

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2014

Public Authority: City of York Council
Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information relating to the spending of public money, how the council deals with legislation on meetings and access to information, and the work schedule of the chief executive.
2. The Commissioner's decision is that City of York Council has incorrectly applied the vexatious provision at section 14(1) of the FOIA.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Issue fresh responses to the requests under the FOIA without relying on s14.
4. The public authority must take this step 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

Requests 1 & 2

5. On 30 June 2013 the complainant made the following request for information via the WhatDoTheyKnow website¹:

“Please confirm how much was paid to Bright White Ltd, Chetwoods, Bar Lane Studios and ARUPS to produce a ‘Wonderland’ in Museum Gardens.” (Request 1)
6. On 27 August 2013, having received no response to the request, the complainant requested an internal review.
7. The council responded on 3 October 2013 stating that it had responded on 30 August 2013 but the whatdotheyknow email address which was used to respond was for a different request. It attached a response dated 2 July 2013 (which the Commissioner notes is on an email dated 30 July 2013) which provided information as follows:

“£91,000 was paid to Bright White Ltd

Income generated from ticket sales was £57k. There was an £18k surplus generated in relation to this event after taking into account sales, grant funding and associated expenditure (marketing, programme and operational costs).”
8. On 4 October 2013, the complainant wrote to the council stating that the response only answers part of the request and repeats the request for the how much was paid to Chetwoods, Bar Lane Studios and ARUPS. He also stated that the request for review had been ignored.
9. The council provided its internal review response on 25 October 2013. It said that no payments were made to Chetwoods, Bar Lane Studios and ARUPS and therefore there is no further information to provide.
10. The complainant wrote again on 25 October 2013 seeking clarification of the information provided and requesting ‘the council report which sets out the costs and income anticipated following last years effort’.
(Request 2)
11. On 3 March 2014, the council replied stating that the outstanding request is being refused under section 14(1) of the FOIA.

¹ https://www.whatdotheyknow.com/request/york_city_illuminate_2012#comment-44457

Requests 3 & 4

12. On 2 July 2013 the complainant made the following request for information via the WhatDoTheyKnow website²:

“Please confirm the name or names of the council employee(s) responsible for deciding that no background report or supporting papers/ draft /non draft notes relating to the York Local Plan be released prior to the 5th June and the start of the public consultation.”
(Request 3)
13. The council responded on 30 July 2013 providing the following narrative information in response:

“Background papers have a specific legal definition. No documents falling within that definition were withheld.

The decisions taken on the timing of the release of supporting papers was taken collectively by [name redacted], [name redacted] and [name redacted] in consultation with the Cabinet Member, Leader and Deputy Leader of the Council.”
14. The complainant then wrote on 5 August 2013 asking for an explanation of the legal definition of background papers and the difference between a background paper and a supporting document. (Request 4)
15. On 7 August 2013, the council stated that in relation to the request for a legal definition of background papers, it is not able to provide legal advice.
16. The complainant requested an internal review on 3 October 2013 stating that he is not asking for legal advice, he is asking for the council’s definition of a draft or background document.
17. On 28 February 2014, the council replied stating that the outstanding request is being refused under section 14(1) of the FOIA.

Requests 5 & 6

² https://www.whatdotheyknow.com/request/york_local_plan#outgoing-308430

18. On 22 August 2013 the complainant made the following request for information via the WhatDoTheyKnow website³:

"Please provide the following information in regard to Statutory Instrument 2089:

1 Who is responsible for advising YCC on the obligations / duties imposed by SI 2089?

2 Has YCC ever sought external legal advice on SI 2089?

3 If the answer to 2 above is yes, please provide details of who was approached, when and by whom and provide a copy of their instructing letter and a copy of their advice and how much has been spent on such advice.

4 If the answer to 2 above is no then please provide a copy of any memo about or including SI 2089 written by the person responsible highlighted by the answer to question 1." (Request 5)

19. The council replied on the same day asking the complainant to 'clarify which SI 2089 you are referring to as there have been several since 1987'.

20. On the same day, the complainant clarified that he was referring to 'The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012'. He also made a further request for 'copies of all correspondence between staff and between staff and members on all matters to do with any breaches or alleged breaches of SI 2089'. (Request 6)

21. On 3 October 2013, having received no response to the request, the complainant requested an internal review.

22. On 3 March 2014, the council replied stating that the outstanding request is being refused under section 14(1) of the FOIA.

Request 7

23. On 10 December 2013 the complainant made the following request for information via the WhatDoTheyKnow website⁴:

³ https://www.whatdotheyknow.com/request/statutory_instrument_2089#incoming-436358

⁴ https://www.whatdotheyknow.com/request/activity_of_the_chief_executive#incoming-480597

"Please present from April 1 to End of November a list of all the days or part days Kersten England was out of the city . List please in excel the following:

date, organisation/ business with whom meeting held, location of meeting. If more than one meeting in the day out of the office then list all. Finally annotate in an additional column if this involved an overnight stay, if so annotate in a further column if this was at the expense of the city ratepayers." (Request 7)

24. The council responded on 8 January 2014 stating that the request is being refused under section 14(1) of the FOIA.
25. On 13 January 2014 the complainant requested an internal review.
26. The council provided its internal review response on 7 February 2014 in which it maintained its original position.
27. The Commissioner is aware that there has been numerous items of correspondence between the council and the complainant regarding this, and related requests. However, for clarity, only correspondence which is most relevant to these particular complaints is detailed above.
28. The request numbering above has been devised by the Commissioner for ease of reference during this investigation. It does not reflect any request numbers referred to by the complainant or the council.

Scope of the case

29. The complainant initially contacted the Commissioner on 10 December 2013 to complain about the way requests for information 1-7 had been handled. He also contacted the Commissioner on 15 February 2014 in relation to request 7.
 30. As information was provided in response to requests 1 and 3, the application of section 14 to these requests has not been considered.
 31. The Commissioner has considered whether the council was correct to apply the vexatious provision at section 14(1) to requests 2, 4, 5, 6 and 7.
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Reasons for decision

32. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
33. The term 'vexatious' is not defined in the legislation. In *Information Commissioner vs Devon County Council & Dransfield*⁵, the Upper Tribunal 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 upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as the "...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
34. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) and harassment or distress of and to staff. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the
- "importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).
35. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.
36. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his

⁵ UKUT 440 (AAC) (28 January 2013)

published guidance on vexatious requests⁶. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

37. As, what appears to be background to the case, the council said that officers were to some extent confused by the complainant's requests, which 'numbered far more than seven, and were interspersed with complaints, accusations, and abuse'. It said that the complainant often forwarded and copied emails to a range of officers and others, leaving individuals unsure whether a reply had already been made, which it referred to as the 'scattergun'. It also said that the complainant said he would withdraw two questions, but later complained when they were not answered. The Commissioner notes that the council did not provide him with any individual examples or evidence to support these claims.
38. The council then went on to say that a more significant issue is whether they amounted to requests for information under the FOIA at all. It said that the requests, although in the form of requests for information, were mostly not capable of being answered by the provision of information already held in recorded form. To explain this, it said that the requests fall into one of three categories:
 - "The apparently factual, which might, with a bit of imagination, be answered by information held in recorded form
 - Those asking for explanation or justification, which could be answered from officers' personal knowledge and experience
 - Those challenging the council, perhaps following up an initial reply. Sometimes these are sarcastic or sneering in tone".

The council then provided the following explanation;

"Once we read those in the last category, re-reading the others (including the seven you have chosen), in order to apply the necessary bit of imagination, shows them no longer as dispassionate requests for fact or truth, made to an impersonal public authority, but as loaded

⁶ http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

questions intended to fuel criticism or even abuse of individuals, or to satisfy some other private concern of [complainant].

There is an alternative, which is to read them literally, without imagination (the council is very conscious of your guidance on reading carefully the written words of a request). The result would almost inevitably be trivial and pedantic; a denial that the information is held. This is what would happen to Q2.

Q1 was in fact answered. Consider Q2 in full:

- Please can you direct me to the council report which sets out the costs and income anticipated following last years effort.

Plainly [complainant] knows that such reports are published on the council's website, and he simply asks to be directed to it. Perhaps he understands that an FoI request for the information in the report would be met with a refusal under Section 21. Whatever, in reality this is a service request, not a request for information as envisaged by the FoI Act. Answering it (or failing, or refusing to do so) is a matter for the council's own Customer Service Standards, but there is no duty under the Act or the Code of Practice to reply. Not replying (or refusing to direct him) involves no failure to observe the duties of the Act or the Code.

In a similar way, Q3 was answered, and followed by Q4. He asks to be given a legal definition, but is not asking for legal advice! This is again not a request for the sort of information envisaged by the FoI Act. It is a service request, to be met or not at the council's discretion. But to the extent that [complainant] demanded replies as if the Act imposed such a duty on the council, it was reasonable to refuse in those terms.

Consider the first part of Q5:

- Who is responsible for advising YCC on the obligations / duties imposed by SI 2089?

No public authority holds, in recorded form, an answer to such a question. No reasonable enquirer would expect this. No individual officer is publicly accountable for decisions, even though it is usual to correspond with citizens on a one-to-one basis. As with Q2 it is an abuse of the FoI Act, because it is apparently intended to facilitate criticism of an individual. [Complainant's] demand for a review is equally an abuse and the refusal was correct. Q6 follows it in [complainant's] usual pattern; continuing the discussion with a new

demand for explanation or justification. It could have perhaps been refused under S12 but its subject is of no public interest at all; the information has no value; it is surely intended to waste time in order to punish the council for not having published a supporting document as [complainant] had wished. The last three points of Q5 fall into the same category."

39. The Commissioner has considered the council's assertion that the requests are not requests for information and should not be dealt with under the FOIA. He appreciates that some of the requests are phrased as questions but considers that a question can be a valid request for information. As stated in his 'Guide to Freedom of Information'⁷, the Commissioner acknowledges that a public authority is not required to answer a question if it does not already have the relevant information in recorded form, but if it does have information in its records that answers the question it should provide it in response to the request. The aforementioned guidance also states;

"The Information Commissioner's Office (ICO) recognises that some public authorities may initially respond to questions informally, but we will expect you to consider your obligations under the Act as soon as it becomes clear that the applicant is dissatisfied with this approach."

All the requests in this case were made via the 'WhatDoTheyKnow' website which should have in itself alerted the council to the fact that the complainant was intending to make requests for recorded information, albeit in the form of questions. As the council itself said, if information is not held, 'a denial is all that is required under Section 1', but it has chosen to view the requests as 'service requests' rather than valid requests for information under the FOIA, mistakenly believing that it has no duties under the FOIA in relation to the requests.

40. In relation to the specific requests, the Commissioner does not agree that request 2 is simply asking to be directed to information that the complainant knows is published on the council's website. The Commissioner does not consider that the council's interpretation is the only objective reading of the request; it is entirely feasible that the complainant was requesting to be provided with the council report he

7

http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/guide_to_freedom_of_information.pdf

described. In relation to requests 4 and 5, the Commissioner considers that it is conceivable that recorded information exists that could answer the questions posed. He also considers that request 6 is a request for recorded information ('copies of all correspondence...') that could conceivably exist.

41. In relation to request 7, the council provided the Commissioner with its review report and asked the Commissioner to consider the report as an integral part of its response to the Commissioner's enquiries about all seven requests. It said that the report seeks to apply the Commissioner's guidance to request 7 and then general conclusions can be drawn that would apply to the other six requests.

42. As stated in paragraph 35, the Commissioner needs to consider whether the requests are likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.

43. The Commissioner draws attention to his aforementioned guidance on vexatious requests, which states that;

"131. When building a case to support its decision, an authority must bear in mind that we will be primarily looking for evidence that the request would have an unjustified or disproportionate effect on the authority.

132. The authority should therefore be able to outline the detrimental impact of compliance and also explain why this would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value."

44. The council said that an estimate of the time needed to complete request 7 was at least 15 hours but did not provide any detail as to what this would entail. It said the complainant is a regular correspondent who has submitted 15 requests since June 2013. It said it had analysed 12 of those requests which includes a total of 93 separate items. It then explained that;

"Of the 93 items, only 17 look likely to be able to be answered by the provision of information in recorded form. 28 look likely to need informed discussion because the answer is likely to be zero or not held at all. The remaining 66 fall directly into the second (or third) category. For example:

(CF4784) Who is responsible for advising YCC on the obligations / duties imposed by SI 2089?"

45. The Commissioner notes that the example given is part of request 5 and the council appears to be claiming that as it does not fall into category 1 (as described in paragraph 38) it is not a request for information.
46. The council also said that none of the other enquiries is on the same topic as request 7 and that the requests cover a range of questions. It stated the following;

"Nor is this number of requests an especially large proportion of the overall number received in the period, which all argues against considering any or all of them vexatious. However the disproportionate burden follows from the related "non-FoI" questions".

The council then said;

"The large number of second category, "non-FoI", enquiries...imposes a significant burden. They are not a clerical matter of locating and retrieving recorded information; someone must be found who is senior and experienced enough, and imaginative enough, to provide such an explanation."

47. The Commissioner does not consider that the council has provided specific evidence that responding to these seven requests would have an unjustified or disproportionate effect. It has not detailed the detrimental impact that complying with the requests would entail. Instead, the council appears to be saying that it is the requests where it would need to provide an explanation, rather than provide recorded information, which impose a burden. As explained above, the FOIA does not require the council to provide information which is not already held in recorded form and therefore the burden of providing information which is not already held cannot be taken into consideration as part of the disproportionate or unjustified level of disruption of dealing with the requests. The council has asserted that most of the requests could be answered by stating no recorded information is held and therefore it does not appear to the Commissioner that compliance with the FOIA would be an onerous task.
48. The Commissioner notes that the council said, in February 2014, that the complainant has made 15 requests since June 2013 but did not provide details of when these were made. He also notes that three of the requests under consideration in this case were made in August 2013, with the others being made in October and December 2013. As the Commissioner considers that only requests made prior to the requests under consideration can be taken into account when assessing the application of the vexatious provision, and it is not clear how many requests had been made before each of the requests in this case, it is

difficult to conclude that previous requests support the council argument that the requests in this case are vexatious.

49. The council said that in the 12 cases it analysed there have been 51 follow-up questions and quoted the following section of the Commissioner's aforementioned guidance on vexatious requests;

"57. The requester's past pattern of behaviour may also be a relevant consideration. For instance, if the authority's experience of dealing with his previous requests suggests that he won't be satisfied with any response and will submit numerous follow up enquiries no matter what information is supplied, then this evidence could strengthen any argument that responding to the current request will impose a disproportionate burden on the authority."

50. The Commissioner has noted occasions where the council has not responded to the complainant's requests in accordance with the legislation or good practice and believes that this is a case where the volume and frequency of correspondence has been contributed to by the council's untimely and unclear previous responses. He considers that the context and history in this case weakens the argument that the requests are vexatious and believes that the following point, made in paragraph 61 of his aforementioned guidance on vexatious requests, applies in this case;

"If the problems which the authority now faces in dealing with the request have, to some degree, resulted from deficiencies in its handling of previous enquiries by the same requester, then this will weaken the argument that the request, or its impact upon the public authority, is disproportionate or unjustified."

51. Turning now to the serious purpose and value of the requests, the council said that the information requested has no value. It said the requests are an abuse of the FOIA and are not intended to put useful information into the public domain but are to satisfy the complainant's private disputes. It also said that insisting on a supposed right under the FOIA for review, or further explanation, is also an abuse of the FOIA.

52. In relation to request 7, it said the following;

"The enquirer has given no reason for his request. He has not indicated that he is having difficulty making an appointment, for instance. By itself it is a random and banal question, if viewed as one with no context, purpose or reason.

The use of the words "a list of all the days..." is curious. It is not limited to the Chief Executive's absences on council business, and would include going home each day and at weekends (she lives outside the city).

The request then jumps to asking about "meetings" which is much more readily understandable. Indeed relevant items from her diary could be provided (unless exempt). Her claims for subsistence could be matched to them, or provided separately for the enquirer to complete his spreadsheet. It would have to be acknowledged that this might not be a complete list, since it would omit (for example) private journeys made out of office hours, such as going home.

However it comes after others have publicly questioned Ms England's performance, and indeed such comments have been added to this WDTK page although it is fair to say that the enquirer has not acknowledged them in any way.

Chief Executives typically do not restrict themselves to working 37 hours a week, or to working in their own office. It is quite normal to find that she and other senior officers are carrying out official duties at all hours of the day, weekends, and even while nominally on leave. No conclusion could be drawn about Ms England's performance from the information requested, whether it shows she spends a lot, or a little, of her time in the city.

The apparent neutrality of simply asking for information is disingenuous. A reasonable person experiencing difficulty in making contact would not use FoI to solve the problem. An enquirer with evidence, or reasonable suspicion, of poor performance or misconduct would report it for investigation by the usual competent authorities, and there would be no evidence or corroboration to be found in this information anyway. Therefore this request has no value."

53. The Commissioner considers that the council has assumed that the purpose behind this request was connected to difficulty in making contact without any discussion with the complainant to clarify this. The Commissioner considers that there is value in this request; that being accountability and transparency of the work schedule of the person holding the most senior position in the council.
54. The Commissioner has considered the serious purpose and value of the other requests in this case and notes that they relate to the spending of public money (request 2), how the council deals with legislation on meetings and access to information (requests 4, 5 and 6), and the work schedule of the chief executive (request 7). The Commissioner strongly believes in the value of such subjects and could to no degree class them as having no or little value.

55. In its review, the council said that factors in the complainant's favour are that;

- "He is not obsessive or aggressive. Nor does he use foul or abusive language
- He has not indicated that it is his intention to cause disruption to the public authority
- Although the requests cover various subjects they do not appear to be simply 'fishing' for information without any idea of what might be revealed
- The issues he asks about have not already been conclusively resolved by the authority or subjected to independent investigation
- Nor are they inane or so extremely trivial that they could be said to be made for the sole purpose of amusement."

It said that factors in favour of the requests being vexatious are that;

- "the information has no public value. The matter being pursued by the requester is relatively trivial and the authority would have to expend a disproportionate amount of resources in order to meet it
- many other enquiries of his have already led to a disproportionate use of officer time in answering discussion questions."

56. The Commissioner agrees with the council's factors in favour of the requests not being vexatious but disagrees that the requests are trivial and of no value. He also notes that his aforementioned guidance on the vexatious requests states, at paragraph 38, that;

"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."

57. The Commissioner appreciates that the council has provided a detailed submission in relation to request 7 and notes that it asked the Commissioner to apply those arguments in relation to the other requests under consideration. However, he notes that the details provided do not specify the disproportionate or unjustified level of disruption, irritation or distress in order to evaluate whether the vexatious provision applies in these cases. Instead, the council has focused on its belief that the requests are not valid requests under the FOIA and the Commissioner considers that it is conceivable that recorded information could exist in answer to questions posed. He does not believe that the requests are an abuse of the FOIA but are a sign of the requestor's persistence in pursuit of obtaining answers to his questions and considers that some of the

requests have been generated by the council's less than adequate responses and could have been avoided if the council gave the requests full consideration as required by the FOIA. The purpose of the requests go to the heart of the legislation, in so much as they relate to accountability and transparency and the Commissioner considers that the council has not demonstrated that the burden imposed by such requests is unjust in the circumstances. Taking into consideration the findings of the Upper Tribunal in Dransfield, that a holistic and broad approach should be taken in respect of section 14(1), the Commissioner has decided that the council was incorrect to find the requests vexatious.

Other matters

58. The Commissioner notes that the council's review states the following:

"The whole of the guidance is applicable to every enquiry and the council should not restrict its application of Section 14 to any future request from any person. However a rule of thumb when looking at any new question might be to ask:

- can the council assume reasonableness and trust on the part of the enquirer
- Would the provision of pre-existing recorded information provide such an enquirer with a meaningful and helpful answer to the question
- Can a meaningful and helpful answer be prepared by one or more officers, including both recorded information and personal knowledge, without imposing a significant or disruptive burden

If Yes to all, devise and provide a suitable answer including both recorded information and officer knowledge. If not, look again at the guidance and consider refusal as vexatious."

59. The Commissioner considers that the council should apply his guidance on vexatious requests when considering further requests from the complainant and notes that an assumption of reasonableness and trust on the part of the requestor is not a requirement for a request under the FOIA to be responded to.

Right of appeal

60. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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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