

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2019

Public Authority: Thanet District Council
Address: Cecil Street
Margate
Kent
CT9 1XZ

Decision (including any steps ordered)

1. The complainant has requested copies of reports which were presented to an extraordinary meeting of Thanet District Council's Overview and Scrutiny Panel on 15 October 2014. The Council originally refused the request under section 42(1)(legal professional privilege) of the FOIA, additionally applying section 44(1)(c)(prohibitions on disclosure – disclosure would constitute or be punishable as a contempt of court) at internal review. During the Commissioner's subsequent investigation the Council applied section 14(1)(vexatious request) to refuse the request. The Commissioner has concluded that Thanet District Council was entitled to refuse to comply with the request on the basis of section 14(1). The Commissioner however found that the public authority breached section 17(5) as it did not give the complainant an adequate refusal notice within 20 working days.

Background

2. In 2014 the complainant was a councillor at Thanet District Council (the Council) and a member of the Council's Overview and Scrutiny Panel. The information which later became the subject of the complainant's information request in April 2018, was shared as 'exempt' confidential items at a Council meeting in October 2014, subject to the information being returned at the end of the meeting. Under a non-disclosure agreement signed by the complainant on 13 October 2014, he agreed not to disclose the information, and not to remove the papers from the building. In submissions to the Commissioner, the Council advised that

'at the meeting the requestor dishonestly brought with him a dummy set of papers which he substituted for the papers he was given'. The complainant returned the 'dummy' set of papers and left the building with the confidential papers (in breach of the non-disclosure agreement). The Council advised that security staff followed the complainant and attempted to recover the papers, but were unsuccessful.

3. In submissions to the Commissioner, the complainant advised that this was, *'almost certainly, the first time that TDC officers had ruled that confidential committee papers could not be removed by elected councillors from the Council building. By any local government standard this was a unique and extremely unusual situation'*. The complainant advised the Commissioner that the confidential papers would not have been issued to any councillor who refused to sign the undertaking to return the papers at the end of the meeting. He advised the Commissioner that:

'I strongly believed at the time, and still believe now, that the imposition of such draconian conditions upon democratically elected councillors was grossly unfair and disproportionate. Indeed, I made this very point at the meeting. However, in order to obtain a copy of the papers, to which I believed I was entitled to retain, I had no choice but to sign an undertaking that I would return them at the end of the meeting'.

4. The complainant advised the Commissioner that in his opinion his signature of the undertaking *'was secured unfairly and under considerable duress and was therefore invalid'*. He therefore did not believe that his subsequent removal of the papers *'was in any way dishonest, as the Council claims'*.
5. As a result of the complainant's removal of the confidential papers, the Council issued legal proceedings in the High Court. The High Court granted an interim injunction in respect of the complainant on 14 November 2014 and a final injunction Order was granted on 3 December 2014. The Order (which the Commissioner has had sight of) states that the complainant *'must not publish and/or republish and/or disseminate in any form the exempt information unless and until he is given duly authorised written notification by the Claimant (the Council) that the Material may be published'*. The Council has confirmed to the Commissioner that at the time of his subsequent request, the complainant did not have their consent to publish or disseminate the exempt information and does not have their consent at the present time.

Request and response

6. On 18 April 2018, the complainant wrote to the Council and requested information in the following terms:

'Please provide me with copies of the exempt reports which were presented to an extraordinary meeting of the Council's Overview & Scrutiny Panel on 15 October 2014. The reports include a document produced by Pinsent Masons and emails exchanged between Pinsent Mason and council officers and a report produced by Strutt Parker and letters/emails exchanged between Strutt Parker and council officers'.

7. The Council responded to the request on 18 May 2018 with a refusal notice which advised that the requested information was withheld under section 42(1)(legal professional privilege) of the FOIA. The Council advised the complainant that, *'you are aware that you remain the subject of an injunction granted by the High Court on the 3 December 2014 in respect of the exempt reports which were presented to an extraordinary meeting of the Council's Overview & Scrutiny Panel on 15 October 2014'.*

8. The Council confirmed that they held the exempt reports and advised the complainant that under section 42(1) of the FOIA, the information was exempt from disclosure as *'the advice is subject to legal professional privilege'.* The Council stated that, *'this advice was obtained relatively recently and its confidentiality was considered by the courts, who granted a permanent injunction in respect of the publishing and/or republishing and/or dissemination of this information. The land the subject of the advice remains to be developed and therefore the decision not to release the information remains justified. On balance, it is not considered to be in the public interest to provide this information'.*

9. On 24 May 2018, the complainant requested an internal review of the decision. He referenced ICO guidance to public authorities which states that, *'authorities should view disclosure as a release of information into the public domain. This means that they must consider the consequences of disclosure to the world at large, and not just the impact of providing the material to the requester'.* The guidance notes that *'it follows that the key question an authority must ask itself when deciding how to respond is whether the information is suitable for disclosure to anyone and everyone'.* The complainant contended to the Council that *'your raising of the injunction should therefore have no bearing upon this FOI request and my request should only be considered on the basis of FOIA exemptions and the public interest'.*

10. The Council provided the complainant with their internal review on 25 July 2018, more than 40 working days after he had requested the same. The Council advised that they were *'unable to disclose the information requested as this would undermine the Injunction dated 14/11/14 previously sought and still in force'*. The review drew the complainant's attention to the second paragraph of the front page of the Injunction Order, which stated that, *'any other person who knows of this order and does anything which helps or permits the Defendant to breach the terms of this Order may also be held in contempt of court and may be sent to prison'*. The Council therefore advised that (in addition to section 42), they were relaying on section 44(1)(c) (prohibitions on disclosure – disclosure would constitute or be punishable as a contempt of court). The review wrongly provided the complainant with the contact details of the Council's Director of Corporate Governance when in fact (the internal review stage having been completed) the review should have provided the complainant with contact details of the ICO.

Scope of the case

11. The complainant contacted the Commissioner on 2 August 2018 to complain about the way his request for information had been handled.
12. On 20 May 2019, in submissions to the Commissioner, the Council advised that they were applying section 14(1) (vexatious request) to the complainant's request. The Council failed to notify the complainant of their reliance on this new provision and the complainant was informed of this provision by the Commissioner, and the Council's basis for the same¹.
13. Section 1(1) of the FOIA does not oblige a public authority to comply with a request for information if the request is vexatious. A finding that section 14(1) applies renders the application of substantive exemptions redundant. Therefore, despite the Council applying section 14(1) at a late stage in proceedings (i.e. during the Commissioner's investigation), the Commissioner is procedurally required to consider the applicability of the provision before any substantive exemptions (such as sections 42 and 44 in this case).

¹ Late reliance on section 14(1) is permissible (*McInerney v Information Commissioner and the Department for Education* [2015] UKUT 0047 (AAC))

Reasons for decision

Section 14(1): vexatious request

14. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request if that request is vexatious. The term vexatious is not itself defined in the legislation, but in *Information Commissioner v Devon County Council & Dransfield*², the Upper Tribunal commented that:

'The purpose of section 14 must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA'.

15. The Upper Tribunal concluded that 'vexatious' could be defined as the:

'Manifestly unjustified, inappropriate or improper use of a formal procedure'.

The Council's position

16. In submissions to the Commissioner the Council stated that it appeared to them that the complainant was *'seeking disclosure in his own private interests (rather than any public interest) as a way to undermine the High Court injunction'*. The Council noted that the matter had been the subject of judicial consideration by the High Court, and that *'the proper way for the [complainant] to resolve this matter is by an application to the High Court for the lifting of the injunction'*.
17. The Council asserted that the complainant had made *'numerous requests'* of the Council to remove the injunction since it was imposed in 2014. They advised the Commissioner that this had included the complainant pursuing a complaint against the Council for their refusal to remove the injunction, and *'making requests for him to be relieved of the restriction of the injunction to members, officers and his MP'*.
18. The Council contended that the complainant's complaint to the ICO was therefore *'a continuation of the [complainant's] pattern of behaviour and his ongoing campaign going back 5 years, to have the injunction*

² UKUT 440 (AAC), 28 January 2013

removed'. The Council contended to the Commissioner that the complainant was now pursuing the issue of the injunction through the FOIA process and that he was pursuing 'a personal matter of little if any benefit to the wider public'. The Council stated that this attempt to circumvent a High Court injunction was a 'manifestly unjustified, inappropriate or improper use of a formal procedure'.

19. The Council referred to *Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454 (14 May 2015) in which Lady Judge Arden observed that, *'the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public'* (para 68).
20. The Council contended to the Commissioner that a request for information which the complainant already holds has no reasonable foundation and has no value to the complainant because he already has it. The Council submitted that requesting information which he already holds made the complainant's request manifestly unjustified and *'patently vexatious'*. The Council advised the Commissioner that in requesting information *'to undermine a High Court injunction'*, the complainant had caused irritation and distress to the Council.

The complainant's position

21. In detailed submissions to the Commissioner, the complainant denied that his request was an attempt to undermine and subvert the High Court injunction against him. He advised the Commissioner that he submitted the request to the Council because he had lost some of the injunctioned documentation which he used to hold. The complainant advised the Commissioner that although the Council had applied to the High Court to recover the documents from him, *'the judge ruled at the interim injunction hearing on 14 November 2014 that because I was an elected councillor and member of the relevant committee, and because the documents were watermarked with my name, I was entitled to have possession of them'*.
22. The complainant acknowledged and accepted that the injunction prohibited him from disseminating the documents or their contents in any way, but contended that it was *'wrong of the Council to describe my request as one which attempts to subvert and undermine the injunction. I am merely requesting copies of documentation, which the High Court ruled that I am permitted to hold, but which I have lost'*.

23. The complainant stated that were the Council to provide him with the requested information, he would still be subject to the terms of the High Court injunction (that prohibits him from disseminating in any way the documents or their contents). The complainant stated that, *'in my opinion, and presumably the opinion of the High Court too, the possession of the injunctioned documents does not in any way subvert or undermine the injunction applied to them'*. He advised the Commissioner that the requested information *'has a very high value, as I intend to use it to prepare an application to the High Court to have the injunction placed upon me lifted'*.
24. The complainant informed the Commissioner that he had had in his possession all, or some of the injunctioned documentation over a period of five years and at no point during that long period of time had he breached the terms of the injunction. He stated that, *'clearly my behaviour during this prolonged period of time demonstrates that my possession of the requested information will not undermine or subvert the terms of the injunction'*.
25. The complainant disputed the Council's statement that he had made numerous requests of the Council to have the injunction removed. In fact, the complainant stated that he had made just one such attempt in five years. On 3 August 2016 he submitted a request to the Council to be released from the injunction, on the grounds that the circumstances under which the injunction had been granted had changed significantly. The request was rejected. On 3 September 2016, the complainant challenged the Council's decision under their complaints procedure, and was notified on 27 September 2016 that his complaint had not been upheld. The complainant advised that his Member of Parliament had sent a letter to the Council supporting his request for the injunction to be lifted. The complainant stated that his approach to the Council was a necessary first stage in any High Court action that he might wish to take to be released from the injunction. The complainant contended that in requesting the Council to release him from the injunction in 2016, and by submitting a complaint to justify his request, he was *'behaving reasonably and in accordance with High Court expectations'*.
26. The complainant advised the Commissioner that the overwhelming majority of his campaigning and commentary on public affairs is conducted via his internet blogsite and since the granting of the injunction he has published 387 articles on the site. He stated that, *'not a single one of these 387 articles makes any mention of the injunction, nor do any of these articles campaign to have the injunction lifted'*.

27. During the same period, the complainant advised that he had produced approximately 20 videos which had been widely distributed on social media, and he had been interviewed on local and regional television and radio. He had also had many letters published in the local press, made several thousand tweets and partook in many hustling meetings as a candidate in the 2015 General Election. The complainant informed the Commissioner that not a single one of his communications had mentioned the injunction and he contended that, *'surely if I was engaged in an ongoing campaign going back 5 years to have the injunction removed, my blog site articles, my videos, my letters to the press, my tweets, my Facebook page, my public speeches and my broadcast interviews would have been replete with references to the injunction and its unfairness. But they did not'*.
28. In submissions to the Commissioner the complainant stated that *'what the Council fails to understand, however, is that my request for copies of the injuncted documents is directly linked to me seeking redress at the High Court'*. The complainant explained that he needed copies of the information which he had lost in order to draw up a comprehensive submission to the High Court for the rescinding of the injunction order. The complainant contended that, *'the requested information is critical to any High Court case I might bring as it will demonstrate that the circumstances in which the injunction was obtained by the Council no longer prevail and that the Council is now maintaining an order which may no longer have legal justification'*.
29. It was the complainant's contention that without access to the requested information, any submission which he might make to the High Court would be weakened. The complainant suggested that if the Council were to provide him with the requested information then, *'paradoxically, it would be helping me to achieve an objective it claims that I should be pursuing'* (i.e. applying to the High Court for a lifting or varying of the injunction).
30. Stating his disagreement with the Council's claim that his request was a 'manifestly unjustified, inappropriate or improper use of a formal procedure', the complainant opined that his request was *'perfectly justified, appropriate and proper'*. The complainant contended that *'the gathering of information via an FOI request, particularly information the High Court has already ruled I am entitled to hold, in pursuit of legal action, is an entirely justified, appropriate and proper action'*. The complainant stated that as his request was *'in fact part of my effort to*

prepare for a fair trial under the terms of Article 6 of the Human Rights Act 1998', it was 'entirely reasonable, justifiable and proper'.

31. The complainant stated that if the requested information were provided to him by the Council then *'it would in no way undermine or subvert the High Court Injunction which is associated with the requested information. My request cannot therefore be described as being in any way an abuse, or improper use of, the FOI process'*.
32. Commenting on the Council's account of how the papers originally came to be in his possession, the complainant stated his belief that it was not reasonable to take into account an event which happened four years prior to the date of his request as evidence of vexatiousness on his part. The complainant stated his belief that, *'because of its age and the fact that it has been disposed of by a court of law, this particular incident has no relevance to the wider circumstances, context or history of this disputed FOI. The ICO should therefore discount this matter from its consideration of this case'*.
33. Acknowledging that his action in removing the papers had been *'undoubtedly unorthodox'*, the complainant contended that he was *'nevertheless, lawfully entitled to remove them from the Council building and the Council was clearly acting unlawfully in forcing me under duress to sign away my rights to retain the documents'*.
34. The complainant expressed his surprise by the Council's application of section 14(1) late in the proceedings, and their failure to notify him of their reliance on this provision. The complainant stated that had the Council notified him of their intention to apply section 14(1) then he would have offered to engage with the Council. *'Part of this engagement would have included a detailed discussion about the purpose and value of my request, which may have led the Council to reconsider its position in relation to Section 14, saving much time and cost'*. The complainant advised that the requested information was not voluminous and readily accessible, such that providing the same would not place a burden upon the Council's resources, or be oppressive or cause distress.

Commissioner's decision

35. It is important to emphasise that section 14(1) can only be applied to the request(s) itself, and not the individual who submits it. A public authority cannot, therefore, refuse a request on the grounds that the requester is himself vexatious. The provision is concerned with the nature of the request rather than the consequences of releasing the requested information. There is no public interest test but the purpose

and value of the request must be weighed against the impact on the public authority in responding to the same.

36. 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 Commissioner considers that the context and history of the complainant's request in this case has a key bearing on whether his request can reasonably and objectively be said to be vexatious.
37. The requested information (or most of it at least) was removed from the Council premises by the complainant in October 2014, in breach of a signed undertaking. The complainant has argued why he considers that he was justified in doing so and has placed prominent weight on the High Court's subsequent finding (as reported by the complainant) that (as a then elected councillor) he was entitled to retain possession of the information.
38. The complainant has contended that he is '*merely requesting copies of documentation which the High Court ruled that I am permitted to hold, but which I have lost*'. He has effectively contended that if the Council were to provide him with the requested information, then they would simply be confirming the status quo, in that they would only be providing him with information which he had previously possessed. The complainant has noted that for over four years during which he has been subject to the injunction, he has not breached the same and made no attempt to undermine or subvert it. He has therefore contended that for him to be provided with the requested information would not undermine or subvert the terms of the injunction.
39. However, this ignores both the purpose and effect of the High Court injunction of 3 December 2014 and the context in which the subsequent request has been made. The injunction prohibits the complainant from publishing/republishing or disseminating in any form the exempt information, unless and until he is given duly authorised written notification by the Council. The Commissioner accepts that at no time since the injunction came into force, has the complainant published, or attempted to publish or disseminate the exempt information. However, the injunction does not only prohibit the complainant from taking such action. The injunction gives notice to '*Anyone who Knows of this Order*' that they are prohibited from taking the aforementioned actions.
40. The injunction clearly states that '*Any other person (i.e. other than the Defendant/complainant) who knows of this order and does anything which helps or permits the defendant to breach the terms of this order may also be held to be in contempt of court and may be sent to prison*'.

41. In his request for an internal review of 24 May 2018, the complainant (by reference to ICO guidance) informed the Council that they should view disclosure as a release of information into the public domain, and the consequences of disclosure to the world at large, and not just the impact of providing information to him personally. The complainant was clearly aware that the FOIA provides a public and not private access to information and consequently, when considering any request for information received, a public authority must consider the consequences and effect of such information being placed in the public domain.
42. Were the Council to accede to the complainant's request and provide him with the requested information, they would be in breach of the injunction since the information would effectively be published in the public domain as well as being provided to the complainant. Such an outcome would obviously undermine and indeed render useless the injunction, the whole purpose of which was to prevent such publication. The complainant is therefore wrong to contend that if the requested information were to be provided to him by the Council, *'it would in no way undermine or subvert the High Court Injunction which is associated with the requested information'*.
43. The complainant has contended that his request for copies of the exempt information is *'directly linked'* to his seeking redress at the High Court and that he intends *'to use it to prepare an application to the High Court to have the injunction placed upon me lifted'*. The Commissioner appreciates that the High Court proceedings and the injunction of 3 December 2014 have had a significant impact and effect upon the complainant, but that is his private interest rather than a public one. The complainant is entirely free to attempt to have the injunction lifted or varied, especially given the significant time that has passed since it was made, but as the Council have correctly stated, the appropriate way for the complainant to pursue that matter is by application to the High Court.
44. The complainant has claimed that his being provided with copies of the requested information *'is critical to any High Court case I might bring as it will demonstrate that the circumstances in which the injunction was obtained by the Council no longer prevail and that the Council is now maintaining an order which may no longer have legal justification'*. The Commissioner does not agree that the complainant having copies of the exempt information is a necessary prerequisite for the complainant making any case to the High Court. As the complainant has noted, the exempt information is not voluminous and was at one stage in his possession. The Commissioner considers that the complainant will be reasonably familiar with the contents of the information, despite having

subsequently lost some of the same. The Commissioner would also note that it would not be the actual exempt information which would demonstrate whether the injunction should be lifted or varied but whether the circumstances had subsequently changed, as contended by the complainant.

45. However, more importantly, there is an inescapable illogic to the complainant's contention that he needs the requested information (the information exempt under the injunction) in order to challenge the injunction. For the reasons explained above, the provision of the requested information to the complainant under the FOIA, and therefore into the public domain, would make any such challenge entirely superfluous, since the publication of the information would achieve exactly what the injunction is specifically designed to prevent. This being the case, the Commissioner can understand why the Council is of the view that the complainant, in making his information request of 18 April 2018, is seeking to undermine or circumvent the High Court injunction, i.e. by securing publication of the information without being in personal breach of the injunction.
46. The Council has not provided any evidence to the Commissioner in support of the contention that the complainant has made '*numerous requests*' of the Council to have the injunction removed since it was imposed in 2014. As shown in his submissions, the complainant has made only one such attempt and through channels that were not unreasonable or inappropriate. Whilst the complainant has clearly wished to have the injunction removed since as far back as at least 3 August 2016, when he submitted a request to the Council to be released from the injunction, the Commissioner does not consider that he can be said to have engaged in '*an ongoing campaign*' for five years. The Commissioner also accepts that it would not be unduly burdensome for the Council to provide the complainant with the requested information and his request cannot be said to be vexatious on this ground.
47. Nevertheless, the complainant has, via his request, attempted to pursue a personal matter under the FOIA rather than by the correct and appropriate process and procedure of applying to the High Court for a lifting or varying of the injunction. The complainant has attempted to reopen an issue which has already been subjected to the appropriate independent scrutiny of the High Court. Such action is clearly unreasonable and futile. The Commissioner considers that the complainant's request meets the Upper Tribunal's definition of vexatious in that it is a manifestly unjustified, inappropriate or improper use of a formal procedure. Consequently, the Commissioner is satisfied that the Council was correct and justified in refusing the complainant's request as vexatious and that section 14(1) applies to the same.

Section 17 – refusal of request

48. Section 17(5) of the FOIA states that a public authority which, in relation to any request for information, is relying on a claim that section 14 applies, must, within the time for complying with section 1(1), give the applicant a notice stating that fact. The time for complying with section 1(1) is 20 working days following the date of receipt of the request.
49. In this case, the complainant submitted his request on 18 April 2018 and the Council failed to provide a section 14(1) refusal notice to the complainant, instead notifying the Commissioner of this exemption in their submissions of 20 May 2019. The Commissioner therefore finds that the Council breached section 17(5) of the Act.

Section 44(1)(c)(prohibitions on disclosure)

50. The Commissioner would note that had she found that the Council was wrong to refuse the complainant's request as being vexatious, then she would consider the requested information to be exempt under section 44(1)(c). This is because had the Council disclosed the requested information to the complainant, then such disclosure would have constituted and been punishable as a contempt of court, for the reasons explained earlier in this notice.

Other matters

51. When refusing a request, it is incumbent upon a public authority to notify the requester. In this case, the Council applied section 14(1) to the request during the Commissioner's investigation but did not inform the complainant. The Commissioner therefore informed the complainant of the section 14(1) refusal and the grounds for the same. This ensured that the complainant understood the Council's position and was in an informed position to challenge it. However, it is the Council's responsibility to notify requesters of provisions or exemptions applied and they must ensure that they satisfactorily discharge that responsibility in future.
52. Whilst it is good practice for a public authority to consider whether a more conciliatory approach would practically address the problem before choosing to refuse a request, as this may help prevent any unnecessary disputes from arising, the Commissioner does not consider that such an approach would have been appropriate or of value in this case, given the litigious context and background to the request.

Right of appeal

53. 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

54. 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.
55. 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

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