

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2020

Public Authority: Development Bank Wales

Address: info@developmentbank.wales

Decision (including any steps ordered)

1. The complainant has requested various information in respect of suppliers of corporate finance for a specific time period. The Development Bank Wales refused the request on the basis that it was vexatious citing section 14(1) of the FOIA.
2. The Commissioner's decision is that the Development Bank Wales was not entitled to rely on section 14(1) to refuse the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant which does not rely 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 21 September 2018, the complainant wrote to the Development Bank Wales ('the Bank') and requested the following information:

"...please provide me with the total fees paid to the top 5 suppliers of corporate finance and financial services for each of the last five years, by name and value. I do not need to know the nature of the expense, and please exclude pension advisors and legal fees."

6. The Bank responded on 25 October 2018. It stated that it was refusing the request on the basis that it was vexatious under section 14(1) of the FOIA.
7. Following an internal review the Bank wrote to the complainant on 27 November 2018. It stated that:

"You have asked that I review our previous response to your requests and having done so I can confirm that I remain of the opinion that the requests fall within the suggested definitions of vexatious requests..."

Scope of the case

8. The complainant contacted the Commissioner 22 February 2019 to complain about the way his request for information had been handled. The complainant provided some background confirming that he had submitted 10 or 11 requests since June of 2018 to which the Bank had responded positively.
9. However, he further informed the Commissioner that it was his contention that the Bank are now confusing 'vexatious' with 'hugely embarrassing' stating that there appears to be a general perception within the South Wales business community that one particular large business, receives a disproportionate volume of work from the Bank.
10. The Commissioner considers that the scope of her investigation is to determine whether the Bank was entitled to rely on section 14(1) to refuse the complainant's request.

Reasons for decision

Section 14(1) - Vexatious requests

11. 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.
12. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) 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 on the circumstances surrounding that request.

13. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded that 'vexatious' could be defined as the "*...manifestly unjustified, inappropriate or improper use of a formal procedure.*" (paragraph 27)
14. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
15. Where this not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such the background and history of the request.
16. The Commissioner notes that the Bank informed the complainant in its original response that the decision to refuse the request on the basis of section 14(1) was based on a number of factors including the volume and overlapping nature of the requests received, and their frequency.
17. It also informed the complainant that a further consideration was the nature of the grievance received in September alleging that without reasonable grounds, a senior member of staff at the Bank acted in a way that resulted in a loss of business to him.
18. The complainant disputed that his requests were voluminous or overlapping, stating that at that point in time (November 2018) two letters were outstanding as a third and later request was a repeat of his request of 1 September 2018 which he considered he had not received a direct answer too.
19. In respect of the allegation referred to in the Bank's response, the complainant stated that having revisited his correspondence of 17 September, it seems clear he was asking how he would make a grievance or complaint. He further stated that as he provided no evidence or specific details, he was not sure on what basis the Bank could reasonably connect that email with his various FOI requests.
20. The Bank responded to the complainant, informing him that it had based its decision on the following:
 - 12 FOI requests, many arriving before earlier requests had been dealt with.

- Its response to his request of 1 September signposting him to information already in the public domain was in line with the requirements of the FOIA.
 - It refuted any allegation that it has acted improperly and favoured a specific business above other suppliers, stating that it had provided details of fees paid over the last 5 years as well as details of its procurement policy.
 - With regard to the contents of the complainant's email of 7 September 2018 under the header 'complaint' the Bank confirmed that it would be investigating the specific case to which the complainant refers.
21. Following the Commissioner's request for further details and evidence in support of its reliance of section 14(1) of the FOIA, the Bank provided some background information to the request informing the Commissioner that in June 2018, it received four letters containing 12 requests for information which was the start of an ongoing dialogue between the two parties.
22. It further stated that from the start, requests were multiple and overlapping and in September 2018, the complainant advised that he had grievances to bring against the Bank's executives who he believed had acted in a manner prejudicial to his business. It further informed the Commissioner that at this stage, several offers were made by the Bank in an attempt to resolve the grievance, confirming that it was not until February 2019 that the grievances were submitted and the specifics made clear.
23. The Bank has informed the Commissioner that it considers the complainant's line of questioning to be vexatious and has applied the following indicators from her guidance in support of its reliance on section 14(1).

Personal grudges

24. The Bank informed the Commissioner that the complainant has on a number of occasions confirmed that his lines of questioning are related to his grievance. The Bank further informed the Commissioner that the grievances are directed at two senior members of its staff and that the exemption was not applied until the complainant made reference to his grievances, adding that once submitted, the complaint which was investigated by an independent senior manager, was not upheld.
25. The Bank further stated that a route to appeal the decision was provided but not taken by the complainant. The Bank provided a copy of the

outcome letter sent to the complainant on 11 March 2019 which did not uphold his complaint.

26. The commissioner would however point out that when considering whether to refuse a complaint on the basis that it is vexatious, whilst public authorities are entitled to take into account the wider context of the request, this relates to the background and history to the request as opposed to subsequent communication between the parties. Regardless of the time that has elapsed since the request,, the Commissioner must consider the situation at the time of this particular request. She cannot therefore take supporting evidence into consideration from the public authority which post-dates the request.

Unreasonable persistence and unfounded accusations

27. The Bank has stated that despite providing detail around fees paid to Price Waterhouse Cooper (PWC) in previous requests, and confirming that none relate to customer due diligence, the complainant has persisted with accusations that the Bank has favoured the supplier in procuring diligence work. It added, that further accusations have been made relating this to the employment history of individuals, and in particular that two of the people against whom grievances were raised were previously employed by PWC.
28. The Bank has further stated that the complainant has subsequently confirmed that the request to which this notice relates is linked to the same line of questioning about PWC fees, despite no evidence that the accusations have any substance.
29. The Commissioner would again point out that she cannot take into consideration supporting evidence which post-dates the request.

Frequent and overlapping requests

30. The Bank has stated that many of the requests submitted are overlapping in nature, or are varied and resubmitted when the information provided does not support the allegations made.
31. The Bank has further stated that in most instances, new requests were submitted before existing requests have been concluded and has estimated that over 50 hours of management time has been invested in handling these responses.
32. The Commissioner has considered the summary timeline provided as supporting evidence from the Bank and notes that it covers the period from June 2018 to August 2019. As referenced in paragraph 29 of this notice, the Commissioner cannot take into account supporting evidence which post-dates this request.

Deliberate intention to cause annoyance

33. The Bank has informed the Commissioner that the complainant has made use of LinkedIn to contact one of the individuals about whom the grievance relates. Additionally, he has contacted customers of the Bank to share the information provided in response to his FOI enquiries and Subject Access Requests (SARs). Further, in correspondence with a customer of the Bank the complainant has described the ongoing situation as a "*minor bit of fun*".
34. The Bank has further stated that there have been threats to report individuals to the Institute of Chartered Accountants in England and Wales (ICAEW) based on information obtained through FOI and SAR requests and considers that these appear to serve no purpose other than to have an impact on the two individuals.
35. Whilst the Bank has acknowledged that any information provided in response to an FOI request is in the public domain, it considers the targeting of its customers and threats to cause to cause disruption in the business community to damage its reputation can also be seen as vexatious.
36. The Bank has reached the conclusion that after more than 12 months of correspondence, that responding to further requests for information would be unlikely to resolve the matter. It has further stated that despite having responded in full to further requests about the allocation of work to PWC, on more than one occasion, the complainant remains dissatisfied. Additionally, the Bank has stated that new questions have been submitted which contain further unfounded allegations and is of the view that past behaviour suggests he will not be satisfied with any response made by the Bank.
37. The Commissioner notes that these arguments post-date the request and as previously stated, can only reiterate that she cannot therefore take them into account in her consideration of the whether the Bank was entitled to refuse this particular request on the basis that it was vexatious.

Conclusion

38. The Commissioner has highlighted throughout the various indicators outlined above that most of the arguments and supporting evidence provided by the Bank in respect of its reliance on section 14(1) of the FOIA, cannot be taken into consideration as it post-dates the request.
39. The Commissioner has however considered the evidence that pre-dates the request and notes the following:

- Four FOIA requests, dated between 19 June 2018 -23 June 2018 received together on 25 June 2018 with a combined total of 12 separate items. The Bank refused items 1 -7 on the basis of section 12 (cost of compliance exceeds the appropriate limit stipulated in the fees regulations), with items 8 – 12 having been responded to on 21 August 2018.
 - Five other FOI requests received between 18 July 2018 and 1 September 2018 with some received before the previous one had been responded too.
40. The Commissioner notes that the combined items of all these requests totalled 20, with seven having been refused under section 12 of the FOIA. Whilst she accepts that the volume of requests over a short period of time was relatively high, she does not consider that this by itself was sufficient to engage the vexatious request provision under section 14 of the FOIA.
41. In terms of other correspondence, the Commissioner would point out that the complainant contacted one particular member of staff on three occasions by various means including LinkedIn, email and letter. She notes that the letter dated 3 July was chasing a response to his four original FOIA requests referred to in paragraph 39 of this notice. However, she also notes that the tone of the letter is indicative of a level of frustration with the individual stating:
- "...I've attached copies for your reference, just in case the originals got lost in the post or maybe because you are using them as coasters for your mid-morning latte."*
42. The email dated 28 August 2018 also suggests an underlying antipathy towards the Bank in the following statement:
- "...it is particularly comforting to know that DBW has a comprehensive policy in place in the very unlikely event that one your employees is alleged to have taken a bribe."*
43. The complainant subsequently emailed a separate individual on 17 September which states:
- Regrettably, it's come to my attention that one of your senior management team is alleged to have advised one of my clients that the DBW would be unable to provide funding to them if I remained involved with their business; at the time my client was trying to secure funds as part of an MBO and we had approached DBW for assistance, and I subsequently lost the client;...*

If the above allegation is true, it would appear that your staff might be using their position in a manner that is prejudicial to my business without (to my knowledge) any grounds for doing so...

...can you please advise to whom I should raise a grievance or complaint?"

44. It is clear from the above correspondence therefore that the complainant has concerns in respect of the conduct of the Bank, and that his correspondence is beginning to indicate a level of antipathy towards it.
45. However, the Commissioner does not consider the volume and frequency of requests at the time of the request combined with other correspondence is sufficiently weighted to engage the vexatious provision under section 14(1) of the FOIA. Additionally, she also considers the Bank's reliance on section 14 to refuse a request submitted only four days after the complainant had indicated he may be about to submit a formal grievance or complaint is a little premature. The Commissioner has therefore concluded that the Bank was not entitled to rely on section 14 to refuse this request.

Right of appeal

46. 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

47. 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.
48. 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

Catherine Dickenson
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