

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 2018

Public Authority: West Sussex County Council
Address: County Hall
West Street
Chichester
West Sussex
PO19 1RQ

Decision (including any steps ordered)

1. The complainant has asked West Sussex County Council to provide him with a copy of certain meeting notes in respect of a safeguarding adults review concerning his brother. Having first refused the complainant's request in reliance on section 31 of the FOIA, the Council now relies on section 3(2) of the FOIA, on the grounds that it doesn't hold the requested information, and on section 14(1) on the grounds that the request is vexatious.
2. The Commissioner's decision is that West Sussex County Council holds the information requested by the complainant for its own purposes being a lead member of the Safeguarding Adults Board. The Council is therefore not entitled to rely on section 3(2) of the FOIA. The Commissioner has considered the Council's application of section 14(1) of the FOIA. She has decided that the Council has correctly applied section 14(1) to the complainant's request on the grounds that it is vexatious.
3. No further steps are required in respect of this matter.

Request and response

4. On 3 June 2017, the complainant wrote to West Sussex County Council and requested information in the following terms:

"I wish to obtain a copy of the meeting notes that the email below relates to. This is in respect of a safeguarding adults review conducted by W. Sussex CC safeguarding adults board, that concerns my brother

[initials redacted] for who I am the legal deputy as appointed by the court of protection”.

5. The Council responded to the complainant’s request on 2 November 2017 following the intervention of the Information Commissioner.¹ The Council confirmed to the complainant that it holds the information he had requested and it advised him that it was withholding the personal data of [the complainant’s brother] in reliance on section 31(2) of the Data Protection Act 1998 (“the DPA”), and the non-personal data in reliance on section 31 of the FOIA.
6. The Council informed the complainant that the meeting note forms part of a multi-agency investigation involving the police and disclosure would likely prejudice the prevention and detection of a crime and/or the apprehension of offenders.
7. On 3 November 2017, the complainant wrote to the Council and asked it to conduct an internal review of its decision.
8. The Council completed its internal review and wrote to the complainant on 17 November 2017. The Council informed the complainant that it was upholding its previous decision to withhold the information he had requested in reliance on section 31 of the DPA, in respect of the information which is the personal data of the complainant’s brother for whom the complainant is his deputy, and on section 31 of the FOIA, in respect of information which is not personal data of the complainant’s brother.

Scope of the case

9. The complainant contacted the Commissioner on 19 November 2017 to complain about the Council’s withholding of the information he had asked for.
10. The Commissioner determined that the focus of her investigation should be the Council’s application of section 31 of the FOIA in respect of all the information it is withholding in reliance on that section.
11. Where the Council has relied on section 31 of the Data Protection Act 1998, the Commissioner will make a separate assessment under section 42 of that Act.

¹ Case FS50690732.

12. Following its receipt of the Commissioner's enquiry, the Council advised the Commissioner that it no longer seeks to rely on section 31 of the FOIA. Rather, the Council informed the Commissioner that it now relies on section 3(2) and 14(1) of the FOIA.
13. The notice which follows is the Commissioner's decision in respect of the Council's current position.

Reasons for decision

14. In response to her enquiries, the Council has informed the Commissioner the minutes requested by the complainant are not in fact linked to the on-going police investigation. Likewise, the Safeguarding Adults Review that was being conducted at the time the complainant submitted his request has now concluded. In these circumstances, the Council has advised the Commissioner that it no longer seeks to maintain its application of the section 31 exemption to this request.
15. The Council has confirmed to the Commissioner that the minutes which the complainant seeks are those dated 4 May 2017.
16. Having reviewed those minutes, the Council has determined that, since they were created by the Independent Author of the Safeguarding Adults Review, on behalf of the Safeguarding Adults Board ("the SAB"), and on the grounds that the SAB is the sole body responsible for commissioning serious case reviews, it is the SAB which holds the requested information and not the Council.
17. The position of the Council is that the minutes it holds are held on behalf of the SAB. Therefore the information is not held for the purposes of the FOIA by virtue of section 3(2)(a).
18. The SAB is a multi-agency board formed by the Authority in compliance with its statutory obligations. The SAB is not listed in Schedule 1 of the FOIA as being a public authority for the purpose to the FOIA, nor has the SAB been added to Schedule 1 by any order made by the secretary of State under section 4 of the FOIA.
19. The Council's current position is that it refuses to disclose the minutes requested by the complainant on the grounds that it does not "hold" the minutes for the purposes of the FOIA under section 3(2)(a), and that it also now relies on section 14 of the FOIA on the grounds that the request is vexatious.
20. In support of its application of section 3(2)(a), the Council has referred to Commissioner to her decision in case FS50511586. That decision

concerns the question of whether South Gloucester Council holds Safeguarding Adult Board information for its own purposes.

21. Since making her decision in case FS50511586, the same question was considered at appeal by the First Tier Tribunal in case EA/2014/0252. The Tribunal noted that:

“Originally, the Council sought to rely on the argument that it did not hold the information on the basis that it was held on behalf of the SAB, which in turn was not subject to FOIA. This seemed incongruous to the panel given that the SAB itself was set up as a multi-agency partnership to promote the safeguarding of adults pursuant to a policy entitled ‘No Secrets’, and that the requested information concerned a subject matter that was extremely important and of significant public interest and concern.”

22. In view of the Tribunal’s comments, the Commissioner now accepts that the minutes are in fact held by the public authority for its own purposes and therefore the Council is not entitled to rely on section 3(2)(a) of the FOIA.
23. In making this decision, the Commissioner recognises that West Sussex County Council is a lead member of the Safeguarding Adults Board which is set up to promote the safeguarding of adults within its area.
24. The Commissioner must now consider the Council’s application of section 14(1) to the complainant’s request of 3 June 2017.

Section 14(1) – vexatious requests

25. Under Section 14(1) of FOIA a public authority is not obliged to comply with a request for information where the request is vexatious. The exemption provided by section 14(1) is not subject to consideration of the public interest test.
26. The term ‘vexatious’ is not defined in the Freedom of Information Act and therefore the Commissioner has adopted the Upper Tribunal’s approach taken in *Information Commissioner v Devon County Council & Dransfield*.²
27. In the Dransfield case the Upper Tribunal defined a vexatious request as, the “...manifestly unjustified, inappropriate or improper use of a formal procedure” and in making this decision the Tribunal determined that the concepts of ‘proportionality’ and ‘justification’ should be central to any consideration of whether a request is vexatious.

² UKUT 440 (AAC) (28 January 2013) paragraph 27

28. The Upper Tribunal found it was 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.
29. The Tribunal stressed that these considerations were not exhaustive and therefore it is important to adopt an 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).
30. Following the approach taken by the Upper Tribunal, the Commissioner needs to consider whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to its serious purpose and value.
31. In the Commissioner's opinion a balancing exercise is required which weighs the impact of the request on the Council against its purpose and value. To assist in this exercise, the Commissioner has identified a number of "indicators" which she has set out in her published guidance³ on the application of section 14(1). The fact that a request contains one or more of these indicators will not necessarily determine that it is vexatious, as all the circumstances associated with the request will need to be considered in making a judgement as to whether the request is vexatious.
32. The Council has advised the Commissioner that the minutes requested by the complainant are those of a meeting which took place on 4 May 2017, between the Independent Author of the Safeguarding Adults Review and the authors of Internal Management Reports from various other agencies.
33. To put its application of section 14 into context, the Council provided the Commissioner with background information which it considers is important. This information is summarised below:
34. The complainant is the Deputy for the affairs of his brother. The complainant's initial contact with the Council arose from his genuine and legitimate concerns about the care of his brother at a particular Care Home run by Sussex Health Care.

³ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

35. At the time the complainant made his request, an Adults Safeguarding Review was taking place with regard to injuries sustained by the complainant's brother and another vulnerable adult whilst at the Care Home.
36. In addition to the Adults Safeguarding Review, there is an on-going wider investigation being conducted by Sussex Police which is focused on the care provided by Sussex Health Care (SHC) to a large number of its residents.
37. The Council is part of a Strategic Management Group involving all relevant agencies. Its Terms of Reference are to protect residents, support the Police investigation and maintain the trust and confidence of victims, families and the local community.
38. On a number of occasions the Authority has declined to disclose information to the complainant on the basis that it may impede the on-going Safeguarding Adults Review (as it was at the time of this request) or the wider on-going police investigation. As a consequence, the complainant began what the Council describes as "a campaign of disruption to the Authority and its officers".
39. On 28 November 2017 the Council wrote to the complainant to inform him that it was applying the section 14 vexatious exemption to a number of his requests. At that time, it was estimated that in excess of 50 hours of officer time had been taken up in dealing with the complainant's requests.
40. Since making its estimate, the Council has asked all of its relevant officer's to provide their estimates of the time spent on dealing with the complainant's requests, complaints and internal reviews. The Council has now determined that at least 34 officers had spent 255.5 hours (34 days) on communications with the complainant and to substantiate this claim it has provided the Commissioner with a schedule of officer time and a schedule which details the complainant's FOI requests, internal reviews and ICO referrals which lead up to the Council's letter of 28 November 2017.
41. The Council has advised the Commissioner that, since November 2017, considerably more officer time has been taken up dealing with the complainant and his communications and complaints which has not been accounted for on the two schedules referred to above.
42. The Council drew the Commissioner's attention to the complainant's intention to refer the Council's solicitor and one of her colleagues to the Solicitors to the Regulatory Authority and the Law Society, which the

complainant then went on to make those referrals for "unethical conduct".

43. The Council asked the Commissioner to note from that the complainant lodged a formal complaint against one of its officers who declined to respond to his further communications following the completion of an internal review, and to a formal complaint about the Council's solicitor, which was referred to the Principal Solicitor, raised to a stage 2 complaint and then raised as a further complaint to the Local Government Ombudsman ("the LGO").
44. The complainant's complaint to the LGO was about the letter he received from the Council in which it refused to comply with his request for information. The complainant asserted that the letter contains untrue and personal statements which were used by the Council to justify the refusal of his request. The LGO determined that it was unable to investigate this matter as it fell to the Information Commissioner to make that determination. With respect to the other elements of his complaints, the LGO did not uphold any of them.
45. To support its position the Council provided the Commissioner with a copy of relevant emails and a copy of the LGO Decision of 7 March 2018.
46. As a result of the complainant's persistent contact, the Council implemented its Persistent Complainant Policy and arranged a single point of contact which the complainant subsequently failed to engage with. This led to the Council's Director of Law and Assurance to write to the complainant and advise him that the Council would no longer communicate with him over the matters around Sussex Care Homes.
47. The Council points out that the Safeguarding Adults Review Report with regard to the complainant's brother and another vulnerable adult was published by the Safeguarding Adults Board on 17 April 2018 and it has since been shared with the complainant and the family of the other vulnerable adult.
48. The Council has explained why it upheld its application of section 31 in relation to the content on the minutes which was not the personal data of the complainant's brother. The Council stated that the minutes form part of a multi-agency investigation and disclosure would be likely to prejudice the prevention or detection of crime and/or the apprehension or prosecution of offenders.
49. It is the opinion of the Council that the application of section 31 of the FOIA was a simple and efficient way of dealing with the complainant's request, despite the fact that the vexatious exemption was also available.

50. The Council's position is that for some time it has considered the complainant's requests as being vexatious. This is evidenced by the Council's letter to the complainant dated 28 November 2017. The Council asserts that the complainant's request of 3 June 2017 is linked to the issues concerning the authority's Care Home and it is part of a series of requests which have been designed to take a disproportionate amount of officer's time, including very senior officers, and to impose an unreasonable burden on officers.
51. Notwithstanding the above, the Council has confirmed that it no longer relies on section 31 of the FOIA.

The complainant's position

52. The complainant has provided the Commissioner with arguments which he considers supports his position that his request is not vexatious.
53. The complainant asserts that it is not "vexatious to continue to ask questions where answers have been provided that are vague or where answers have not been provided at all" and he asserts that his approach in seeking information has not been intended to burden the Authority in any way.
54. The complainant notes that the independent safeguarding review carried out in respect of his brother is "highly critical" of the Council. The complainant considers that the report vindicates his continuous requests for answers where, following the publication of the final report he and his family were only allowed an initial two hours to review and digest the 71 page report before being asked to provide feedback.
55. The complainant asserts that the Council failed to provide the safeguarding review with full and accurate information and that this suggests that the Council was colluding and attempting to cover up matter concerning the care of his brother.
56. The complainant considers that his request of 3 June 2017 is not part of the current and wider police investigation of Sussex Healthcare. The complainant holds the position that he still doesn't know what happened to his brother or who injured him and he points out that a review of his requests will show that others have also made request under the FOIA of a similar nature around the cases of his brother and the other vulnerable adult.
57. The complainant argues that the volume of his requests have been out of necessity on the grounds that the information given in response to his requests have not answered the questions posed or have raised further questions around the Council's performance. The complainant considers that his focus on a particular councillor is justified on the grounds that he needs to know which councillor is being referred to, as the report

makes reference to poor performance of the Council around conflicts of interest management involving a councillor.

58. In rebuttal of the Council's position regarding the time taken in dealing with his requests, the complainant says, "This may be indicative that [the Council] does not store its data in a format that allows ease of accessibility by possibly too few sufficiently experienced and trained officers to deal with such matters. This may also indicate that WSCC does not regularly review its data handling resource and process sufficiently regularly to ensure that such problems do not cause detriment to itself or enquirers"
59. The complainant acknowledges that the Council offered him the opportunity to meet with its Chief Executive. He has advised the Commissioner that he did not take up the Council's offer because the meeting was originally arranged to allow the Chief Executive to deliver the outcome of his review of the evidence put to him, in respect of certain officers not having acted effectively and that the culture and governance of the Council was ineffective. In the week leading to the proposed meeting, the Chief Executive had changed the objective of the meeting obtaining clarification of points which the complainant had raised some weeks earlier.
60. The complainant made clear that he did not wish to meet with the Chief Executive just to provide clarification, which could have been given in a telephone conversation. The complainant asserts that the Chief Executive continues to claim that he has seen no evidence on the part of any of his officers or that the culture and governance within the Council is ineffective.
61. The complainant acknowledged his previous telephone calls and meetings with senior officers and elected members. Nevertheless he asserts that those contacts did not answer his questions fully and effectively, and that certain of his attempts to contact or meet with certain officers were unreasonably refused, particularly in the light of the findings of the independent safeguarding adult review.
62. The complainant argues that his request does not concern the on-going investigation of Sussex Police which centres on the provision of care by Sussex Health Care. He considers that his request concerns 'his case' and it is therefore separate to that investigation.
63. The complainant disagrees with the Council's assertion that his request can be considered to be part of a campaign of disruption to the Council and its officers. He refutes this charge by stating, "At no stage have I set out to disrupt the Authority or its officers. If [the Council] is unable to control its affairs then this is a matter for its internal governance and oversight processes to deal with".

64. With regards to him having submitted over 30 requests under the FOIA and having raised further enquiries or seek internal reviews, the complainant says, "there have certainly been a number of questions to pose as agreed by the independent report author" and that he "should not be penalised for that". The complainant added that, "if the responses raise further questions or challenge then my understanding is that this is the correct process to follow".

The Commissioner's considerations and decision

65. The Council has provided the Commissioner with a schedule of the complainant's requests in a document entitled 'Corporate FOI Tracker'. The schedule lists 36 requests made by the complainant between 27 May 2015 and 11 December 2017. This is approximately 1 request per month.

66. The Commissioner has reviewed this schedule and she notes that:

1. All of the complainant's requests, in some way, concern the care of his brother at one of the Authority's Care Homes. They also concern the safeguarding review that was carried out by the SAB or the matters which have flowed from the findings of the published review.
2. Some of the complainant's requests fall to be treated under the provisions of the Freedom of information Act, where they concern recorded information held by the public authority. Other requests fall to be treated under the Council's normal business arrangements, where the complainant seeks answers to questions rather than access to recorded information.
3. The complainant has previously asked the Commissioner to make decisions under section 50 of the FOIA in respect of three of his requests. These decisions were made in the following cases: FS50690732 (Decision notice dated 19 October 2017), FS50700039 (Decision notice dated 21 May 2018) and FS50704680 (Decision notice dated 15 May 2018).

67. The schedule substantiates the Council's claim that it has spent a considerable amount of time in considering and responding to the complainant's requests.

68. To determine whether the complainant's request of 3 June 2017 is vexatious, the Commissioner is obliged to consider that particular

request in the wider context of his other requests and then to apply her own guidance⁴.

69. The evidence supplied to the Commissioner is persuasive: It is clear to the Commissioner that the complainant's request is part of a campaign to uncover information which may or may not be useful to the complainant for whatever purpose he might have.
70. That said, the Commissioner accepts that there is some value to the complainant's request: The complainant is clearly not seeking trivial information and it is not obvious to the Commissioner that the complainant has some untoward motive in making his request.
71. What is apparent to the Commissioner is the effect the complainant's requests have had on the Council. The Commissioner cannot ignore the fact that the complainant has chosen to pursue his campaign by submitting requests under the FOIA at a time when the care of his brother was being legitimately reviewed by the SAB as well as being investigated by the police.
72. The complainant has submitted a significant number of requests. The number and frequency of these requests cannot be overlooked nor can their cumulative effect on the Council.
73. It is not difficult for the Commissioner to find that the complainant is persistent in making his requests. Whether that persistence is unreasonable is more difficult: For that, the Commissioner must view the complainant's requests in the context of the Safeguarding Adults Review which was taking place when the request was made, together with the still on-going police investigation.
74. It is obvious to the Commissioner that both the review and investigation were set up with clearly defined objectives and both are required under appropriate statutory provisions. In the Commissioner's opinion, the review and investigation must surely be the legitimate routes for determining the issues raised by the treatment of the complainant's brother.
75. The Commissioner disagrees with the complainant's assertion that the findings of the independent review vindicates his continuous requests for answers. The Commissioner recognizes the critical nature of the safeguarding Adults Review's findings. Those finding are such as to confirm that the review process is the appropriate route for investigating failures in the care of vulnerable adults.

⁴ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

76. To make requests of a local authority in a period when formal and official investigations are taking place and where the same local authority is also required to comply with those investigations makes the burden imposed by the complainant's request even more taxing to the Council.
77. In reviewing the above, the Commissioner cannot disregard the evidence provided by the Council which confirms the time spent by its officers in dealing with the complainant's requests and correspondence. That time is estimated by the Council to amount to 255.5 hours, which is equivalent to 34 days of officer time.
78. The Commissioner has no reason to dispute the Council's estimate. When considered in the context of the complainant's previous correspondence and requests, the Commissioner is in no doubt that his request of 3 June 2017 is vexatious on the grounds of its cumulative effect on the Council.
79. In the Commissioner's opinion the complainant request adds to the significant burden already imposed by his other requests and correspondence. It is clear to the Commissioner that the complainant's request has crossed a line where a reasonable person would consider his requests are now harassing the Council.
80. For the Council to respond to the complainant's request would not be particularly burdensome in itself, nevertheless it does add to the disproportionate and unjustified burden which has been caused by having to deal with his previous requests and correspondence.
81. The Commissioner believes that the information which the complainant has asked for is not without some public interest. That said, the Commission considers that the public interest is predominantly met through the publication of the SAB's report. The Commissioner must give weight to the fact that the complainant has been provided with a copy of the final report from the Safeguarding Adult Board and that the report is now placed in the public domain. The report details its findings in respect of the incident involving the care of the complainant's brother at Beech Lodge Care Home in Horsham.
82. The report which the complainant now possesses clearly supersedes the minutes dated 14 May 2017.
83. The on-going police investigation must also inform the Commissioner's decision.
84. In view of the above, the Commissioner's decision is that the complainant's requests of 20 November and 23 December 2015 are vexatious. He finds that Derbyshire County Council is entitled to rely on section 14(1) of the FOIA.

Right of appeal

85. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

86. 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.
87. 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
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