Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2013

Public Authority: London Borough of Enfield Council
Address: Civic Centre
Silver Street
Enfield
Middlesex
EN1 3XF

Decision (including any steps ordered)

1. The complainant has requested information relating to the actions of a social worker at the London Borough of Enfield Council, the social worker previously reported the theft of a cat which the complainant had taken back to a cat charity after she found that its health was suffering in a care home. No action was taken by the police. The council stated that no information was held, but also stated that if further FOI requests were received about the same subject matter it would declare the request vexatious. After further requests were made by the complainant under the Data Protection Act 1998 it subsequently applied section 14 to the request.

2. The Commissioner's decision is that the Council has incorrectly applied section 14 to the complainant's request. However the council had already confirmed that no information is held in respect of the request and so the Commissioner does not require the council to take any steps.

Request and response

3. On 11 November 2013 the complainant wrote to the council and requested information in the following terms:

4. *7) I have been advised by Cats Protection that [name of council officer redacted] was still making enquires about Smokie in May 2012. If they made a mistake and it was actually 2011, as this was still months after [name redacted] died and also many months after [name of police officer redacted] and I separately informed [name of council officer redacted] (in December 2010 and January 2011) [name redacted]was no longer Smokie's legal owner because ownership had been legally reclaimed by the cat group which originally homed her with [name redacted] (because Smokie's welfare was not being maintained), I would also like a copy of [name of council officer redacted] records of her phone call/contact with Cat's Protection.*

5. The council responded on 13 November 2012. It stated that no further information was held and suggested that if the complainant did not believe that to be the case she should appeal the previous decision notice to the First-tier Tribunal. It added at the bottom of its response that:

   "I would like to reiterate that the Council has already sent you all the information it holds pertaining to your request dated 11 November and your earlier requests relating to the late [name redacted] and her cat Smokie. The ICO is satisfied that this is the case. Therefore, the Council will not be able to respond to any further requests for information pertaining to the late [name redacted] or her cat Smokie. Should any further requests in this respect be received from you, they will be treated as vexatious under Section 14 of the FOIA and will be refused."

6. The complainant then made a further series of requests for information under The Data Protection Act 1998 (the DPA) relating to the same issues on 30 November 2012. The council therefore wrote back to the complainant on 4 December 2012 applying section 14(1) to the request of 11 November 2012.

7. Following an internal review the council wrote to the complainant on upholding its decision that section 14(1) applies.

Scope of the case

Background to the case

8. The complainant has been in a long running dispute with the council regarding issues relating to the care provided to her friend, and the re-homing of her friend's cat. The complainant arranged for her friends cat to stay with her friend in a care home however after a short period of time she removed the cat from the home and returned it to a cat charity which her friend had originally obtained it from. She said that the cat's health was suffering as it was not suited to life in the care home.

9. The council asked for the cat to be returned, and when the complainant refused to do so a council social worker reported the issue to the police. She asked the police to investigate whether the complainant had stolen the cat.

10. The police carried out an initial investigation and decided that no action should be taken. The complainant had a vets report saying that the cat's welfare was suffering because it was not suited to living at the care home. She could also demonstrate that the legal ownership of the cat reverted to the cat charity in the event that the cat was not being cared for properly. She had taken the cat back to the cat charity when her view that the cats welfare was suffering was confirmed by the vet. The police therefore refused to take further action.

11. The complainant states that the council social worker then reported the issue to a different police department. Again this police department took no further action for the same reasons.

12. The complainant says that she has heard from the cat charity that the social worker made further inquiries about the cat in May 2012; fifteen months after the complainant's friend had died. The complainant is therefore troubled that the council has accused her, a number of times, of stealing the cat despite her providing clear evidence of the lawfulness of her actions to the council and the police taking no action in response to their complaints.

13. The complainant previously made a complaint to the Commissioner about a wider ranging information request relating to both the council's actions regarding the cat, and regarding the care provided to her friend. She has also made subject access requests for personal data relating to her held by the council. A decision notice was issued by the Commissioner on the 18th October 2012 over these issues and is available at http://www.ico.gov.uk/~/media/documents/decisionnotices/2012/fs_50

411821.ashx. An assessment was also carried out under the Data Protection Act.

14. The decision notice found that the council held information which had not initially been disclosed to the complainant which should have been. The information was however disclosed during the course of the Commissioner's investigation. The notice therefore found that the council did not initially comply with the Act but that after subsequent searches and disclosures on a balance of probabilities no further information was held by the council.

15. On 11 November 2012 the complainant sent in a further series of requests to the council, both under the DPA and FOIA. This was during the appeal period for the decision notice. The complainant states that she has evidence that the council holds further information in relation to her. She also considers it reasonable to request any further information it holds which relates to the social workers actions as regards any subsequent attempts by her to pursue the whereabouts of the cat with the cat charity. She also considered that in the time between her previous request and this request further information may have been recorded or obtained by the council.

16. The council reiterated that it held no further information and that the decision notice agreed with that finding. It said that if the complainant did not believe that to be the case then she should appeal the decision notice to the First-tier Tribunal. The council also told the complainant that if she persisted in making further FOI requests about these issues it would apply section 14 to the request.

17. The Commissioner notes therefore that the council effectively responded to the complainant's request. It stated that no information was held but issued a warning that it would apply section 14 if the complainant persisted to ask questions on the issue.

18. The complainant did not appeal the notice to the First-tier Tribunal. She wrote back to the council (after the appeal deadline had finished), making further requests for information specifically under the DPA. This second request was clearly entitled 'A completely new and fresh DPA request' and did not include any FOIA requests.

19. When the council made this further DPA request the council wrote to her and applied section 14 to her initial requests for information. The subject access request was refused on the basis that it was a repeated request.

20. The complaint was therefore that the council should not be able to apply the exemption after initially warning her that it would only apply the exemption in the event that she made a further request under the Act.

She also wished the Commissioner to consider the councils application of section 14 if his decision was that the council could apply the exemption without first receiving a further request.

21. The Commissioner recognises that the majority of the requests which the complainant made were made under the DPA rather than FOIA. Even where the Commissioner considers that the requests made under FOIA it is likely that if information was held this would also be likely to include some personal data relating to the complainant. However as the council has stated that no information is held then that assumption cannot specifically be made and the Commissioner must consider the request as it stands; requests for information on the actions of a social worker as regards the whereabouts and legal ownership of a cat.

Reasons for decision

The late application of section 14

22. The council applied section 14(1) after receiving the complainant's second set of requests. Part of the complainant's complaint to the Commissioner was that the council should not have applied section 14 to her request after it had initially warned the complainant that it would apply it if she made any further FOI requests. She points out that her subsequent request was a DPA request rather than an FOI request. The Commissioner agrees that subsequent requests were made under the DPA, and the council did not dispute that this was the case.

23. The Commissioner is satisfied that although the council applied the exemption late, it was nevertheless entitled to apply it. He recognises that it is not unusual for a public authority to decide that a new exemption applies during the course of an investigation, or even when appealing to the First-tier Tribunal.

24. The Commissioner understands the complainant's anger that she was led to expect that section 14 would only apply if she made a further FOI request. Nevertheless the Commissioner cannot refuse to accept the late application of this exemption by the council purely on the basis that it had issued this initial warning rather than applying the exemption at that time. He has therefore gone on to consider the application of section 14 by the council.

Section 14

25. Section 14(1) of FOIA states that a public authority is exempt from the requirements of section 1(1) where the request is vexatious. This means that it does not have to confirm whether information is held, nor provide

a copy of that information to the complainant. Section 14(1) applies to the request rather than the complainant.

26. The Commissioner notes that the council stated to the complainant in its first response that no information was held. In effect it had therefore already complied with the requirements of Section 1(1)(a) and 1(1)(b) in its first response. The later application of section 14 therefore appears superfluous for this request and serves little actual purpose. The council had already carried out the actions which were required of it under the Act, and the complainant had been duly warned, and had taken into account that further questions of a similar nature made under the Act would be likely to be responded to by the application of section 14.

27. The complainant did not ask the council to review its decision and did not make a complaint to the Commissioner regarding the council's initial response. It therefore appears that she had accepted that section 14 would be applied to further FOI requests made about the same subject, albeit that in reality she considered that further information was in fact held. She sought therefore to establish whether further information was held about her by submitting fresh subject access requests under the DPA.

28. Nevertheless the Commissioner has gone on to consider the application of section 14 further. When considering the application of section 14 the Commissioner has recently published new guidance for public authorities on considering whether a request is vexatious. The Commissioner considers that the key question in deciding whether the exemption is applicable is whether complying with the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, public authorities should weigh the impact on the authority and balance this against the purpose and value of the request. Where relevant, public authorities can take into account wider factors such as the background and history of the request.

29. At the time that the council considered this request it was working to the Commissioner's previous guidance. This provided a number of factors as an aid in considering the nature of the request. The Commissioner issued new guidance in May 2013, after the council had considered and responded to the request applying section 14. The analysis below therefore takes into account the councils consideration of factors provided under the old guidance. In effect however the application of both the approach in the new guidance and in the old should reach the same conclusion.

30. The Commissioner's previous guidance considered the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors:

a) whether compliance would create a significant burden in terms of expense and distraction
b) whether the request is designed to cause disruption or annoyance
c) whether the request has the effect of harassing the public authority or its staff
d) whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable.
e) whether the request has any serious purpose or value

31. The Commissioner has considered these guidelines, bearing in mind that the final decision should be taken from an overall viewpoint of the request taking into account the context and history leading up to the request.

32. a) In the review of its decision he also notes that the council did not find that responding to the request would cause a significant burden. It did not provide arguments to this effect as a reason for its application of section 14. It additionally confirmed to the complainant that it did not hold relevant information and so it clearly did not consider hat responding to this particular request would cause it a significant burden. He has not therefore considered this aspect further.

33. b) The Commissioner again notes that the council did not submit arguments that the request was designed to cause disruption or annoyance. Again therefore he has not considered this aspect further.

34. c) The council stated that the request, in context has the effect, if not the intention, of harassing it or its staff. It argues that the complainant has exercised her right to complain to the Local Government Ombudsman about the Council's involvement in the events relating to her requests and also made requests for related information under s7 of the Data Protection Act. The Council said that it did not dispute that she had such rights but when taken in the whole it believed a reasonable person would consider this request, in this context, as harassment.

35. The Commissioner has considered this further. The council is correct to identify that it is the effect upon the authority which is relevant to the application of the exemption. It is not whether any harassment was intended by the applicant.

36. The council's argument also takes into account the history of the issue between it and the complainant. During the Commissioner's previous investigation the complainant made numerous further requests to the council, highlighting areas where she considered further information should be held and asking questions about the council's responses. The council carried out extensive further searches for information in

response to these requests, and in response to correspondence from the Commissioner.

37. However when responding to these further questions and requests the council did on occasion identify and provide further information to the complainant which had not initially been identified. This has compounded the complainant's belief that further information may be held.

38. In its initial response to the complainant to her new request the council highlighted that if the complainant disbelieved that no information was held she was within time to appeal the Commissioner's decision to the First-tier Tribunal. The complainant however did not do so as she believed that a fresh request was the best way forward. Making an appeal was an option for the complainant to take at that time however she chose not to do so.

39. The Commissioner therefore understands that the further requests would be likely to have made staff consider that she was seeking to reopen a closed issue whilst still in the period for appeal. It would understandably argue that the correct route to question the issue further was to appeal the notice to the tribunal.

40. However the Commissioner also understands the complainant's concerns that further information may be held given the past history and context of her previous requests to the council. Additionally he has taken into account the additional suggestion made to her by the cat charity that the council social worker involved in reporting her to the police previously was making further inquiries into the whereabouts of the cat after the death of her friend. It is only natural that she would want further information as to why that might be the case given the previous police involvement.

41. The Commissioner has also borne in mind that the complainant understands that the council officer was making inquiries in May 2012. This is after she had made her initial requests to the council which were dealt with in decision notice FS50411821. Although the Commissioner understands that the council sought to locate information without reference to the date of the request during the course of the Commissioner's previous investigation, it was certainly possible that the Tribunal would only look to information held at the time that the initial requests were received from the complainant in 2011. Therefore any information held created by the council in May 2012 through its further inquiries could have been ruled to fall outside the scope of any appeal to the First-tier tribunal. The Tribunal and the Commissioner will normally

restrict their investigation to the time that the request was first received, or at the latest, the time of the review.

42. In conclusion therefore the Commissioner recognises the reasons why the council might consider the request as harassment. The council would consider the complainant was seeking to continue a complaint which had been independently evaluated and which it considered to be closed. However the Commissioner considers that the complainant has made various complaints about the council's actions previously which have led to further information being discovered. She was told that the social worker was continuing to make inquiries about the cat in May 2012 he believes that the complainant is entitled to ask for information about this given the previous referrals to the police.

43. d) The council also argue that the request, when put into context, can be characterised as being obsessive. It said that the council had made clear that no further information was held and yet the request has little or no regard to this fact or even that the Commissioner has issued a decision stating that no further information was held.

44. The Commissioner has considered this. He again considers that the council's previous searches may have been confined to information held at the time of the previous requests albeit it that he considers in fact that the council did consider all information it held during the course of his investigation.

45. The current request encompasses any actions taken by the social worker after that time. Rather than being a result of any obsession by the complainant her request was simply seeking to determine whether there was evidence held by the council that further inquiries had taken place by the . The Commissioner is therefore satisfied that the request was not obsessional but reasonable given the further information she had received.

46. e) The council stated that the request, when put into context, lacks any serious purpose or value. Although requests under the Act are motive blind when considered alongside the other arguments above it felt that in this case that any further effort by the authority in dealing with this or any further related requests as disproportionate.

47. The Commissioner considers that the council was essentially relying upon its assertion, and the Commissioner's decision, that no further information was held when considering this aspect of the guidance. This is understandable. It considered that the complainant was asking it to carry out further searches for information within a month of a decision

notice which found that on a balance of probabilities no further information was held.

48. However the Commissioner considers that the council did not take into account that the initial request which was dealt with in the notice had been received months before and that the response was therefore potentially only reflective of the position at that time. The Commissioner recognises that in reality its searches were continued throughout the investigation period however. For the reasons provided above the Commissioner recognises why the complainant may have decided that appealing the decision notice was not appropriate however.

49. When considered with the information which the complainant had received that further inquiries had been made to the cat charity by the social worker then this does provide a serious purpose and value to the complainant's requests. She was aware of the previous reports to the police by the officer concerned and was also aware that the officer had been told by the police that there was no theft. The complainant had provided further evidence to the social worker that the retrieval of the cat was legal and the ownership of the cat had been returned to the cat charity. There should therefore have been no formal reason for the social worker to make further inquiries about the cat.

50. Given the previous reports made to the police it was only natural that the complainant would therefore seek to ascertain whether the social worker had made further inquiries or not, and if so, what the purpose was behind those inquiries.

Conclusions

51. The Commissioner has considered the request and the findings of the above in context. He understands the position of the council and why it might have considered that the requests were vexatious given the previous history and the context in which the request had been made. The complainant had previously made numerous requests for information, complaints about the council's response and this had taken up a significant amount of officer time. It had created a significant burden on the authority. The Commissioner had issued a decision notice, only weeks before, which found that no further information was held, and the council was quick to point out to the complainant that if she disbelieved that that was the case then she could appeal that decision to the First-tier tribunal.

52. In the vast majority of cases such independent oversight and the history of the case the council would provide strong arguments that the requests were vexatious. In this case however the Commissioner is

satisfied that the council has not taken into account factors that he has identified above. Had it done so it would have recognised that the complainant was entitled to seek further information on the actions of the social worker and that given the time which had passed between its receipt of the original request and this one there was the potential for further information to have been generated or recorded.

53. Additionally the Commissioner has taken into account the fact that the council's initial response actually provided the councils answer to the complainant. It stated that no information was held falling within the scope of the request. It is difficult to see how the council can establish that section 14 is applicable because complying with the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress. It has already responded to the request. It is also difficult to establish and weigh the impact on the authority when it has already responded.

54. The Commissioner therefore considers that the council was not correct to apply section 14 in this instance.

55. In an effort to reassure the complainant the Commissioner also asked the council to confirm specifically whether any information was held by the social worker relating to the inquiries. This was not specifically confirmed during the last investigation. The Commissioner notes that the council did not have to carry out this search. It had applied section 14 and was not therefore under a duty to carry out any searches for information until the application of that exemption was overturned. It chose to do so on the basis that this would aid in satisfying the complainant's concerns.

56. The council asked the departmental manager of the social worker to search and confirm whether any information was held falling within the scope of the request. She confirmed that no information was held by the social worker or by the department falling within the scope of the request.

57. Whilst the complainant says that she has specific evidence that the social worker was making further inquiries about the whereabouts of the cat this does not provide evidence that any information was retained or recorded about this. If a telephone call was made to the cat charity it appears that no record was made of that call by the council.

58. Given the councils voluntary search for information falling with the scope of this request, the Commissioner is not ordering the council to take any further steps in respect of his decision in this notice. As a result of his decision that section 14 was not applicable he would generally include

steps within the decision notice requiring the council to respond again to the complainant as required by section 1(1). By confirming that no information is held the Commissioner is satisfied that there would be little point in him requiring this in this case. Additionally, should further requests be received for this same information by the council from this complainant the Commissioner considers that the council's arguments in respect of section 14 may well carry much more weight.

The Commissioner's new approach

59. The Commissioner new approach differs slightly from the above method of assessing potentially vexatious requests.

60. Public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance.

61. However, if a request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress then this will be a strong indicator that it is vexatious.

62. In this case the complainant's request is not for a large amount of information, and it would not cause a significant burden upon the authority to check whether relevant information is held. It did so and confirmed that no information was held prior to applying section 14.

63. Whilst the Commissioner accepts that the request would cause some irritation he does not consider that it would cause distress. The council answered the complainant's request in its first response by stating that no information is held. Only after receiving the subject access request did it inform her that it considered the request to be vexatious.

64. The Commissioner has also explained why he considers that the further requests were justified in this instance. The information the complainant received from the cat rescue charity would have led her to believe that there was still a possibility that the council was seeking the return of the cat or for further investigation by the police. It was also possible that the council's response to the earlier requests did not encompass information which was created after that request was received and would not have included any later enquiries by the social worker about the cat. Additionally any appeal to the Tribunal would have been likely to exclude such information as it would only consider the information held at the time of the first request.

65. The Commissioner therefore considers that the request was neither disproportionate nor unjustified. He considers that section 14 was not applicable.

Right of appeal

66. 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: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

67. 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.

68. 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 .....

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF