

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2018

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information relating to the operation of a private finance initiative contract. Sheffield City Council ("the Council") refused to comply with the request on the grounds that it was vexatious within the meaning of section 14 of the FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 14 of the FOIA to refuse to comply with the request.

Background

3. In August 2012, the Council entered into a private finance initiative 'Streets Ahead' contract with Amey, an infrastructure support service provider, to maintain the city's roads, pavements, street lights and highway trees. The contract allowed for the felling of highway trees, where necessary.
4. Some local residents considered that healthy trees were being felled unnecessarily and there has been considerable, active opposition to the Council's tree-management programme. The programme was paused

during 2018, in order to respond to issues brought up as a result of an organised campaign of protests against it¹.

5. Protesters are considering whether to apply for a judicial review of the Council's decision to award the Streets Ahead contract to Amey, based on a belief that Amey may have breached contract regulations during the tendering process. This is something that the Council refutes.

Request and response

6. On 13 February 2018, the complainant wrote to the Council and requested information in the following terms:

"According to HM Treasury Guidance 'Standardisation of PFI Contracts' (Version 4, March 2007, the standards in force at the time of contract award), it is a 'required drafting' within the PFI contract to detail 'the accumulation of [_] or more [performance points] in any [Quarter/Year]'. This is detailed in paragraph 21.2.2.1(m) on page 146 of the guidance.

Could you therefore please advise:

- the total number of performance points accrued during each quarter since contract commencement;

- the reason for each accrual and the number of performance points allocated against each accrual;

- the scale for the accrual of performance points and the thresholds whereby action is taken by SCC. For example, on a scale of 1-10, accrual of 1-3 points might equate to a minor breach of contract, whereas the accrual of 10 points may constitute a major breach and the issuing of a termination notice.

Finally, could you please advise if the HSE investigations following Rustlings Road (November 2016), Myrtle Road (August 2017), and the current HSE investigation into the undertaking of night time work without adequate lighting and/or safety barriers/zones (as reported by myself to the HSE, 26th January 2018), constitutes a 'Persistent Breach' as per paragraph 21.2.2.1(b) on page 145. If not, could you

¹ <https://www.theguardian.com/uk-news/2018/mar/26/sheffield-council-pauses-tree-felling-scheme-after-criticism>

please advise why breaches of a statutory duty (ie. H&S law) are not considered a 'persistent breach'.

...

For the avoidance of doubt, this concerns the PFI contract between SCC and Amey."

7. The Council responded on 26 February 2018. It refused to comply with the request on the grounds that it was vexatious within the meaning of section 14(1) of the FOIA. Furthermore, it informed the complainant that no further response would be provided on the matter or to subsequent, related requests.
8. The complainant requested an internal review, stating that his request was not vexatious.
9. The Council provided the outcome of the internal review on 6 April 2018. It upheld its decision to apply section 14(1) of the FOIA to refuse the request.

Scope of the case

10. The complainant contacted the Commissioner on 24 April 2018 to complain about the way his request for information had been handled. He disputed that the request could be considered to be vexatious.
11. The analysis below considers the Council's application of section 14(1) to refuse to comply with the request.

Reasons for decision

Section 14(1) – vexatious requests

12. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
13. Section 14(1) of the FOIA states:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."
14. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner*

v Devon CC & Dransfield [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

15. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
16. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained 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).
17. The Commissioner has published guidance on dealing with vexatious requests², which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether or not a request is vexatious.
18. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".
19. However, the Commissioner would also stress that the relevant consideration for public authorities is whether the request itself is vexatious, rather than the individual submitting it.
20. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "*In cases where*

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress”.

The complainant's view

21. The complainant challenged the application of section 14 to refuse his request, which he believed to be legitimate request for information. He said:

“Although I have submitted a number of FOI requests concerning the PFI contract between Sheffield City Council and Amey, all have been legitimate requests for information in order to put together a legal case (a warning letter was sent to Sheffield City Council by Richard Buxton Environmental & Public Law Solicitors on 20th April 2018 to this effect). There are legitimate grounds for my requests due to the repeated intervention by the Health & Safety Executive for breaches of health and safety law both pre and post-contract award.”

22. The complainant told the Commissioner that there was a “*strong likelihood*” that the requested information would be used in furtherance of a judicial review³ application in the near future.

The Council's position

23. The Council's position is that the complainant's request, whilst reasonable at face value, is vexatious when seen in the context of his wider correspondence and interactions with the Council. It said the complainant was part of a wider campaign of local opposition to the Council's city-wide tree-management programme which was having a significant impact on its FOIA resources. It said that, particularly when viewed in the context of the wider use of the FOIA by the complainant and other protesters, the request met the threshold to be considered vexatious.
24. In the internal review, the Council stated the following in support of its application of section 14(1) of the FOIA:

“...the Council considers that your requests meet the following vexatious indicators:

³ <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/>

- **Burden on the authority** – related to the persistent nature of your request across FOI and other channels related to the health and safety and the Streets Ahead contract
- **Unreasonable persistence** – continuation of health and safety related issues appears to be a continuation of complaints in order to cease the Streets Ahead contract which has been exhaustively responded to in wider correspondence with the Council
- **Unfounded accusations** – related to accusation on the validity of the Streets Ahead contract and the attempts to raise this with external bodies
- **Intransigence** – attempts to conclude this area of enquiry by providing information under previous FOI requests and wider correspondence have failed
- **Frequent or overlapping requests** – as identified in the four linked cases they all relate to Health and Safety and the Streets Ahead contract and follow a further thirteen request linked to the same matters during the 2017/18 financial year
- **Futile requests** – there appears to continue to be linkage to the health and safety provision in related to the Streets Ahead contract and the attempts find a reason to cease the contract which has been covered by the Council in previous correspondence

The Council has expended a significant amount of public money on the management of your FOI requests and associated contact with the Council on areas linked to these requests. Section 14(1) legitimately allows the Council to refuse to deal with requests where the burden and vexatious behaviour is causing a negative impact as in this case."

25. The Council told the Commissioner it believed the complainant was motivated by opposition to its tree-management programme and that his intent was to "seek the termination or invalidity" of the Streets Ahead contract with Amey, under which the tree-management programme was executed.
26. The Council explained that its city-wide tree-management programme had met with local opposition, mainly due to a perception that excessive numbers of trees were being felled, and there were several tree protest action groups active within the city.
27. The Council said that while the complainant's requests were not directly to do with tree-management, a review of the minutes of various Council meetings revealed that he had been present, and had spoken at, many Council meetings where tree protesters targeting the Council's management of highway trees had also been in attendance. It also

provided the Commissioner with a link to a website which identified the complainant as a campaigner for a named tree protest action group, and which stated that he was using the FOIA to uncover information about Amey in a bid to have its contract with the Council terminated. The Council therefore considered it reasonable to consider the complainant to be acting as part of a wider campaign against it, and to take this into account when considering his request.

28. The Council accepted that the FOIA had been used legitimately by the tree protest groups active in Sheffield to access information. While it had initially been keen to provide information to requestors in accordance with the FOIA, it increasingly considered that there had to be a limit to the impact such requests could be permitted to have on its resources. Dealing with tree-management related FOIA requests had had a significant impact on its ability to "*operate normally*", due to the time and resources that had to be given over to them. It received 157 information requests during the financial year 2017/18 where the terms "*tree*", "*Streetsahead*", "*Streets Ahead*" or "*Amey*" featured (it stressed that this was a keyword search and thus that it would not have captured all requests generated as a result of opposition to its tree-management programme). Against this background it considered that the complainant's persistence on a related matter had met the threshold for being considered vexatious.
29. With regard to the nature of the impact on it of dealing with the complainants' request, the Council pointed to the time required to collate any relevant information and compose a response. It supplied the Commissioner with a breakdown of 18 requests for information which it said were submitted by the complainant in the financial year 2017/18. Requests were regularly submitted in quick succession, with the Council not having sufficient time to deal with one request before another was received (for example, during both June and December 2017, the complainant submitted five requests), and one response would lead to a follow up request or a new request, all of which had to be processed by the Council within a fixed budget. It considered it likely from his previous pattern of correspondence that a response to this request would lead the complainant to make further FOI requests or submit further questions, further increasing the burden on the Council's resources.
30. The Council said that 13 of the requests were of a similar nature and three other requests had been identified as vexatious contemporaneously to this request. It considered the complainant used the FOIA as a means to extend the life of issues already raised and dealt with by the Council in wider correspondence and questions/petitions directed to other council departments.

31. The Council said that the complainant was unreasonably persistent and intransigent with regard to the awarding of the Streets Ahead contract, a matter on which it had corresponded with him on multiple occasions. He had been made fully aware of the Council's position regarding it and had been advised to pursue any concerns he had about its legality, formally, through the courts. It said some of his correspondence contained what it considered to be libellous statements, and they had been widely circulated by him to multiple Council email addresses. It had warned him that he would be restricted to corresponding with a single point of contact within the Council unless he modified his behaviour.
32. The Council attributed little value to the request, saying that the complainant was effectively using the FOIA regime to make detailed requests in an attempt to uncover information which might be helpful in achieving his aim. It said he applied a random, "scatter gun" approach, to "fish" for potentially useful information, as opposed to seeking information on matters of genuine interest or pertinence to him. It said that this approach tied up a great deal of its resources in ensuring that correspondence was properly addressed.
33. With regard to the potential judicial review cited by the complainant, the Council believed that the complainant was using the FOIA to obtain information in pursuit of legal action, rather than obtaining such information through the appropriate, formal channels. However, it also expressed doubt that the intention to progress legal action was serious or well evidenced, stating that "*...no related legal action has actually been listed in court about this specific issue and therefore the intention to review does not appear to have been progressed to this point, in excess of six months after the initial request.*"

The Commissioner's view

34. There are many different reasons why a request may be vexatious. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.
35. As the Upper Tribunal in Dransfield observed:

"There is...no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to

whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA”.

Is the request vexatious?

36. In reaching a decision in this case, the Commissioner has considered both the complainant's position and the Council's arguments regarding the information request in this case. She has balanced the purpose and value of the request against the detrimental effect on the public authority. She has also considered, in light of the dealings between the complainant and the Council, whether, at the time, the request crossed the threshold of what was reasonable.
37. As in many cases which give rise to the question of whether a request is vexatious, the evidence in the present case showed a history of engagement. Clearly, in this case, the Council considered that the particular context and history of the request strengthened its argument that it was vexatious. In particular, it placed emphasis on the volume of the complainant's requests (over a twelve month period he made eighteen requests, 13 of which were about the contract), the frequency with which he submitted requests, their overlapping nature, and their wider connection to at least 157 other requests received in the same period, generated it believed, as part of a coordinated campaign against its tree-management policy.
38. The Council sees little value in the request itself. It says the complainant is speculatively "fishing" for information which might be useful to the tree protesters' cause, and that when viewed in this context it does not justify the grossly oppressive burden that compliance would impose on its resources.
39. In contrast, the complainant believes his request is a legitimate request for information. He told the Commissioner that the information requested here might be pertinent to a judicial review application.
40. The Commissioner understands that the main focus of the complainant's requests appears to be whether the contract between Amey and the Council was entered into lawfully, due to his belief that Amey might have failed to disclose pertinent information about a health and safety conviction during the tendering process. The Commissioner understands from the substantial amount of information which is in the public domain about the matter, that tree protesters are considering applying for a judicial review to consider this.
41. On that point, the Commissioner notes that the Council has told the complainant in a previous response to an FOIA request that Amey was not required to disclose the information in question:

"In 2011, the Health and Safety Executive proceeded with a prosecution...in which an employee of Amey LG Limited died. Amey LG Limited's involvement was not causative of the fatality but it accepted a charge in respect of a failure to record all inspections which resulted in a fine of £30,000. As Amey LG Limited were not the Lead Organisation or a Consortium Member the question regarding grave misconduct and convictions (i.e. the question in Section B of Part 2 of the PQQ) did not apply to them. Any suggestion that this information was not provided in breach of the Public Contracts Regulations 2006 is inaccurate. The fact that the conviction was recorded against Amey Infrastructure Services Limited had no bearing on this. Amey (UK) Plc specifically refer in their bid to the fact that following a restructure Amey Infrastructure Services was renamed Amey LG and even if the name change had not taken place the question regarding grave misconduct and convictions still would not have applied to them.

As the Public Contracts Regulations 2006 and the PQQ did not require this information to be provided in relation to Amey LG Limited, the circumstances in which consideration could be given to terminating/renegotiating the Highways PFI Contract as set out in your petition do not arise."

42. It is not the Commissioner's job to examine whether what the Council says is correct. However, it is clear that the complainant has been told that this is the Council's position with regard to the awarding of the contract and any obligations Amey was under with regard to declaring the health and safety conviction. It appears that any disagreement about this would best be resolved by an examination of the requirements of the Public Contracts Regulations 2006, in which case the information requested here would be unlikely to add anything.
43. Furthermore, the Commissioner notes that the request is not for information which might itself reveal whether the Council's tree-management policy is flawed. It is for information which might support an attempt to have the contract with Amey invalidated on a legal technicality. The protestors are attempting to achieve their overall aim of getting the tree-management programme stopped, tangentially, by exploiting an unrelated issue. The Commissioner considers there to be a limited public interest in the FOIA facilitating access to information for that purpose, where the impact on the public authority is disproportionate.
44. The Commissioner accepts that the complainant appears to have genuinely held concerns about the wider matter to which the information relates, and she does not consider his request to be maliciously founded or made in pursuit of a personal grievance against the Council. The complainant appears to be requesting information he genuinely believes might be useful in connection with a wider matter over which there is

documented public concern, and which might result in an application for judicial review. Judicial reviews should not be applied for lightly, and there will be cost implications for both parties. There is clearly a public interest in people being permitted to access information which will help determine whether it would be appropriate to apply for judicial review.

45. In her guidance on dealing with vexatious requests, the Commissioner recognises that the FOIA was designed to give individuals a greater right of access to official information, with the intention of making public bodies more transparent and accountable.
46. However, while the Commissioner considers that public authorities must accept that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance, she also acknowledges that they should not be expected to deal with requests which have a disproportionate impact on their resources. The purpose of section 14 of the FOIA is to protect public authorities and their employees in their everyday business. In her guidance, the Commissioner recognises that dealing with unreasonable requests can place a significant strain on public authorities' resources and get in the way of delivering mainstream services or answering legitimate requests.
47. Having been told the Council's position with regard to the declaration of the health and safety conviction, the complainant has nevertheless continued to make further, detailed requests about the contract. It appears to the Commissioner that the complainant is looking to build arguments against the Council by obtaining information which may potentially be useful, in a piecemeal fashion. This is an entirely understandable approach from his perspective. However, the Commissioner has weighed up whether, in all the circumstances of the case, it is reasonable to expect the Council to continue to respond to such an approach.
48. The complainant's requests are often not straightforward requests for stand-alone information. Rather, they tend to be quite specific in what they ask for, and where they reference statements made in reports, they require the Council to consult detailed documents in order to ascertain precisely what information is being requested. The Commissioner considers the request in this case would be time consuming to deal with and that the complainant's established pattern of requesting means that it would be likely to generate further requests.
49. This request is being considered against a background of significant costs incurred by the Council in responding to opposition to its tree-

management programme. It has reportedly recently paid out compensation of £700,000⁴ and legal costs of £325,000⁵. This has occurred during a time when, as a local authority, it is already under significant pressure to deliver services with a reduced budget. The resources expended in dealing with FOIA requests on the matter therefore add to the overall burden to the Council of dealing with the response to its tree-management programme.

50. Nevertheless, the Council has said that it initially tried to accommodate the complainant's requests, and so the Commissioner has looked at how his other requests have been treated. She notes that of the 18 requests he has submitted, six were refused, while the remainder were successful. Furthermore, refusals only began to be issued in February and March 2018. The Commissioner considers that this supports the Council's claim that it had hitherto endeavoured to accommodate the complainant's requests, but that his persistent use of the FOIA had become excessive.
51. The Commissioner considers that there is no guarantee that responding to this request would reveal information which would further the complainant's aim of applying for judicial review of the Council's decision. The likelihood is that he will continue to make requests for information in the belief that something is held which supports his view that the contract is not lawful or which will otherwise provide grounds for the tree-management programme to be stopped. This could go on indefinitely, with the Council being required to absorb the costs to it of complying.
52. It is clear from reviewing the Council's submissions and from the evidence that has been provided, that the Council is having to spend a considerable amount of time and resources on responding to the complainant. The complainant's approach to making requests (to see if something useful can be found, rather than for a specific purpose) leads him to submit frequent and often overlapping correspondence. Ascertaining the information required by the request can often be time consuming in its own right. Whilst the Council has not provided a definitive log, or any central estimate of the time spent dealing with the

⁴ <https://www.yorkshirepost.co.uk/news/sheffield-council-pays-700-000-compensation-bill-for-tree-felling-delays-1-9210254>

⁵ <https://www.bbc.co.uk/news/uk-england-south-yorkshire-41417810>,

<http://www.itv.com/news/2018-07-11/legal-cost-of-action-against-protesters-over-tree-felling-reaches-75-000/>

complainant's correspondence, the Commissioner is satisfied that the requests are frequent and the time required to issue considered responses is significant.

53. The complainant's requests will have been dealt with by a dedicated information governance team within the Council (whose job it is to respond to information requests); those staff will necessarily have had to consult with the relevant subject matter experts in other business areas in order to respond. The Commissioner considers that the frequency and the detail of the requests are such that it would be likely to have an impact on the ability of those subject matter experts to perform their normal functions. As the complainant's requests are restricted to a relatively narrow sphere of interest, it is likely that, in practice, a very small number of staff would have to field all these requests, placing a considerable burden upon those staff.
54. The complainant's request is, on the face of it, reasonable. However, when considered in the context of his other requests the Commissioner is satisfied that, at the time of the request, the cumulative burden to the Council of dealing with them had exceeded that which a public authority might reasonably be expected to tolerate, and that this cannot be justified by the motive or purpose behind the request.
55. The Commissioner considers it to be highly likely that responding to this particular request would be unlikely to cause the pattern of the complainant's behaviour to change in any significant way, and that he would be likely to continue to submit requests. As mentioned previously, section 14(1) concerns whether the request, rather than the requestor, is vexatious, but the complainant's pattern of requesting information from the Council, his wider correspondence with it, and his connection to the wider protest about the tree-management campaign provide the context in which the request was made. In this case, it is that context which transforms this particular request from a reasonable one into a vexatious one.
56. The Commissioner therefore concludes that the Council was entitled to rely on section 14(1) to refuse to comply with the request.

Right of appeal

57. 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

58. 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.
59. 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

Samantha Bracegirdle
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