the request, although wider than just funding arrangements around the i360 as it incorporates how a complaint to the Commissioner and subsequent appeal to the Tribunal has been dealt with, is related to previous requests as information held by the council regarding the funding arrangements around the i360 is likely to be within the scope of the request being considered in this case.
22. The council also does not accept that its responses to previous requests have been unclear. It said that where information has been withheld the complainant has been provided with a compliant refusal notice and provided the example of a four page refusal notice dated 23 October 2015 in response to FOI5394/15 (ICO reference FS50609004). The Commissioner notes that the response to FOI5394 is detailed and appears to comply with the refusal notice requirements as set out in section 17 of the FOIA.
23. In relation to the argument that the request in this case will help the public to obtain clarification on how the council reaches its decisions on matters concerning the FOIA, the council said that it does not believe that the disclosure of legally privileged communications about commercially sensitive information would serve the public interest. It explained that it has a detailed policy for dealing with requests made under the FOIA which is publicly available on its website. The Commissioner considers that there is serious value in understanding how a public authority deals with transparency legislation generally but acknowledges that the publication of the council's Freedom of Information policy goes some way to providing that understanding.
24. With regards allaying concerns about the amount of money spent by the council to appeal against the Commissioner's decision notice (reference FS50609004), the council said that it disclosed details of its legal costs of dealing with the appeal in response to an information request. It explained that this is a £46m project and it was successful in the appeal

and its actions were clearly merited. It quoted the conclusion of the appeal as follows⁴ (paragraph 50):

"In summary, the Tribunal acknowledges the significant public interest in full disclosure and unqualified transparency in relation to this important development. It is, however, clearly outweighed by the interests in preserving confidence, in treating competing concerns equally and fairly and, most importantly here, in protecting the company from grave financial disadvantage through disclosure of critical information to its rivals and protecting the integrity of the large loan from public funds."

25. The Commissioner acknowledges that the fact that the council's appeal was successful can be seen as justification for the money spent on it. She considers that this reduces the value of the request in this case in regards to allaying concerns regarding the council's actions in appealing the Commissioner's decision notice.
26. When considered in the context and history of this case, the Commissioner does not consider that the purpose of this request justifies the disproportionate effect on the council. She acknowledges that there is merit in knowing how the council deals with requests made under the FOIA. However, she considers that this is met to some degree by the publication of the council's Freedom of Information policy, and in relation to this particular request, the successful appeal to the Tribunal demonstrates that the council correctly applied exemptions to the complainant's previous request (case reference FS50609004). The Commissioner also acknowledges the council's position that the burden of dealing with this specific request isn't the main issue in this case but considers that, when coupled with previous dealings on the same matter, including dealing with the complaint to the Commissioner and subsequent appeal, responding to the request would result in a disproportionate or unjustified level of disruption, irritation or distress. The Commissioner has taken into consideration that the council has stated that some of the requested information is legally privileged and inevitably contains some of the information previously withheld under the exemptions for information provided in confidence and for information where disclosure would prejudice commercial interests. She has also taken into consideration

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1969/Brighton%20%20Hove%20City%20Council%20EA.2016.0119%20\(02.03.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1969/Brighton%20%20Hove%20City%20Council%20EA.2016.0119%20(02.03.17).pdf)

the fact that the request sought information regarding, what was at the time, an ongoing appeal to the Tribunal which could be considered as an inappropriate use of information rights under the FOIA.

27. Returning to the findings of the Upper Tribunal in Dransfield, and its view that a holistic and broad approach should be taken in respect of vexatious requests, the Commissioner has decided that the council was correct to deem the requests as vexatious. Accordingly she finds that section 14(1) of the FOIA is engaged.

Right of appeal

28. 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

29. 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.
30. 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

Deborah Clark
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