



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2012/0064

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50406303
Dated: 31 January 2012**

Appellant: PETER MARSH

Respondent: THE INFORMATION COMMISSIONER

Heard at: Field House, Breams Building, London, EC4A 1DZ

Date of hearing: 17 July 2012

Date of decision: 1 October 2012

Before

CHRIS RYAN

(Judge)

and

HENRY FITZHUGH

MIKE JONES

Attendances:

The Appellant appeared in person.

The Respondent did not attend and was not represented.

Subject matter: Vexatious or repeated requests s.14

Cases: *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222).

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 31 January 2012 is substituted by the following notice:

Public Authority: Southwark Council
Address: PO Box 64529
London
SE1P 5LX

The complainant's request for information from the public authority dated 20 June 2011 was not vexatious and accordingly the public authority was not entitled to rely on section 14 of the Freedom of Information Act 2000 and should have responded to it pursuant to its obligation to do so under section 1(1). However, as the complainant now has the information he was seeking from the public authority it is not required to take any steps.

REASONS FOR DECISION

The request for information

1. On 20 June 2011 the Appellant ("Mr Marsh") sent a request for information to the Southwark London Borough Council ("the Council"). The relevant part of the request read:

*"Follow-up requests to request #128625
Your letter of 07.04 stated inter alia that "the Council is currently reviewing the methodology for any increase in court costs. It is anticipated that this review will be complete with May and any increase approved by June. I now request (a) the outcome of such review, or, if it has not been completed, the expected date of completion, and (b) an explanation of any difference in methodology from that followed for the benefits costs benchmarking exercise."*

We will refer to the request in (a) as "the Costs Review Request" and the request in (b) as "the Benchmarking Request". We will refer to the request as a whole as "the Information Request".

2. The Information Request was made under section 1 of the Freedom of Information Act 2000 ("FOIA"), which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. In this case the Council refused disclosure. Its reasons were set out in a letter dated 23 June 2011, which included this passage:

"You have been in correspondence with the council for a significant period of time as well as making numerous Freedom of Information requests in relation to the court costs regarding Council Tax collection. In addition, we are also of the opinion that when the council answers a particular request this simply leads to you sending further correspondence and making further requests. Therefore whilst your current request is not vexatious in isolation it is the latest in a long series of overlapping requests and other correspondence and the council's view is that it forms a wider pattern of behaviour that makes it vexatious."

On that basis the Council concluded that it was entitled to rely on FOIA section 14, the relevant part of which reads:

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

3. Mr Marsh asked the Council to undertake an internal review of its refusal, which it did. It wrote to Mr Marsh on 19 July 2011 maintaining its stance that it was entitled to refuse the Information Request under FOIA section 14. It relied on what it said was a long series of overlapping requests or other correspondence from Mr Marsh, which it felt formed "*part of an extended campaign to expose alleged improper practices in relation to issues that either directly or indirectly linked to council tax*". The letter conceded that the Information Request did not impose a significant burden on the Council, that it was not designed to cause disruption or annoyance and that it did not lack any serious purpose or value. However, the Council then went on to explain why it considered that the Information Request could fairly be seen as obsessive and as being likely to have the effect, when considered in the context of earlier requests and correspondence dating back to 2006, of harassing the Council and causing distress to its staff.

The complaint to the Information Commissioner and his Decision Notice.

4. Mr Marsh complained to the Information Commissioner about the Council's refusal to disclose the information he had requested. The Information Commissioner, after investigating the complaint, issued a Decision Notice on 31 January 2012 ("the Decision Notice"). In it he examined the circumstances surrounding the Information Request and considered whether, in context, it:
 - a) Would create a significant burden on the Council in terms of expense and distraction;
 - b) Was designed to disrupt or annoy;
 - c) Had the effect of harassing the Council or its staff;
 - d) Could fairly be characterised as obsessive or manifestly unreasonable; and
 - e) Had any serious purpose or value.

In the Council's representations to the Information Commissioner it did not press factors a), b) or e). However, it did rely on the other factors.

5. The Information Commissioner concluded that the Information Request had the effect of harassing the Council or its staff (factor c) above), due to the volume and frequency of requests, even though the language used, although robust at times, was not in itself distressing. He also concluded that the Information Request was obsessive and manifestly unreasonable (factor d)), given the volume and frequency of correspondence received from Mr Marsh and the Council's attempts to provide responses to earlier requests. The Information Commissioner took particular note of three arguments put to him by the Council. The first was that Mr Marsh tended to reopen issues dealt with in earlier correspondence and requests, with several requests often being contained in a particular communication. The second argument was that the same or similar issues that formed part of the Information Request had been raised by Mr Marsh when complaining to the District Auditor about the Council's annual accounts for each of the years 2007/8, 2008/9, 2009/10 and 2010/11. The third and final argument was that the Council had been forced to expend considerable resources in dealing with Mr Marsh's requests and other correspondence.

6. The Information Commissioner concluded that, primarily because of the volume of requests and the consequent use of Council resources in dealing with them, the Information Request was obsessive and manifestly unreasonable. He drew particular attention to the fact that the request stated that it was a follow-up to a previous request, the substance of which had been previously answered. He concluded:

“...the request continues an established pattern of obsessive behaviour which, in its volume and frequency, harassed council staff. He is satisfied that the council's previous efforts to comply with section 1 in relation to the complainant's request/s had justifiably shifted to section 14(1) with regard to this particular request as it exemplified the complainant's need to revisit matters that had become, by that stage, vexatious.”

The appeal to this Tribunal

7. Mr Marsh appealed the Information Commissioner's decision to this Tribunal. In his grounds of appeal he suggested that responding to the Information Request would have been relatively straightforward and argued that the Council's failings in relation to the matters that concerned him (the recovery of court costs in claims for the recovery of council tax) had been established as a result of his previous attempts to uncover them and had been acknowledged by the District Auditor. He also challenged the Information Commissioner's assessment of the history of information requests submitted to the Council and complaints addressed to the District Auditor.
8. The Notice of Appeal included a request that the matter be determined at a hearing, rather than on the papers. As an appellant has a right to a hearing, directions were given to enable a hearing to take place. This resulted in both the Information Commissioner's Response and Mr Marsh's Reply including their respective arguments and being accompanied by any documents relied on, so as to compress the pre-hearing procedures. In the event the Information Commissioner chose not to appear at the hearing but relied on his written submissions. Mr Marsh did appear. He argued his case and answered a number of questions put to him by the Tribunal. At our request he provided us, after the hearing, with a copy of a particular item of correspondence and further information about the sequence of communications between himself and the

Council. This was provided to the Information Commissioner who indicated that he did not wish to make any further submissions relating to it.

9. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
10. We propose, first, to deal with the Costs Review Request (paragraphs 11 to 32 below) and then the Benchmarking Request (paragraphs 33 to 35).

The Costs Review Request

11. In light of the acceptance by the Council and Information Commissioner that a serious reason lay behind Mr Marsh's requests and that he had not set out to disrupt the Council's business or annoy its staff, the section 14 challenge relies heavily on the quantity of correspondence received from Mr Marsh, its subject matter and the period of time during which it was generated. In those circumstances we need to explore the whole history of the matter.

The history of correspondence between Mr Marsh and the Council

12. In late 2006 Mr Marsh received a court summons, issued by the Council, claiming unpaid Council Tax. Added to the summons was a claim for fixed costs of £65. The documentation served on Mr Marsh also stated that a further £30 would be claimed if the summons was not complied with and the court issued a Liability Order. It subsequently became apparent that the summons had been issued in error. The claim for both tax and costs was withdrawn.
13. The incident led Mr Marsh on a train of enquiry about the way in which the Council's costs claim had been calculated. He set out to discover whether fixed cost claims included in Council Tax summonses would result in the Council recovering too high a figure (to the detriment of defendants), or too low (to the

detriment of the general body of Council Tax payers). He therefore submitted a request under section 1 of the FOIA in December 2006 seeking information about how the costs had been computed and an explanation of why the Council considered that it was entitled to claim reimbursement of what it claimed to have incurred. He also added requests for information about the number of summonses issued and the number that had subsequently to be withdrawn due to errors by the Council or its agents.

14. Correspondence ensued between Mr Marsh and the Council, during which Mr Marsh pursued his earlier requests about the computation of costs claims, but also tried to set this in the context of the gross costs of the Council Tax Department. It is clear from the correspondence we have seen, as well as the Council's own log of the complete chain of communications, that Mr Marsh suspected that an inflated costs figure was being added to each summons which, if paid, would have caused the Council to recover, not just the costs incurred in generating the summons and related work, but also some part of the otherwise unrecoverable overheads of the Council Tax Department. He also formed the view that the level of recovery actually achieved as the result of taking court action against Council Tax payers was surprisingly low. He therefore submitted a request for several additional pieces of information, apparently targeted at that issue.
15. It has to be said that the number of items of information requested was substantial and involved a good deal of quite detailed statistical and/or financial information. However, no question arose at that stage of the Council characterising any of the requests as vexatious.
16. We were not provided with the full history of correspondence between Mr Marsh and the Council, but it appears that in February 2007 the Deputy Leader of the Council intervened on Mr Marsh's behalf, writing to the Council's Chief Executive asking that the requests, which had not been responded to by that date, should be answered. Either as a result of that intervention, or for other reasons, there certainly appears to have been an attempt by the Council to discuss Mr Marsh's concerns. The Council provided a written explanation of the rationale behind the fixed costs structure in November 2007 and appears to have adopted some of Mr Marsh's suggestions for the re-drafting of the documentation used by the Council in respect of Council Tax summonses. At that stage the Council seems to have

been willing to concede that its approach to fixed cost recovery could be open to challenge, although it had been advised that it *“would be able to present an argument that the level of costs [was] not unreasonable.”* It indicated that the consideration the issue had received presented an opportunity for it to re-visit its approach with a view to quantifying the actual costs incurred and to demonstrating that the costs were reasonable. The Council indicated willingness at that stage to share with Mr Marsh its proposed new costs model.

17. A meeting between the parties then took place in February 2008 in an apparent attempt to explain the Council's position and, presumably, to satisfy Mr Marsh on the issues that were causing him concern. The dialogue clearly extended beyond the simple issue of information release and developed into a debate about the Council's cost-recovery procedures more generally. Mr Marsh asserted that in the course of that meeting the Council's Finance Director went further than the earlier correspondence and conceded that the cost issue had not been dealt with properly. Mr Marsh was given information at the time which, while not satisfying him that all of his freedom of information requests had been satisfied, did lead him to believe that there were discrepancies in the recording of costs recovered and written off, and that tax recovery work may have taken up a disproportionate part of the total workload of the Council Tax Department (or, if not, that cost recoveries were subsidising the Department's budget). He accordingly continued to pursue his enquiries in preparation for a further meeting which Council Officials had promised to schedule. However the Council initially postponed that follow up meeting and then, in a letter from its Chief Executive dated 16 July 2008, broke off further discussions, saying:

“We do not believe as a Council we should spend valuable time and resources meeting and discussing this further as we are confident that if a measurement was used we are in no doubt that the costs exceed £62.”

18. The decision by the Council to discontinue the co-operation with Mr Marsh led him to escalate the issue by taking his concerns to both the Audit Commission and (through his Ward Councillor) the Council's own Overview and Security Committee.
19. Mr Marsh's reference to the Audit Commission took the form of a complaint that costs award claims recorded in the Council's accounts had in fact been unlawful because they exceeded that which had been “reasonably incurred”. Although we

have, again, not been provided with the whole of the correspondence, we were provided with evidence that the Audit Commission gave the Council an opportunity to comment on Mr Marsh's complaint. Those comments included an acknowledgement, as early as July 2009, that the fixed cost figure, although agreed with the London Forum of Magistrates' Clerks in October 2005, had not been based on detailed calculations.

20. On 15 October 2008 the Overview and Security Committee considered a number of issues that troubled Mr Marsh including the following:

- a) The suggestion that the Council had misrepresented that a cost recovery of £62 on each summons represented its reasonable costs (for the purpose of the Council Tax (Administration and Enforcement) Regulations 1992), as it had not calculated the figure. It appears that the Council did not claim at this stage that any computation had been carried out, but argued that, as the courts appeared to be satisfied at the level of costs claimed, and as the figure was consistent with those claimed by other local authorities across the London area, it had acted properly. However, the Finance Director did tell the Committee that attempts were being made at that time to uncover reliable costs data from the London Forum of Magistrates Clerks and the group of local authorities deputed to seek agreement with the clerks ("The London Review Group"). Members of the Committee, including its chair, expressed some concern that costs charge should have been properly calculated.
- b) A complaint that the summons documentation was misleading, which the Council had already acknowledged and had, with the co-operation of the court, amended.
- c) Criticism of perceived inadequacies in the book-keeping, administration and financial reporting of council tax collection. The Council's view was that Mr Marsh's criticisms stemmed from a misunderstanding of the figures, but the Committee nevertheless decided not to initiate a scrutiny review into this aspect of the Council's tax because, as a result of Mr Marsh's complaint to the Audit Commission, that body was already carrying out an investigation. The Committee decided that it would review the situation when the outcome was known.

21. After the date when Mr Marsh took his complaint to those other bodies he continued to engage with the Council on the computation of costs claims and the

process of pursuing them. In February 2011 he followed up on a reference in the Council's budget statement to an additional £1.3 million being secured by increasing Council Tax and business rates costs awards by 34% and 37.5% respectively. He asked for details of the computation of this amount and was informed that £0.5 million was expected to be obtained by increasing the amount of costs claimed and that the balance of £0.8 million was expected to come from increasing arrears collection. Mr Marsh told us that the Council subsequently informed him on 7 April 2011 that there was to be no increase in the unit amount of cost demands and that it held no further information about the £0.5 million. It also told him that the projected savings figure of £1.3 million remained achievable through increased recovery of arrears. On the same date it stated that:

"...the Council is currently reviewing the methodology for any increase in court costs. It is anticipated that this review will be complete within May and any increase approved by June."

22. Also in April 2011 Mr Marsh pressed the Council to justify the projected figures in the face of certain statistics that he clearly felt threw doubt on their reliability. The request was refused. By an email dated 20 May 2011 Mr Marsh continued to press the Council for more information to support its figures. His request was allocated four separate numbers, in order to avoid delay in the event that some of the items of information could be produced earlier than others. This caused an artificial increase in the number of information requests that Mr Marsh appeared to have submitted. One of the requests was complied with on 15 June 2011, by the Council providing Mr Marsh with a statement to the effect that court costs had been unchanged in the financial year 2010/11 from the previous financial year. The response also stated that, following changes to the arrangements for pursuing Council Tax arrears:

"... no new computation will be made until we are able to assess the relevant costs of the reconfigured service. The Council is keen to review these costs as soon as practically possible although given current workloads within the new team this is unlikely to be until next year"

23. On 20 June 2011 Mr Marsh followed up on the Council's statement, quoted above, that it expected to complete its review of court costs in May by submitting the Information Request.

24. We regard the communications summarised in paragraphs 12 to 23 above as representing a single line of enquiry pursued by Mr Marsh (“the Central Enquiry”). Over the same period of time he raised a number of other issues with the Council, which we will refer to as “the Peripheral Enquiries”. And, after the Information Request had been submitted, he continued to pursue other questions (“the Subsequent Enquiries”). As the Council and the Information Commissioner relied upon the volume of correspondence to support the case for refusing disclosure, we summarise the Peripheral Enquiries and the Subsequent Enquiries in the following paragraphs.

25. The Peripheral Enquiries: The communications that came into existence as part of the Peripheral Enquiries were the following:

- a) On 6 September 2009 Mr Marsh asked the Council for information on the mean average times taken for the preparation of council tax summonses. He explained to us that this was relevant to his continuing interest in monitoring the correlation between the fixed cost claim and actual costs incurred over a particular period, which had been released to him in previous years. However, on this occasion the Council refused disclosure.
- b) From time to time Mr Marsh asked the Council to update and/or clarify information he held on the number of summonses issued, and liability orders granted, each year. That information was released to him in August 2010, but a request for a later period was refused in 2011.
- c) Mr Marsh also arranged to inspect the Council's accounts from time to time, no doubt so that he could consider whether it would be appropriate to make a complaint to the Audit Commission in respect of the particular year which the accounts covered.
- d) In July 2010 Mr Marsh asked for clarification of some of the data that had been given to him during the February 2008 meeting referred to in paragraph 17 above.

26. The Subsequent Enquiries comprised the following:

- a) Three requests on 20 June 2011 for the Council to respond to earlier requests falling within the scope of the Central Enquiry; and
- b) A request on 3 July 2011 for the Council to respond to another earlier request falling within the scope of the Central Enquiry.

Our conclusions on the application of FOIA section 14 to the Costs Review Request

27. The Information Commissioner referred to a decision of a differently constituted panel of this Tribunal in the case of *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222). It included this passage:

“Abuse of the right to information under s.1 of FOIA is the most dangerous enemy of the continuing exercise of that right for legitimate purposes. It damages FOIA and the vital rights that it enacted in the public perception. In our view, the ICO and the Tribunal should have no hesitation in upholding public authorities which invoke s.14(1) in answer to grossly excessive or ill-intentioned requests ...”

The decision also stressed that the assessment of whether a request was vexatious should not be reduced to a process of assessing how many of the criteria summarised in paragraph 4 above had been satisfied since, for example:

“...a request which by no means overwhelms the resources of the authority but which is clearly motivated merely by a desire to cause a nuisance may be judged vexatious without more.”

And, a little later:

“...a modest request, viewed against a long history of similar requests showing no obvious serious purpose in the requester may satisfy s.14, even where, seen in isolation, it would fall far short of doing so.”

28. Although we are not bound by other decisions of this Tribunal we think those remarks make very good sense. However, consideration must also be given to the subject matter of the information request under review, particularly where the persistence of its pursuit forms part of the grounds for invoking section 14. Put at its highest, the pursuit of information about serious wrongdoing by a public authority would justify a very great deal of persistence, including “drilling down”, in a series of requests, into the detail behind previous responses which may have been expressed in general terms. At the other end of the scale, even one follow up request might be regarded as vexatious if the subject matter is trivial. The difficulty which the Information Commissioner and Tribunal may sometimes face is that it is not entirely clear how important or trivial information is until it has been disclosed.

29. In this case Mr Marsh drew our attention to certain events, occurring after the Information Request had been refused, which throw some light on the subject matter and, as he put it to us, his justification for pursuing his enquiries. He produced correspondence showing that the Audit Commission's ultimate conclusion, in respect of the Council's 2009/10 and 2010/11 accounts, had been that, although no item of account was unlawful, there was scope for the Council to improve its arrangements for calculating and managing court costs and liability orders. It made certain recommendations to address many of the issues that concerned Mr Marsh. These were put to the Council and in February 2012 the Council notified the Audit Commission that:

- a) It intended to undertake a calculation of costs following the first year of a new method of operating, to be completed within the first quarter of 2012/2013;
- b) It would monitor the charges collected against the costs incurred in order to assess whether recovery was exceeding cost;
- c) It would make certain changes to its procedures in respect of liability orders; and
- d) It would make further reports to the Audit and Governance Committee from time to time.

30. We think it appropriate, and indeed necessary, for us to take into account this evidence because it reinforces our own view, having gone through with Mr Marsh the Council's complete log of its communications with him, that the Central Enquiry was not vexatious. We have demonstrated, in the history summarised in paragraphs 12 to 23 above, how Mr Marsh pursued a legitimate concern on an issue of some significance, at first with a degree of co-operation from the Council and, when that was removed, by dogged, forensic investigation of the information the Council provided to him or to the public. It was a campaign that led the Council's own Overview and Security Committee to investigate in 2008 and some of its members to express concern about the way in which cost claims appeared to have been assessed. There is also some suggestion that, having provided the public with a budgeted £0.5 million increase in costs recovery, which it was then unwilling or unable to justify when challenged by Mr Marsh, it simply refused to engage with him on the subject and issued a refusal notice (see paragraph 21 above). The issue under consideration was also a relatively complex one, involving detailed analysis of both the legal basis for a costs claim and the manner in which the Council treated the direct costs of Council Tax recovery and

its underlying overheads. This provides further justification for different strands of enquiry having been pursued in parallel and investigated in some depth.

31. We are satisfied that the Information Request falls within the logical line of investigation which we have traced through the Central Enquiry and that, as such, it was not vexatious. Whether or not requests falling within the Peripheral Enquiry or the Subsequent Enquiry might legitimately be characterised as vexatious is not an issue we need to address and we will say nothing on the subject because we understand that at least one of the requests might already be the subject of a challenge under FOIA section 14. However, we do need to consider whether the nature of those requests should influence our decision on the Information Request itself. Does a request which, for the reasons given, is not vexatious in its own right, become so because the person making it has also sent a number of other requests that have a connection with the same subject matter? We should say, at the outset, that we do not think that the pursuit, in parallel, of an inspection of the Council's accounts, under an entirely separate right of public participation, carries any significant weight in making that assessment on the facts of this particular case. Nor do we attribute any significant weight to the fact that Mr Marsh, having been provided with certain information on cost claims in one year, should have asked for the equivalent information in respect of a later year. As to the other freedom of information requests, we have concluded, that although it is appropriate to take them into account, they do not have the effect of tainting the Central Enquiry with such a stain of vexatiousness that we should be led to conclude that section 14 applies. We conclude, therefore, that the Costs Review Request was not vexatious and that the Council was not therefore entitled to refuse to comply with it.

32. So that there should be no doubt on the point we stress that our decision relates to the Costs Review Request only. It should not be interpreted as approving, or expressing any view about, any of the requests falling outside the Central Enquiry or any requests Mr Marsh may make in the future on the same general topic.

The Benchmarking Request

33. On 8 February 2011 Mr Marsh asked the Council for certain information about its participation in certain benchmarking exercises, including one conducted by the

Chartered Institute of Public Finance and Accountancy (“CIPFA”). On 24 March 2011 Mr Marsh chased the Council for a response to his request. He informed us that the Council informed him at some stage that the body that had organised the benchmarking exercise objected to disclosure. However, the only document we have seen setting out the Council’s grounds of objection is its letter of 23 June 2011, quoted in paragraph 2 above, which rejected both parts of the Information Request as being vexatious.

34. It is true that the Benchmarking Request arose out of the Costs Review Request and arguable whether it fell within the Central Enquiry or the Peripheral Enquiry. However, the issue is academic because, on the same day that the Council wrote to Mr Marsh rejecting the Information Request, a lawyer from its Governance Team wrote to him enclosing a copy of the Council’s submission to CIPFA.
35. Mr Marsh informed us that, although he had therefore received the information he had requested, he did not wish there to be a decision against him characterising either part of the Information Request as vexatious. Although the Information Commissioner did not address this particular aspect of the appeal in his written submission, we regard the Council as having, in effect, abandoned its section 14 argument in respect of the Benchmarking Request when it provided the information requested.

Conclusion

36. For the reasons we have given we consider that neither element of the Information Request was vexatious and that the Council should therefore have complied with the Costs Review Request in the same way as it did in respect of the Benchmarking Request.
37. We should add that Mr Marsh informed us that he does now have all the information he was seeking under the Costs Review Request and accordingly we are not required to make any direction to the Council to make further disclosure to him under the Information Request.
38. Our decision is unanimous.

[Signed on original.]

Chris Ryan

Judge

1 October 2012