First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0049

Before

BRIAN KENNEDY QC

MARION SAUNDERS AND DAVID WILKINSON

Between

PAUL ROBERT WILLIAM GOSSAGE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below the Tribunal allows the appeal.

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 19 February 2018 (reference FS50697160), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 3 September 2018.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Mr Gossage's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Elmbridge Borough Council ("the Council") was correct to characterise the Appellant's request as vexatious.

CHRONOLOGY

23 March 2017	Appellant requests information and correspondence relating to a swimming pool
19 April 2017	Refusal, citing s14(1) FOIA as vexatious
1 June 2017	Appellant requests internal review
5 June 2017	Council upholds refusal under s14(1)
21 Aug 2017	Appellant complains to Commissioner
19 Feb 2018	DN upholding the refusal

Relevant Legislation:

Freedom of Information Act 2000

14 Vexatious or repeated requests.

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

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

Commissioner's Decision:

[4] The Appellant explained that his request comes from "unaddressed concerns" about the safety of a Council-owned swimming pool. The complainant considers that the Council, and the contractor that manages the leisure centre on its behalf, have failed to abide by a duty of care to the public. This is on the basis that the 'general public' group of swimmers

are located too far away from the lifeguard. The complainant believes that this issue can be effectively resolved by a 'swap over', and having the general public group use that part of the swimming pool which is currently used for swimming lessons (and which is closest to the lifeguard).

[5] These concerns were first raised by the Appellant in 2013, with 47 separate instances of communications with the Council, or actions taken in response since then. The contractor sought advice from the Royal Life Saving Society, who found no issues with the lifeguarding arrangement. The Appellant raised his concerns with the Council's Chief Executive, the contractor's Board of Directors, and his MP. The Chief Executive for the contractor wrote to the Appellant on 7 February 2017 to refer him to the further safety review undertaken in January 2017 (by the Institute of Qualified Lifeguards), and to advise him that the matter was now considered to be closed. Around the same time, the contractor confirmed to the Appellant's MP that the matter had been fully considered with no safety issues found. The Appellant has been protesting outside the leisure centre with a placard, and organising a petition. After the subject request had been made, the Appellant was banned from entering the leisure centre following "an act of unauthorised access" to part of the centre while closed to the public.

[6] The Council argued that the Appellant's previous correspondence with the Council and Contractor has been persistent and voluminous, and has consumed a significant amount of resources. Assembling a response would be extremely time consuming, and the Council feels that nothing it could say would allay the Appellant's concerns or advance the matter.

[7] The Commissioner emphasised that proportionality is the key consideration for a public authority when determining whether a request is vexatious. The essential question, she argues, is whether the value of a request outweighs the impact that the response would have on the public authority's resources. The Commissioner was satisfied that the Council and the contractor had investigated the Appellant's concerns fully; the fact that this request came immediately following notification from the Council that the matter was considered closed indicated to her that the Appellant was attempting to "force continued engagement" on the matter. The Commissioner concluded therefore that the Council was correct to apply s14(1).

Grounds of Appeal:

[8] The Appellant argued that the Council was untruthful in its submissions, and that public interest lay in disclosing the information as it concerned a public safety issue. He appended to his submissions a copy of a petition he had started, and an information sheet in which he accused named individuals of "stubborn intransigence, complacency, weak excuses, delaying tactics" and "complete incompetence". He also included the work email address of individuals and encouraged signatories of the petition to email these people to continue to press the issue of a swap-over.

Commissioner's Response:

[9] The Commissioner referred to the guidance of the Upper Tribunal in *IC v Devon County Council and Dransfield* [2015] AACR 34 on the meaning of vexatiousness. She agreed that the purpose and value of the request are relevant considerations, but they must be weighed against the burden of compliance. In regard to the Appellant's contention that the Council had misled the Commissioner in its submissions, there was no detail given to this allegation, and she has no reason to doubt the veracity of any specific fact. In any event "any inaccuracy...was not material to the Commissioner's reasoning" as the Appellants' concerns have been fully investigated over a long period of time.

Tribunals Findings:

[10] The Tribunal do not agree that the evidence establishes that the Appellants concerns had been fully investigated. At the heart of the Appellant's request is his concern he sets out clearly at Paragraph 1 of his request where he seeks information "---- *which relate to the idea of swapping over the positions od the swimming groups at Xcel pool."*.

[11] The Tribunal have considered the evidence carefully and while it is clear the Public Authority did consider the issues with the Lifeguarding arrangement we can find no evidence that the Council, or those they engaged in assessing safety at the swimming pool in question,) recognised or considered the Appellant's consistent and specific proposition and/or proposals to swap over the position of the swimming groups in order to secure, as he perceived it, a number of potential safety improvements. His proposition or proposals did not entail any move in the positions of the lifeguards and was quite distinct from that, as we understand it. The evidence before us does not address the request in relation to the "swapping over" the positions of the swimming groups as opposed to the moving of Lifeguards.

[12] In their internal review the Public Authority records that the Appellant says; *" --- that the lifeguards should be positioned on the other side of the pool, closer to the casual family swimmers and are therefore able to respond more quickly to an incident*". This point was repeated verbatim in the Public Authority's comprehensive and Final arguments in this matter to the Commissioner on 9 January 2018 (see Bundle at page 72). From July 2013, the Appellant had, in his own words, " --- *consistently been asking for the positions of the general public and the swimming lessons to be swapped over, with the lifeguards staying in the same place".* The responses he received, as he has indicated; *" --- addressed something I wasn't asking for --- "* [Bundle at Page 21].

[13] The Commissioner accurately reflects the Appellant's position at paragraphs 13 and 22 in the DN. However her review of the Council's position (at paragraphs 14 to 19 of the DN) fails to note or record that the Public Authority never actually addressed the Appellant's specific proposal or request. This suggests to us that the Commissioner has erred in Paragraph 23 of the DN when she concludes the Appellant's concerns; *" – have been repeatedly considered by the Council and its contractor since 2013 ---".* The Tribunal therefore cannot accept the Commissioner's conclusion that the matter at issue, that is to say; *"--- the swapping over the positions of the swimming groups at Xcel pool.",* has been*; "--- fully investigated and concluded"* (see Paragraph 24 of the DN). Similarly, on the evidence before us we cannot accept the assertion in Paragraph 6 a of Commissioner's Response to the Grounds of Appeal, dated 3 May 2018 (Bundle Page 31) that: - *" ---- the Appellant's concerns have been thoroughly investigated including by the relevant professional body, and it has been found that no steps have been taken."*

In this context, the frustration and apparent desperation experienced by the Appellant should be considered in a different light. It is the view of this Tribunal that had the essence of the Appellant's specific concern and request been properly recognised and dealt with, then the matter would not have festered in the way that it did. The fact that it did, in these circumstances in our view, does not make the original request vexatious.

[13] Accordingly we allow the appeal. The Public Authority should deal with the request in a proper and comprehensive manner within the recommended timescale.

Brian Kennedy QC 24 September 2018.