

Decision Notice

Decision 181/2015: Mr N and South Lanarkshire Council

Dog entering garden

Reference No: 201501488

Decision Date: 19 November 2015



Scottish Information
Commissioner

Summary

On 23 April 2015, Mr N asked South Lanarkshire Council (the Council) to confirm whether the owner of a dog had ever admitted that the dog had entered his garden.

The Council refused to comply with the request on the grounds that it was vexatious.

The Commissioner did not accept all of the Council's submissions to her arguing this, as the submissions did not make a sufficiently clear link between all of the factors it claimed applied and the arguments to support them.

Although she did not accept all of the factors claimed, the Commissioner accepted that the request had the effect of harassing the Council and so it was entitled to refuse to comply with Mr N's request on the grounds that it was vexatious.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 14(1) (Vexatious or repeated requests)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. Mr N was in correspondence with the Council over his concerns about a neighbour's dog. On 23 April 2015, Mr N asked the Council for confirmation whether the dog owner had ever admitted that the dog had entered his garden.
2. The Council responded on 20 May 2015. It decided to treat Mr N's request as vexatious, in terms of section 14(1) of FOISA concluding that it was not required to comply with the request.
3. On 21 May 2015, Mr N emailed the Council requesting a review of its decision. He did not accept that his request was vexatious.
4. The Council notified Mr N of the outcome of its review on 9 June 2015. The Council upheld its previous response without amendment.
5. On 14 August 2015, Mr N emailed the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr N did not accept the Council's conclusions in relation to his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was then allocated to an investigating officer.

7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 2 September 2015, the investigating officer notified the Council in writing that Mr N had made a valid application. The Council was invited to comment on this application and to answer specific questions, including justifying its reliance on section 14(1) of FOISA. The Council responded on 18 September 2015.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr N and the Council. She is satisfied that no matter of relevance has been overlooked.

Section 14(1) – vexatious request

9. Under section 14(1) of FOISA, a Scottish public authority is not obliged to comply with a request for information if the request is vexatious.

The Council's submissions

10. The Council considered the factors that the Commissioner would find relevant to a finding that a request was vexatious¹. Of those factors, the Council considered that the following were relevant in this case:

- (i) the request would impose a significant burden on the Council
- (ii) the request was designed to cause disruption and annoyance to the Council
- (iii) the request has the effect of harassing the Council
- (iv) the request does not have serious purpose or value.

The Council asked the Commissioner to take into account the history of correspondence which it had had with Mr N on this matter when reaching a decision.

11. The Council made reference to the Upper Tribunal Decision - *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC)² in which the Tribunal accepted that the question whether a request is vexatious depends upon the circumstances surrounding the request, which may include the context created by previous correspondence from the applicant.
12. The Council noted that it is clear that in both FOISA and its UK equivalent, the motive of the requestor is relevant: i.e. the underlying rationale or justification for the requests. The Council considered that Mr N is merely using the FOI process to further his complaints and to re-open a channel of communication with the Council in relation to those complaints as other channels are no longer available to him.
13. The Council submitted that it has been anxious to seek a resolution to Mr N's issues with the neighbour's dog. Mr N has been unable or unwilling to help the Council sufficiently to enable it to substantiate any of his complaints.

¹ See Commissioner's guidance on section 14: <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

² <http://www.bailii.org/uk/cases/UKUT/AAC/2013/440.html>

14. The Council noted that its investigations have not identified any matter upon which it can take action against the owners of the dog in question. The Council considered that this has clearly prompted dissatisfaction (if not a certain amount of anger) in Mr N. It described his correspondence as growing more and more intemperate in its terms.
15. The Council noted that Mr N has followed the Council's complaints procedures and his complaints have not been upheld. He has also appealed unsuccessfully to the Scottish Public Services Ombudsman (SPSO). The Council noted Mr N has recently complained again to the SPSO, but that the SPSO will not take the matter forward. Mr N has also involved elected representatives such as Councillors and MSPs in relation to this matter.
16. The Council provided a file of its correspondence with Mr N, to show the extent of correspondence arising from Mr N's repetition of his complaint and the steps taken by the Council to seek to resolve the issues.
17. The Council submitted that dealing with Mr N's complaints and FOI requests has taken a disproportionate amount of time and diverted resources from the Council being able to carry out its statutory functions.
18. The Council stated that until Mr N can provide information that substantiates his complaints or allegations regarding the dog, the Council is unable to take further action. The Council noted that Mr N is clearly unhappy with that situation. Given that his complaints regarding the Council's actions in relation to this matter have exhausted the internal and external complaints procedures, the Council considered that he is now seeking to use the FOI process to try to get the Council to reverse its position.
19. The Council considered that Mr N worded his request with the aim of harassing the Council and its employees into taking action (which it cannot legally do). The Council accepts that Mr N is genuinely fearful of the dog, but considers that there is no more that the Council can do to assist him. The Council stated that it has no information or evidence upon which it can act, and considers that this has led to dissatisfaction on the part of Mr N.
20. In conclusion, the Council considered that Mr N is now merely using the FOI process to further his complaints despite being aware that the Council has done all that it can in relation to those complaints. The Council considers that his request is clearly vexatious. The Council stated that it could respond to Mr N "in very short terms" (in other words, the Council could provide Mr N with the answer to his request), but as it considered his request was clearly vexatious, responding in this way would allow Mr N to abuse the FOI process, which it believed would be contrary to the public interest.

Mr N's submissions

21. Mr N submitted that he did not see why his questions cannot be answered. He argued that they were patently not vexatious. He considered it would take a matter of minutes to answer his request and that the Council was making it a big issue. Mr N did not know how much staff time has been wasted trying to avoid answering a simple question but he was sure this time could be better used. He could not understand how answering this simple question could be "vexatious".
22. Mr N noted that the dictionary definition of "vexatious" is causing or tending to cause annoyance, frustration, or worry. Mr N considered that the dog's presence in his garden is definitely vexatious but answering his question was not. He said that all he wanted was an answer so that something could be done before he was attacked by a dangerous dog.

23. With his application, Mr N provided a line by line commentary on the Council's summarised contact record with him, either explaining why he made the contact or commenting on the Council's actions.

The Commissioner's findings

24. The Commissioner has published guidance on the application of section 14(1) of FOISA. This states:

There is no definition of "vexatious" in FOISA. The Scottish Parliament acknowledged that the term "vexatious" was well-established in law and opted to give the Commissioner latitude to interpret that term in accordance with this background, in order that the interpretation might evolve over time in light of experience and precedent.

25. In the Commissioner's view, there is no single formula or definitive set of criteria that allow a formulaic approach to determining whether a request is vexatious, and each request must be considered on the merits of the case, supported by evidence and clear evaluation and reasoning. In its submissions, the Council referred to the factors that the Commissioner considers to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is vexatious. These are documented within the Commissioner's briefing on section 14 of FOISA³, so she will not repeat them here.
26. While the Commissioner's view is that the term "vexatious" must be applied to the request and not the requester, she also acknowledges that the applicant's identity, and the history of their dealings with a public authority, may be relevant in considering whether a request is vexatious.
27. The Commissioner recognises that Mr N's request of 23 April 2015 might not appear, on the face of it, to be vexatious. She is aware, however, that the vexatious nature of a request might only emerge after considering the request within its context, for example, a history of previous or ongoing correspondence with the applicant.
28. The Council cited four factors which it considered relevant to its decision that the request was vexatious. These are set out in paragraph 10 of the decision. The Council's submissions deliberately did not go on to set out specific arguments in relation to each of these factors, stating they were interlinked so it was taking an holistic approach. This approach was unfortunate because it meant it was unclear just what the Council's arguments were in relation to each of the factors cited. Given it cited these factors, the Commissioner has structured her decision in relation to them.

The request would impose a significant burden on the Council

29. Although it cited this factor, the Council made no supporting arguments to substantiate it. While responding to the correspondence and complaint about the neighbour's dog over a period of time may have imposed significant burden, the test is whether Mr N's request, in context, would impose a significant burden. The Council has not demonstrated this, quite the opposite in that it acknowledged that it could respond to the request easily. Consequently, the Commissioner does not find that responding to the request would impose a significant burden on the Council.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

The request was designed to cause disruption and annoyance to the Council

30. Although it cited this factor, the Council again made no supporting arguments to substantiate it. The Commissioner acknowledges and agrees with the Council's assertion that, in relation to the context of the request, Mr N's motive is an attempt to reopen the complaint about his neighbour's dog. However, seeking to reopen a complaint about an issue which is of genuine concern to a complainant is not necessarily an action designed to cause disruption and annoyance, and the Council has made no attempt to explain why it is.

The request does not have serious purpose or value

31. Mr N considers he had a serious purpose in requesting the information. His fear of the dog is genuine and it is this which is motivating him to continue his correspondence pursuing his request for a fence to be erected by the Council to prevent the dog entering his garden. It is in this context that his information request was made. The Commissioner disagrees that this is not a serious purpose and does not consider that any reasonable person would reach a different view. Therefore the Commissioner does not uphold the Council's assertion that Mr N's request did not have serious purpose.

The request has the effect of harassing the Council

32. The Commissioner has considered in detail the large amount of correspondence between Mr N and the Council. She notes that the time period covered by the correspondence is just over a year, extending from February 2014 to May 2015. For the purposes of this decision, the Commissioner has considered the correspondence from February 2014 to April 2015, when Mr N submitted his request. Within this period, the volume of correspondence is substantial, and there was continuous correspondence from Mr N about the dog entering his garden and poor fencing, asking the Council to take action.
33. Having read the correspondence, the Commissioner notes that the Council has reiterated many times to Mr N that it cannot take any further action about the dog entering his garden and that if he wants to erect a fence, he could do so.
34. The Commissioner cannot investigate or comment on matters which are outwith her remit and this means she is not able to investigate, or comment on, the way in which the Council has acted in relation to Mr N's complaint and concerns about the dog. The Commissioner must decide whether the Council was correct to treat Mr N's request of as "vexatious" under FOISA, and to refuse to comply with it on that basis.
35. The Commissioner is satisfied that the information request which Mr N submitted to the Council is an attempt to get the Council to re-open dialogue in relation to his concerns about the dog entering his garden, and that the effect of his repeated correspondence on this subject has been harassing to the Council.
36. The Commissioner appreciates that Mr N is fearful of the dog, but whether or not his intention was to harass the Council the Commissioner must consider the *effect* of his correspondence, not the reasons for it. She accepts that in this case the effect was to harass the Council's officers in relation to a matter already addressed and closed and on which the Council could take no further action in the current circumstances. In these circumstances, she accepts the Council's conclusions that the request was vexatious.
37. The Commissioner has therefore found that the Council was not obliged to comply with Mr N's request of 23 April 2015, on the grounds that it was vexatious and section 14(1) of FOISA applied.

Decision

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr N.

Appeal

Should either Mr N or South Lanarkshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner

19 November 2015

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

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